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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

C



Constitutional Affairs

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Petitions

**Follow-up to the European
Parliament's Resolution of 8
September 2015 on 'The situation
of fundamental rights in the
European Union (2013-2014)'**

LIBE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

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

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Follow-up to the European Parliament's Resolution of 8 September 2015 on 'The situation of fundamental rights in the European Union (2013-2014)'

STUDY

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. With a view to support the preparation of the report on the situation of fundamental rights in the European Union (2015), it examines the follow-up given to the European Parliament resolution of 8 September 2015 on 'The situation of fundamental rights in the European Union (2013-2014)'. It considers the conditions that should be established for the establishment of an EU fundamental rights strategy, as well as the recent developments related to the issues of concern and proposals made in the resolution of 8 September 2015.

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EXECUTIVE SUMMARY

Taking as departure point the resolution adopted by the European Parliament on 8 September 2015 on "The situation of fundamental rights in the European Union (2013-2014)", this study examines the extent to which the European Commission and the Council of the EU have effectively promoted and enacted the policies and legislative initiatives requested by the European Parliament in this resolution, with a view to informing the next LIBE annual report on "The situation of fundamental rights in the European Union in 2015". Its broader objective, however, is to contribute to the debate on how the fundamental rights framework of the Union could be improved. Part 1 of the study is dedicated to this issue, whereas Parts 2 and 3 examine specific policy areas in which the Parliament requests actions to be taken for a more inclusive Union -- one in which the commitment to non-discrimination and equality of treatment is strengthened (part 2) --, and for a Union that exercises its competences in order to protect and promote fundamental rights in the area of the rights of the child, in the media, in detention facilities, and in the field of asylum (part 3).

The fundamental rights architecture of the Union

The fundamental rights framework of the Union currently includes two layers. First, the EU institutions and the EU Member States acting in the field of application of Union law cannot violate the fundamental rights recognized in the EU legal order. These include both the Charter of Fundamental Rights, which partially codifies this *acquis*, and other fundamental rights that are part of the general principles of Union law the Court of Justice ensures respect for (Article 6(1) and (3) TEU). This duty is enforced through courts, under the ultimate supervision of the Court of Justice of the European Union. Second, EU Member States are committed to adhere to the "values" on which the Union is built, including fundamental rights, democracy and the rule of law (Article 2 TEU). This duty is enforced through political bodies, particularly under Article 7 TEU. These two layers of protection are currently disconnected from one another. Each could be strengthened, but the greater challenge is to gradually unite them into a single, coherent approach.

The first layer of the existing fundamental rights system in the EU could be improved by strengthening the mechanisms ensuring *ex ante* that law- and policy-making in the EU shall not lead to violations of fundamental rights. A first problem is that, as regards the legislative proposals submitted by the Commission, there is a confusion between the respective functions of compatibility checks (a purely legal exercise) and impact assessments (which are meant to guide the choice between policy options), and although safeguards are in place to ensure that legislative proposals shall comply with the Charter of Fundamental Rights, there is no attempt to ensure that, in its exercise of the right to initiate legislative proposals, the Commission shall proactively seek to contribute to improving fundamental rights. A second problem is that neither the Commission, nor the Council of the EU or the European Parliament (though they rely on their respective legal services or, in the case of the European Parliament, on the LIBE Committee), systematically request an independent assessment of the compatibility of draft legislation with the requirements of fundamental rights. Within the EU Member States, although any legislation or other measures implementing Union law should comply with the fundamental rights recognized in the EU legal order, there is no uniform practice of ensuring such compliance in the drafting of such legislation or measures. Strengthening the role of the Fundamental Rights Agency could address a number of these weaknesses, even within the current definition of the mandate of the Agency.

One specific weakness concerns the absence of any fundamental rights impact assessment, or compatibility check, accompanying the governance of the eurozone under the "two-pack" regulations that define its current regime. Neither in the preparation of the draft budgetary plans that Eurozone Member States should submit annually to the Commission and to the Eurogroup, nor in the preparation of the economic partnership programmes by States placed under an excessive deficit procedure, do the current arrangements provide for a duty to take into account fundamental rights. Although this gap could be remedied by amending Regulations Nos 472/2013¹ and 473/2013², there is no need to wait for an explicit legislative mandate in order to improve the existing practice: the European Commission could immediately include fundamental rights impact assessments as part of the economic governance in the EU, building on the current "social impact assessments" that it has put in place in 2014-2015.

The second layer of the fundamental rights system of protection would benefit from being further "depoliticized". Both the Commission and the European Parliament have made significant contributions to supervise compliance of the EU Member States with the values on which the Union is built, whether by adopting a "Rule of Law Framework" to ensure Article 7 TEU shall not have to be activated where concerns arise, or by adopting regular reports on the situation of fundamental rights in the EU. These institutions however, could better discharge their functions under Article 7 TEU by relying on information that is collected independently, through a non-selective and objective methodology using common indicators across the Member States, and including an assessment not only of legal and policy developments but also of actual outcomes. The Fundamental Rights Agency could provide such information, by adopting annual conclusions on the situation of fundamental rights in the Union. Such conclusions could also inform the annual "Rule of Law dialogue" inaugurated by the Council of the EU.

The broader challenge is to bring about a fundamental rights policy of the Union improving the coherence between these two layers of protection -- the "legal" and the "political". Such a fundamental rights policy would see such rights not only as limitations imposed on the EU institutions or on the EU Member States, but also as guiding action. It would also seek to ensure that the Charter of Fundamental Rights operates as a bridge between the Union and international human rights law, rather than as a screen.

The various obstacles to the emergence of a fundamental rights policy for the EU, operating proactively, could be largely removed by tasking the Fundamental Rights Agency with the preparation of an annual report on the situation of fundamental rights in the EU and to take this report not only as a basis to identify gaps in the legal order of the EU, that could call for legislative or policy initiatives, but also as a way to allow the Commission and the European Parliament to better exercise their role under Article 7 TEU. Such a report could form the basis of a robust, but depoliticized -- and robust *because* depoliticized -- approach to fundamental rights in the EU. Such a report could fulfil this role if it feeds into a policy process, in which both the Commission and the Parliament would draw the political conclusions from the findings they would be presented.

¹ Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140/1 of 27.5.2013.

² Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 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.

The immediate challenges

Much of the study seeks to track progress in the implementation of the recommendations included in the resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014). The key findings are the following:

- A proposal for a new Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation is pending before the Council since 2008. Divergences between the EU Member States continue to obstruct the completion of the anti-discrimination legal framework in the Union, despite the increased pressure to make progress that results from the accession of the EU to the UN Convention on the Rights of Persons with Disabilities.
- Despite the request made by the European Parliament, the EU still has no strategy on the protection and promotion of the rights of national, ethnic and linguistic minorities. The only exception concerns the Roma, building on the 2013 Council Recommendation on effective Roma integration measures in the Member States. Yet, the Charter of Fundamental Rights commits the EU to prohibit discrimination on grounds of membership of a national minority, and a number of tools could be mobilized to that effect.
- Again despite the request made by the European Parliament in this regard, the Commission did not propose a legislative instrument to combat violence against women in the Union. It did, however, propose that the EU accede to the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). This could significantly support further efforts of the Union in this area.
- In response to the call of the European Parliament for a EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, the Commission presented on 8 December 2015 a *List of Actions by the Commission to advance LGBTI equality*. Although an important step in other regards, the document falls short of expectations in certain domains. It does not take a firm position as to whether legislation or policies that prioritize "marriage" (as defined by the respective domestic laws of the EU Member States) or that grant certain advantages to "married couples", should be considered as a prohibited form of discrimination against same-sex couples. It does not unambiguously provide an interpretation of the Free Movement Directive (Directive 2004/38/EC) guaranteeing the freedom of movement of same-sex couples. It does not draw explicitly the implications from the requirement that the Family Reunification Directive (Directive 2003/86) be interpreted in line with the prohibition of discrimination on grounds of sexual orientation and with the right to respect for family life. It does not include a commitment to push for the harmonization of criminal law across the EU in order to combat certain forms of homophobia and transphobia, particularly hate crimes motivated by homophobia and transphobia or hate speech directed against LGBTI persons.
- In order to further the integration of persons with disabilities, and in line with the EU's international obligations under the Convention on the Rights of Persons with Disabilities, the Commission proposed on 2 December 2015 a new directive to improve the accessibility for products and services in the Union. The so-called "European Accessibility Act" could be further improved however, particularly as regards the question of what should be considered a disproportionate burden for the economic operator.

- Despite the explicit request made by the European Parliament in this regard, the Commission has not proposed a successor to the EU Agenda on the Rights of the Child, initiated in 2006 and the second version of which was phased out in 2014. This is despite the fact that there exists a strong consensus on this issue in all the EU Member States, and that all EU Member States are parties to the UN Convention on the Rights of the Child, which provides a robust normative baseline for further action.
- Consistent with a request of the European Parliament, the Commission proposed a revision of the audiovisual media services directive (Directive 2010/13 ("AVMSD")), which includes guarantees of the independence of national audiovisual regulators, and would ensure that they operate in a transparent and accountable manner and have sufficient powers. The proposal, however, does not include provisions to safeguard the pluralism of the media, although Article 11(2) of the Charter of Fundamental Rights commits the Member States to preserve media pluralism in implementing the AVMSD. The proposal offers to align the grounds for prohibiting hate speech to those of the 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia, however this definition is narrower than that suggested by the European Commission against Racism, the relevant Council of Europe expert body, in a policy recommendation adopted in December 2015.
- The *Schrems* case on which the Court of Justice delivered its judgment on 6 October 2015, finding invalid a decision of the Commission to declare that the United States rules of the protection of personal data provided sufficient guarantees for the purposes of Article 25(6) of Directive 95/46/EC, further drew the attention on the issue of mass surveillance by public authorities, including secret services. Recent decisions of the European Court of Human Rights confirm that indiscriminate or "mass" surveillance, since it is untargeted by definition, cannot be considered to comply with the requirements of necessity and proportionality that apply to all interferences with the right to respect for private life. Such form of indiscriminate surveillance also results in a considerable diversion of resources of law enforcement agencies, at the expense or more targeted (and arguably more effective) forms of surveillance.
- Violations of detainees' rights across the EU undermine the mutual trust on which judicial cooperation is based, particularly in the implementation of European arrest warrants. Although the Parliament has called for an initiative to improve the rights of detainees in the EU and to ensure that the EU Member States fully implement the recommendations of the Council of Europe's Committee for the Prevention of Torture, no such proposal was made by the Commission. In order to make progress on this issue, the Fundamental Rights Agency could be requested to take into account the findings of monitoring bodies of the Council of Europe and of the United Nations in the annual conclusions on the situation of fundamental rights in the European Union that it may be requested to provide, in order to strengthen the incentives for Member States to faithfully implement the recommendations from these bodies.
- No progress was achieved on the proposal presented by the Commission on 27 November 2013 for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings. However, insofar as they act in the scope of application of Union law -- as when they execute a European arrest warrant --, the EU Member States are bound to comply with the requirement to provide legal aid, which is a right stated explicitly in Article 47(3) of the Charter of Fundamental Rights as well as in Article 6(3)(c)

ECHR and in Article 14(3)(d) of the International Covenant on Civil and Political Rights. The Court of Justice of the European Union may already be led to conclude that the failure to provide legal aid, if it results in depriving the persons requested in EAW proceedings from a right to a dual defence, is in violation of fundamental rights as recognized in the EU legal order.

- A number of developments took place in the area of migration and asylum in 2015 and 2016. On 4 May 2016, the Commission proposed to complement the existing Dublin system (currently organized by Regulation (EU) No 604/2013) with a corrective allocation mechanism, which would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers. The proposal is intended to improve the Common European Asylum System by introducing as a permanent feature the reallocation mechanism agreed by the Council as an emergency measure in September 2015. The dismal implementation of the emergency relocation programme, however, illustrates the limited political will of the EU Member States to show solidarity with Greece and Italy, the EU Member States that currently shoulder the most significant burden.
- The statement adopted jointly by the Members of the European Council and Turkey on 18 March 2016 constitutes another significant development. The statement is intended to end the irregular migration from Turkey to the EU and make the smuggling of migrants from Turkey less attractive. The key legal question that arises is whether Turkey may be considered a "safe third country" in the meaning of Article 38 of the 2013 (Recast) Asylum Procedures Directive, since, according to Article 61(1) of the Law on Foreigners and International Protection, Turkey does not extend the protection of the Geneva Convention on the status of refugees to persons (such as Syrian refugees) who are not fleeing from European countries.

1. INTRODUCTION

This study takes as departure point the resolution adopted by the European Parliament on 8 September 2015 on "The situation of fundamental rights in the European Union (2013-2014)" ([2014/2254\(INI\)](#)). Its primary objective is to analyse the extent to which the European Commission and the Council of the EU have effectively promoted and enacted the policies and legislative initiatives requested by the European Parliament in this resolution, with a view to informing the next LIBE annual report on "The situation of fundamental rights in the European Union in 2015" ([2016/2009\(INI\)](#)).

The focus of the study is, therefore, on the actionable points of the resolution, which call for action by either the European Commission or the Council of the EU, and which are concrete enough to be assessed. The study is divided in three parts. The first part examines the general framework of a fundamental rights strategy for the EU. It reviews: (1) initiatives that should be taken to ensure that EU institutions comply more systematically with fundamental rights; (2) initiatives that should be taken to ensure that Member States comply with fundamental rights, both within the scope of application of EU law (where the EU Charter of Fundamental Rights applies) and outside that scope of application (where the rule of law risks being undermined or where there exists a serious risk of violation of the values on which the EU is founded; (3) institutional reforms that could be initiated in support of the above-mentioned initiatives, concerning both the mandate of the Fundamental Rights Agency and other actors, both within and outside the EU institutional system; as well as (4) actions to be taken to improve the ability for the EU Member States to mobilize resources in favor of supporting fundamental rights.

The second and third parts of the study examine specific policy areas in which the Parliament requests actions to be taken for a more inclusive Union in which the commitment to non-discrimination and equality of treatment is strengthened (part 2), and for a Union that exercises its competences in order to protect and promote fundamental rights in the area of the rights of the child, in the media, in detention facilities, and in the field of asylum (part 3).

The study concludes (in part 4) with recommendations identifying how the role of the European Parliament could be enhanced in the monitoring and promotion of fundamental rights in the EU, so that it can establish itself as a guardian of these rights in the EU legal order.

2. A FUNDAMENTAL RIGHTS STRATEGY FOR THE EU

KEY FINDINGS

- The fundamental rights strategy of the Union currently includes two layers. First, the institutions, bodies and organs of the EU and the EU Member States acting in the field of application of Union law cannot violate fundamental rights that are recognized in the EU legal order (Article 6(1) and (3) TEU). This duty is enforced through courts, under the ultimate supervision of the CJEU. Second, EU Member States are committed to adhere to the "values" on which the Union is built, including fundamental rights, democracy and the rule of law (Article 2 TEU). This duty is enforced through political bodies, particularly under Article 7 TEU. These two layers of protection are currently disconnected from one another.
- The first layer of the existing fundamental rights system in the EU could be improved by strengthening the mechanisms ensuring *ex ante* (i.e., preventatively) that law- and policy-making in the EU shall not lead to violations of fundamental rights. For the moment, such preventative mechanisms are still weak. This is in part because the Charter of Fundamental Rights is generally relied on as an exclusive benchmark, whereas the fundamental rights not included in the Charter are comparatively neglected, even though, as for the Convention on the Rights of the Child, they are binding in the EU legal order.
- But the existing mechanisms also have procedural weaknesses: As regards the legislative proposals submitted by the Commission, there is a confusion between the respective functions of compatibility checks (a purely legal exercise) and impact assessments (which are meant to guide the choice between policy options), and although safeguards are in place to ensure that legislative proposals shall comply with the Charter of Fundamental Rights, there is no attempt to ensure that, in its exercise of the right to initiate legislative proposals, the Commission shall proactively seek to contribute to improving fundamental rights.
- Neither the Commission, nor the Council or the European Parliament systematically request an independent assessment of the compatibility of draft legislation with the requirements of fundamental rights. Within the EU Member States, although any legislation or other measures implementing Union law should comply with the fundamental rights recognized in the EU legal order, there is no uniform practice of ensuring such compliance in the drafting of such legislation or measures. Strengthening the role of the Fundamental Rights Agency could address a number of these weaknesses, even within the current definition of the mandate of the Agency.
- One specific weakness concerns the absence of any fundamental rights impact assessment, or compatibility check, accompanying the governance of the eurozone under the "two-pack" regulations that define its current regime. Although this gap could be remedied by amending Regulations Nos 472/2013 and 473/2013, there is no need to wait for an explicit legislative mandate in order to improve the existing practice: the Commission could immediately include fundamental rights impact assessments as part of the economic governance in the EU, building on the current "social impact assessments" that it has put in place in 2014-2015.
- The second layer of the fundamental rights system of protection would benefit from being further "depoliticized". Both the Commission and the European Parliament could better discharge their functions under Article 7 TEU by relying on information that is collected independently, through a non-selective and objective methodology using common indicators across the Member States, and including an assessment not only of legal and policy developments but also of actual outcomes. The Fundamental Rights Agency could provide such information, by adopting annual conclusions on the situation of fundamental rights in the Union. Such conclusions could also inform the annual "Rule of Law dialogue" inaugurated by the Council.

- European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014) rightly identifies the fight against corruption and the fight against tax evasion or the erosion of the tax base by fiscal optimisation strategies followed by corporations, as a significant obstacle to the fulfilment of fundamental rights within the EU. In part as a result of the "Luxleaks" revelations and of the release of the "Panama papers", a number of initiatives were taken on these issues in 2015 and 2016. The general objective is to improve transparency and to limit the losses of revenue for the EU Member States that result from fiscal competition and from tax avoidance strategies of companies. These efforts should be pursued.

2.1. The current situation

The resolution adopted by the European Parliament on 8 September 2015 on the situation of fundamental rights in the EU (2013-2014) takes as its departure point that it is "essential to guarantee that the common European values listed in Article 2 TEU are upheld in full, in both European and national legislation, public policies and their implementation" (OP 1). A fundamental rights strategy for the EU, however, should clearly distinguish between two layers.

First, EU institutions, bodies and agencies, as well as the EU Member States when they act in the sphere of application of EU law, should fully comply with the EU Charter of Fundamental Rights (Art. 6(1) TEU), as well as with the fundamental rights included among the general principles of Union law. Such fundamental rights derived 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 (Art. 6(3) TEU)).

The duty to comply with the Charter of Fundamental Rights and with fundamental rights as part of the general principles of Union law is enforceable by courts, under the ultimate supervision of the Court of Justice of the European Union. The Commission, as the guardian of the EU treaties, may use its powers of launching infringement procedures under Article 258 TFEU in case of breaches of fundamental rights falling under the scope of EU law. The Court may also be asked to annul legislative or regulatory acts that are adopted in violation of fundamental rights recognized in the EU legal order, in accordance with Article 263 TFEU; and it may be requested by domestic jurisdictions to assess the validity of secondary Union law or to interpret EU law, in the conditions provided for preliminary rulings by Article 267 TFEU.

Second, the EU Member States, whether or not they act in the sphere of application of EU law, are expected to comply with a set of values, now listed in Article 2 TEU, which refers to "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". In contrast to the duty to comply with fundamental rights in the EU legal order, this duty is currently enforced through non-judicial means. Article 7 TEU stipulates the conditions under which the Council of the EU may "determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2" (Art. 7(1) TEU), as well as the conditions under which the European Council, "may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2" (Art. 7(2) TEU), a finding which in turn allows the Council of the EU to "decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question" (Art. 7(3) TEU). In addition, the Commission issued on 11 March 2014 a Communication

on a new EU Framework to strengthen the Rule of law the European Commission,³ in order to allow it to answer situations that, while not raising to the level that would justify the use of Article 7 TEU, nevertheless does seem to call for a reaction of the EU institutions.

At the current stage of development of the Union law, these two layers are distinct and follow separate logics: they differ not only by their rationale, but also by the criteria on the basis of which assessments are performed and by the procedures followed.

Table 1. The comparison between the two layers of the fundamental rights framework of the EU

	Ensuring compliance with fundamental rights in the field of application of EU law (Art. 6(1) and (3) TEU)	Ensuring compliance with the values listed in Article 2 TEU
Rationale	To ensure fundamental rights are fully complied with in the EU legal order, thus reassuring domestic courts that the EU Member States implement EU law and shall not cooperate in violation of fundamental rights	To ensure all EU Member States adhere to a set of values justifying that they develop relationships based on mutual confidence
Addressees	EU institutions and Member States acting in the sphere of application of EU law	EU Member States, even as regards actions taken outside the sphere of application of EU law
Criteria	EU Charter of Fundamental Rights and fundamental rights as part of general principles of Union law	Values listed in Article 2 TEU: human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities
Procedure	Infringement proceedings by the Commission; exercise of judicial remedies by victims of violations of fundamental rights, either before the Court of Justice or before domestic courts	Final assessment by the European Council (serious and persistent breach) or by the Council (clear risk of a serious breach)

Each of these two components of the fundamental rights framework of the EU presents its own challenges. As regards the first track, there is a growing realization that, beyond ensuring compliance with fundamental rights *ex post* by remedial measures before courts, such compliance should be ensured *ex ante*, during the design and adoption of legislation and policy measures. The resolution adopted by the European Parliament on 8 September 2015 on the situation of fundamental rights in the EU (2013-2014) notes the need, in this regard, of pre-screening legislation, for instance in the adoption of measures to counter terrorism (OP 19 and 26). In addition, the precise definition of the scope of application of EU law is sometimes unclear. Article 51(1) of the Charter of Fundamental Rights states that the Charter only applies to the action of the Member States insofar as they are implementing European Union law: according to the Explanations accompanying the Charter of Fundamental Rights, '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

³ COM(2014) 158 final.

of Union law'.⁴ The reports on the application of the Charter by domestic courts show, however, that this condition is still poorly understood by legal practitioners.⁵ In the 2013 case of *Åklagaren vs Åkerberg Fransson*, the Court of Justice took the view 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"⁶, a position that was widely seen as providing a generous extension of the scope of application of the Charter but which also may have increased legal uncertainty. A specific question that arises in this regard is whether the Charter also applies to measures adopted by Member States as part of policy reforms that are adopted in accordance either as part of the 'European semester' for the monitoring of national budgets,⁷ or as part of an adjustment programme as regards euro zone countries placed under 'enhanced surveillance' as defined by Regulation (EU) No 472/2013,⁸ the second component of the 'Two-Pack' set of measures adopted in order to safeguard the overall stability of the euro zone.

As regards the second track also, a number of questions emerge as the European Parliament calls for a more systematic monitoring of the Member States in order to ensure that they comply with the expectations set forth in Article 2 TEU⁹. First, the values listed in Article 2 TEU include, but are not limited to, fundamental rights as codified in the EU Charter of Fundamental Rights: "democracy" and the "rule of law", in particular, are notions that are still poorly understood in their full implications, and it is unclear whether the Charter can be an appropriate benchmark to assess compliance with these values. Second, whereas the EU Member States are subject to a number of monitoring procedures (particularly through Council of Europe mechanisms) that assess whether they comply with fundamental rights even outside the scope of application of Union law, such procedures generally focus either on structural indicators (the legal and institutional framework) or on process indicators (the policies in place and the budgetary allocations made), but address outcomes (the impacts on people of the legal and institutional framework and policy measures) only through individual instances of alleged violations. This is a gap that may have to be filled in the future.

The following paragraphs of this section of the study address these various issues, with a view to contributing to the discussion on the strengthening of a fundamental rights strategy for the EU. The two layers of the fundamental rights framework of the EU are examined in turn.

⁴ In accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, these Explanations have to be taken into consideration for the purpose of interpreting the Charter.

⁵ For instance, the Fundamental Rights Agency notes in its review of the application of the Charter of Fundamental Rights by domestic courts that "there were examples where the Charter was referred to in contexts where EU law did not appear to apply. In that sense, the reach of the Charter does not necessarily stop short of purely internal situations. In such cases, the Charter is mentioned without the question of applicability and scope being raised" (Fundamental Rights Agency of the European Union, *Fundamental Rights: Challenges and Achievements in 2014 - Annual Report 2014*, 2015, p. 176).

⁶ Case C-617/10, judgment of 26 Feb. 2013 (ECLI:EU:C:2013:105), para. 28.

⁷ 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.

⁸ 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 140/1 of 27.5.2013.

⁹ See, in addition to the Resolution of 8 September 2015, European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law ([2014/2006\(INI\)](#)).

2.2. Aligning law- and policy-making in the EU with fundamental rights

2.2.1. Background of the debate: compatibility checks and impact assessments

A distinction should be made between two separate practices, that have been gradually institutionalized after the proclamation of the EU Charter of Fundamental Rights in 2000. A first practice is that of **compatibility checks**. The European Commission has pledged to verify the compatibility of its legislative proposals with the Charter at an early stage already in 2001.¹⁰ 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,¹¹ and in 2009, it published a Report containing an appraisal of this methodology and announcing a range of improvements.¹² The approach of the Commission could be further strengthened in a number of ways,¹³ but it already may serve to reassure the Court of Justice of the European Union 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.¹⁴

Similarly, the Council of the European Union adopted guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies, prepared by its Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons.¹⁵ And the European Parliament has ensured, in its Rules of Procedure, that it would 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".¹⁶

In parallel to such assessments of the compatibility of the draft legislative proposals submitted by the European Commission, the practice of **impact assessments** also was improved in order to better take into account the requirements of fundamental rights. The preparation of such impact assessments has become a standard practice since 2002.¹⁷ When they were revised in 2005, the guidelines for the preparation of impact assessments paid greater attention to the potential effects of different policy options on the guarantees

¹⁰ SEC(2001) 380/3.

¹¹ 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.

¹² See COM(2009) 205 final of 29.4.2009 on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights.

¹³ 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.

¹⁴ See, for instance, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, judgment of the Court (Grand Chamber) of 9 November 2010, 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").

¹⁵ 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).

¹⁶ Rule 38 of the [Rules of Procedure](#) (version of September 2015).

¹⁷ Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

listed in the Charter.¹⁸ The new guidelines are still based, as the former impact assessments, on a division between economic, social and environmental impacts. Indeed, 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. In its 2005 communication presenting the revised version of the guidelines for impact assessments, the European Commission explains this position by the fact that impact assessments should not be confused with a legal assessment of the compatibility of legislative proposals with the requirements of fundamental rights. But its choice not to create a separate "fundamental rights impact assessment" can also likely be explained by the fact that the results of human rights impact assessments would be more difficult to ignore than if such results are part of a broader assessment, in which positive impacts at various levels (including, e.g., on economic growth and social cohesion) can compensate for other, negative impacts (such as a narrowing down of civil liberties or of the provision of certain public services).

Despite these hesitations, 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 more explicit.¹⁹ Fundamental rights and (for the external dimension of EU action) human rights are now part of the [Better Regulation "Toolbox"](#), in which they constitute tool # 24.

In its December 2012 resolution on the situation of fundamental rights in the EU (2010-2011), the Parliament "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). It also calls on the Commission "to make systematic use of external independent expertise, notably from the Fundamental Rights Agency, during the preparation of impact assessments" (OP 6). The resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014) reiterates this request, expressing the hope that a revised rule of law framework, building on the framework presented by the Commission in 2014, shall "stipulat[e] that all EU legislative proposals, policies and actions, including in the economic sphere and in the field of external relations and all EU-funded measures, must comply with the Charter and undergo a detailed ex ante and ex post assessment of their impact on fundamental rights" (OP 9, (f)).

2.2.2. Strengthening the role of fundamental rights in impact assessments

The Toolbox on fundamental rights guiding the practice of impact assessments as regards legislative proposals or policy initiatives prepared by the Commission is largely satisfactory. If fully taken into account, it 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, although 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

¹⁸ See SEC(2005)791, 15.6.2005. The European Commission (specifically, what was then DG Justice, Freedom and Security) commissioned a report from the EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment*. Final Report, December 2004, 61 pages.

¹⁹ 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.

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). However, in addition to the guidelines on impact assessments having to be updated to take into account the new organisational structure of the Commission (and the new denomination of certain departments (DGs) and services), certain weaknesses remain.

First, of course, **the guidelines on impact assessments (and particularly Toolbox #24 which details the fundamental rights component of IAs) only apply to the Commission. Similar duties to take into account the impacts on fundamental rights are acknowledged neither by the Council, nor by the Parliament, the two co-legislators under the ordinary legislative procedure of the Union.** Although both institutions have established mechanisms to ensure that the amendments they make to legislative proposals from the Commission shall not lead to violations of the Charter of Fundamental Rights, such mechanisms are not designed to ensure that, in choosing between different regulatory options, they will opt for the option that will contribute most effectively to the protection and promotion of fundamental rights.

Second, whereas 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, and whereas the Council of the EU and the European Parliament rely on their own Legal Services, **these mechanisms 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 may be warranted. Under Article 4(1)(a) of its Founding Regulation²⁰, 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 institutions²¹.

Third, just like the institutions, bodies and organs of the EU are bound to comply with the Charter of Fundamental Rights and with the other fundamental rights that are recognized as general principles of Union law, the EU Member States should take these rights into account in the adoption of acts, whether legislative or executive, that fall under the scope of application of Union law. Yet, **there is no systematic attempt to ensure that the EU Member States implementing EU law ensure that they act in full compliance with the fundamental rights recognized in the EU legal order.** The EU Fundamental Rights Agency, whose tasks include providing "Member States when implementing Community law with information, assistance and expertise on fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights"²², could usefully improve this by adopting opinions providing guidance to Member States as to how to implement EU legislation in compliance with fundamental rights, particularly where directives leave to the Member States a broad margin of appreciation.

²⁰ 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.

²¹ Id., Article 4(2).

²² Id., Preamble, para. 7.

Fourth, **compatibility checks and fundamental rights impact assessments should be more carefully distinguished from one another.** It is perfectly possible that a particular initiative does not violate a fundamental right, but nevertheless constitutes an option that, from the point of view of fundamental rights, constitutes a regression, although the same objective could have been achieved at a lesser cost to fundamental rights (albeit perhaps less efficiently). Conversely, it may occur that a particular measure appears on balance to be justified, since its positive impacts outweigh its negative impacts, although the measure implies a real risk of violation of fundamental rights. The clarifications made in the Toolbox in this regard are encouraging, but they highlight the difficulty more than they address it.²³ Since fundamental rights are part of a broader inquiry into economic, social and environmental impacts, there is a risk that compatibility assessments will simply be merged into impact assessments and that certain infringements of fundamental rights will be considered acceptable provided that the benefits of the action are obvious and weigh more heavily in the balance.

Fifth, **there is a tension between the duty imposed on the Commission to take into account the principles of subsidiarity and proportionality in proposing a certain course of action, and ensuring that the proposal made contributes to the protection of fundamental rights.** In the 2006 *Parliament v. Council* case,²⁴ in which the Parliament was seeking the annulment of the 2003 Family Reunification Directive, the Court of Justice took the view that the directive did not violate fundamental rights (in particular, the rights of the child as stipulated under the Convention on the Rights of the Child), 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".²⁵ Thus, although the Court did acknowledge that "a provision of a Community act could, in itself, not respect fundamental rights if it required, *or expressly or impliedly authorised*, the Member States to adopt or retain national legislation not respecting those rights" (emphasis added),²⁶ it does not consider that the EU legislator is acting in violation of fundamental rights simply because it leaves to the EU Member States a freedom to act in certain areas (for instance, for the implementation of directives), even in situations where the Member States may be tempted to exercise such freedom in violation of fundamental rights. This is precisely the point at which fundamental rights impact assessments should be seen as an opportunity to move beyond verifying the compatibility of legislative proposals with the requirements of the Charter of Fundamental Rights, in order to ensure that the European legislator not only does not violate fundamental rights (a merely negative requirement), but in addition exercises its competences in order to contribute to the full realization of fundamental rights (which amounts to a positive duty). Indeed, it is in this spirit that the European Parliament, in the resolution of 12 December 2012 referred to above, notes that "observing the duty to protect, promote and fulfil does not require new competences for the EU but rather proactive institutional engagement with human rights, developing and reinforcing a genuine culture of fundamental rights in the institutions of the Union and in Member States".²⁷

²³ The Toolbox does make it clear that "Since limitations to fundamental rights can only be justified if they meet with the requirement of necessity and proportionality, a simple cost/benefit analysis is not sufficient when assessing impacts on fundamental rights of a policy option", and it also notes that "if the examination concludes that the need to attain the general interest objective would justify maintaining a policy option that would cause a interference (*sic*) to one or several fundamental rights, it must be considered which safeguards would be necessary to ensure that the negative impact would not amount to a violation of the fundamental right".

²⁴ Case C-540/03, *Parliament v Council*, [2006] ECR I-5769.

²⁵ *Id.*, para. 104.

²⁶ *Id.*, para. 23.

²⁷ Preamble, para. F.

Sixth, **relying exclusively on the EU Charter of Fundamental Rights as the benchmark against which the legislative proposals and policies should be assessed, may be problematic.** The Charter of Fundamental Rights is incomplete in some respects, particularly in the area of social rights: this is precisely why the Parliament, in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), "calls on the Member States to promote the extension of the social rights in the EU Charter to other social rights mentioned in the revised Social Charter of the Council of Europe such as the right to work, the right to fair remuneration, and the right to be protected from poverty and social exclusion" (OP 144).²⁸ Nor is it the only source of fundamental rights binding in the legal order of the Union: Article 6(3) TEU was included precisely in order to allow the list of rights to evolve with the constitutional traditions of the Member States, and with developments of international human rights law (which by no means should be restricted to the European Convention on Human Rights). As such, the references made to the Charter in the Guidelines on Impact Assessments should be complemented, at a minimum, by a reference to the human rights instruments that all Member States have ratified, or in the elaboration of which they have cooperated.

²⁸ See also "The European Social Charter in the context of the Implementation of the EU Charter of Fundamental Rights" (Jan. 2016), study (STU (2016)536488) commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, pp. 14-16.

Table 2: Integrating the Convention on the Rights of Persons with Disabilities in the fundamental rights strategy

The final weakness resulting from the fact that the Impact Assessment Guidelines make almost exclusive reference to the Charter of Fundamental Rights is illustrated by the fact that, even where the Convention on the Rights of Persons of Disabilities is mentioned, this instrument is only seen as having to guide the interpretation of the Charter.²⁹ This approach is insufficient, insofar as it appears to be based on a presumption that all the requirements of the Convention on the Rights of Persons with Disabilities are included in the EU Charter. The EU is a party to the Convention on the Rights of Persons with Disabilities since 2011, however, and its international commitments under this instrument a far more proactive approach on its part to ensure the full implementation of the Convention in the exercise by the Union of its powers. Indeed, following the presentation by the Union of its initial report to the Committee on the Rights of Persons with Disabilities in June 2014³⁰ and the examination of this report by the Committee on 27 and 29 August 2015, the Committee recommended in particular "that the impact assessment guidelines be reviewed and modified in order to include a more comprehensive list of issues to better assess compliance with the Convention".³¹

The Committee on the Rights of Persons with Disabilities also recommended "that the European Union conduct a cross-cutting, comprehensive review of its legislation in order to ensure full harmonization with the provisions of the Convention, and actively involve representative organizations of persons with disabilities and independent human rights institutions in the process".³² This recommendation was made public just days before the adoption by the Parliament of its resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014), in which the Parliament "Calls on the Commission to assess the compatibility of European legislation with the requirements of the UN Convention on the Rights of Persons with Disabilities and to evaluate any future proposal in the light of that convention by means of its impact assessments" (OP 96). Going beyond the call of the Parliament, the Committee also recommended the adoption of "a strategy on the implementation of the Convention, with the allocation of a budget, a time frame for implementation and a monitoring mechanism".³³

2.2.3. States under enhanced budgetary surveillance and the European semester

As mentioned above, it remains unclear whether the Charter of Fundamental Rights applies to the adoption by Member States of measures taken in the context of the "European semester" or as part of adjustment programmes adopted when they are placed under enhanced surveillance after receiving support from the European Stability Mechanism. In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament "calls on the Member States to ensure that all EU legislation, including the economic and financial adjustment programmes, is implemented in accordance with the Charter of Fundamental Rights and the European Social Charter (Article 151 TFEU)" (OP 2; see also OP 141-142); it also deplores the negative impacts on the full range of fundamental rights of austerity measures (OP 137-138), and "Stresses that the EU institutions, as well as Member States which implement structural reforms in

²⁹ 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)".

³⁰ UN doc. CRPD/C/EU/1 (3 December 2014).

³¹ UN doc. CRPD/C/EU/CO/1 (2 October 2015), para. 13.

³² UN doc. CRPD/C/EU/CO/1 (2 October 2015), para. 9.

³³ UN doc. CRPD/C/EU/CO/1 (2 October 2015), para. 9.

their social and economic systems, are always under an obligation to observe the Charter and their international obligations, and are therefore accountable for the decisions taken" (OP 139).

The importance of this recommendation, and of removing any ambiguity as regards the duty for Member States to comply with the Charter of Fundamental Rights in such situations, is illustrated by the case of Greece.

Various independent assessments have highlighted the significant impacts on the enjoyment of a range of economic and social rights of the adjustment programme implemented in Greece: such assessments include findings of the UN Committee on Economic, Social and Cultural Rights³⁴ and of other United Nations human rights treaty bodies³⁵ as well as those of an earlier study commissioned by the European Parliament.³⁶ Most recently, acting at the request of the United Nations Human Rights Council, the current UN 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 conducted an official visit to Greece from 30 November to 8 December 2015, building on an earlier visit conducted by his predecessor in 2013.³⁷ Relying on the Guiding principles on foreign debt and human rights and on the Guiding principles on Extreme Poverty and Human Rights, which were endorsed by the Human Rights Council respectively in 2011 and in 2012,³⁸ but also on recommendations issued in 2015 by the Greek National Commission for Human Rights,³⁹ the Independent Expert deplored that the adoption of austerity measures was not accompanied by an appropriate human rights impact assessment: whereas "the European Commission has ... set out guidelines to undertake systematic human rights or social impact assessments of its own legislative proposals and developed methodologies for conducting human rights impact assessments of its external policies", he noted, it "failed to undertake so far any meaningful

³⁴ E/C.12/GRC/CO/2.

³⁵ Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Greece, U.N. doc. CEDAW/C/GRC/CO/7 (1 Mar. 2013) ('The Committee notes with concern that the current financial and economic crisis and measures taken by the State party to address it within the framework of the policies designed in cooperation with the European Union institutions and the International Monetary Fund (IMF) are having detrimental effects on women in all spheres of life' (para. 6)); Committee on the Rights of the Child, Concluding Observations on the combined second and third periodic reports of Greece, U.N. doc. CRC/C/GRC/CO/2-3 (13 Aug. 2012) ('The Committee notes that the recession and the current financial and economic crisis are taking their toll on families and on public social investment, including on the prospects of implementing the Convention, especially with regard to article 4 of the Convention' (para. 6)).

³⁶ The Impact of the crisis on fundamental rights across Member States of the EU. Country Report on Greece, 2015, PE 510.014. See also European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28.2.2014.

³⁷ Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mission to Greece (22-26 Apr. 2013), U.N. doc. A/HRC/50/15/Add.1 (27 Mar. 2014).

³⁸ The Guiding principles on foreign debt and human rights provide in para. 40 that: "Lenders should not finance activities or projects that violate, or would foreseeably violate human rights in the Borrower States. To avoid this eventuality, it is incumbent upon lenders intending to finance specific activities or projects in Borrower States to conduct a credible Human Rights Impact Assessment (HRIA) as a prerequisite to providing a new loan" (UN doc. A/HRC/20/23 (10 April 2011)). The Guiding Principles on Extreme Poverty and Human Rights provide that "Before adopting any international agreement, or implementing any policy measure, States should assess whether it is compatible with their international human rights obligations" (para. 61) and that "States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices" (para. 92) (UN doc. A/HRC/21/39 (18 July 2012)).

³⁹ Greek National Commission on Human Rights, [Impact Assessment on Human Rights as an instrument for the protection of human rights in times of Crisis](#) (in Greek).

human rights' impact assessments when designing the adjustment programmes".⁴⁰ Although a social impact assessment was prepared when the third Memorandum of Understanding between Greece and its creditors was negotiated in August 2015,⁴¹ the Independent Expert noted that:

The social impact assessment is not a human rights assessment. It does not make any reference to human rights, nor to the rulings by the Greek Council of State, recommendations by the Greek National Commission for Human Rights, or to the comprehensive country study carried out on behalf of the European Parliament on the impact of the crisis on fundamental rights in Greece. It does not consider the views of the Council of Europe, the European Social Committee monitoring the implementation of the European Social Charter, or findings and recommendations by human rights mechanism of the United Nations, including those of his predecessor.⁴²

At present, whereas Regulation (EU) No 472/2013⁴³ provides that "budgetary consolidation efforts set out in the macroeconomic adjustment programme shall take into account the need to ensure sufficient means for fundamental policies, such as education and health care" (Article 7 (7) 2), it refers neither to the duty either to comply with the requirements of the EU Charter of Fundamental Rights, nor to the need to prepare fundamental rights impact assessments as part of the preparation of adjustment programmes imposed on eurozone Member States who are placed under enhanced surveillance. Indeed, as already deplored in another study prepared for the Parliament,⁴⁴ the Regulation is silent on economic, social and cultural rights, except for a reference to the need to respect the right of collective action and bargaining in the design of an adjustment programme (Article 7 (1)).

Both this earlier study and, most recently, the Independent Expert on the foreign debt of the Human Rights Council confirm the view expressed by the Parliament in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) that the preparation of such fundamental rights impact assessments is not simply a matter of "better regulation", in order to allow both the Lender (the European Stability Mechanism, in the current 'Two-Pack' mechanism) and the Borrowing State to assess adequately the full range of implications of the adjustment measures adopted: it is also a legal obligation, that follows from the fact that the Charter of Fundamental Rights should be considered fully applicable to the Memoranda of Understanding negotiated between the parties.

Indeed, the duty to prepare fundamental rights impact assessments, and to fully comply with the requirements of fundamental rights, also should be imposed under the 'European semester', the mechanism established for the monitoring of national budgets in order to

⁴⁰ 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) (UN doc. A/HRC/31/60/Add.2 (26 Feb. 2016)), para. 28.

⁴¹ Commission Staff Working Document, Assessment of the Social Impact of the New Stability Support Programme for Greece, SWD(2015) 162 final, of 19.8.2015.

⁴² 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, cited above, para. 44.

⁴³ 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 140/1 of 27.5.2013.

⁴⁴ "The European Social Charter in the context of the Implementation of the EU Charter of Fundamental Rights" (Jan. 2016), study (STU (2016)536488) commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, pp. 22-24.

ensure the overall stability of the eurozone. Regulation (EU) No. 473/2013,⁴⁵ which sets up this mechanism, is silent on fundamental rights, with the exception of a reference to Article 28 of the Charter of Fundamental Rights which recognizes the right to collective action. The Preamble also refers to Article 9 TFEU, which provides that, in defining and implementing its policies and activities, the Union is to 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.⁴⁶ This is insufficient. Neither in the preparation of the draft budgetary plans that Eurozone Member States should submit annually to the Commission and to the Eurogroup, nor in the preparation of the economic partnership programmes by States placed under an excessive deficit procedure, do the current arrangements provide for a duty to take into account fundamental rights. This gap could be remedied by amending Regulations Nos 472/2013 and 473/2013. In order to improve the practice, however, there is no need to wait for an explicit legislative mandate: the European Commission could immediately include fundamental rights impact assessments as part of the economic governance in the EU, building on the current "social impact assessments" that it has put in place in 2014-2015.

2.2.4. Conclusion

The proposal to clarify the distinct roles of compatibility checks and of fundamental rights impact assessments, and to strengthen the role of fundamental rights in impact assessments, should lead to a renewed understanding of the role of fundamental rights in European integration. Fundamental rights hitherto have been seen as a substantive limitation to the action both of the institutions of the EU and of the EU Member States, when they act in the field of application of EU law – restricting their ability to adopt certain measures, and thus limiting the avenues for political imagination. This may be referred to as the 'negative' function of fundamental rights in the EU legal order. In contrast, the 'positive' function of fundamental rights, as guides to action, is underdeveloped: fundamental rights prohibited certain things from being done, but hardly influenced the way of doing things. Instead of being empowering and of provoking innovative solutions, fundamental rights have in effect served to depoliticize issues. A binary approach was adopted towards the prescriptions of fundamental rights. It was left to the experts to determine what these rights mean: whatever fundamental rights prohibited was removed from the political discussion, but any measure that did not create a risk of violation of fundamental rights, could safely ignore them as irrelevant.

Strengthening the role of fundamental rights in impact assessments to encourage choosing regulatory and policy options that contribute to the realization of fundamental rights, means seeing fundamental rights not as a set of requirements that are or are not complied with, but rather as a set of values that should guide law- and policy-making, and which are to be progressively realized. Conceived thus, fundamental rights are not restricting political imagination: they are, instead, an incentive to search for innovative solutions, in order to make progress towards fulfilling them.

⁴⁵ 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.

⁴⁶ Id., preambular paras. 7-8.

2.3. Monitoring Member States' compliance with fundamental rights

2.3.1. Background of the debate: hesitations about monitoring Member States' compliance with the values of Article 2 TEU

The European Parliament has regularly contributed to the debate on whether and how compliance of the EU Member States with the values on which the Union is built should be monitored. It has requested the preparation of studies on this issue,⁴⁷ and a legislative own-initiative report was under preparation within the LIBE Committee at the time of writing "*on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights*".⁴⁸

In order to assess the various options, it is important to recall the background of this debate. The Treaty of Nice amended Article 7 TEU allowing for the institutions of the EU to take action in situations where a Member State does not comply with the values on which the EU is built (a possibility initially introduced in 1997 by the Treaty of Amsterdam with a view to clarifying the expectations towards the new EU Member States prior to the enlargement of the EU), by introducing the possibility of recommendations being adopted *preventively*, where a 'clear risk of a serious breach' of those values is found to be present. Although the Treaty of Nice only entered into force on 1 February 2003, the European Parliament immediately saw the introduction of this new procedure, together with the proclamation of the Charter of Fundamental Rights, as justifying its stronger involvement in monitoring the situation of fundamental rights in the EU Member States. In July 2001, it adopted a resolution explaining that, 'following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)', and that 'it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee [the Committee on Civil Liberties, Justice and Home Affairs (LIBE)] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter'.⁴⁹

This raised the question whether this should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union. In October 2003, the European Commission adopted a communication in which it set out its intentions about the implementation of Article 7 TEU.⁵⁰ Referring 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 European Parliament's LIBE Committee in order to support its task of monitoring fundamental rights in the EU,⁵¹ the Commission took the view that the

⁴⁷ See in particular The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU - Towards an EU Copenhagen Mechanism ([PE 493.031](#)).

⁴⁸ 2015/2254(INL).

⁴⁹ 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), paras. 2-3.

⁵⁰ 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.

⁵¹ 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 (requesting that "a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts"). The EU Network of Independent Experts on Fundamental Rights was composed initially of 16 experts (later to become 26 experts, in order to include experts from the 10 acceding EU member States),

information collected by the network 'should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty. Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches'.

The Commission was thus suggesting to establish a permanent form of monitoring of the compliance with fundamental rights by the EU Member States, both to contribute to the mutual trust in the establishment of an area of freedom, security and justice, and where necessary, to provide the institutions of the Union with the information they require to fulfil the tasks entrusted to them by Article 7 TEU. It saw the EU Network of independent experts on fundamental rights as the laboratory of such a mechanism ; the communication stated that this network might be established on a permanent basis in the future, in order to perform these functions.

The initial response of the European Parliament was sceptical. While deploring, in other respects, the timidity of the reading proposed by the European Commission of Article 7 TEU, the Parliament insisted in a resolution of 20 April 2004 that the use of Article 7 TEU should be based on four principles, including the principle of confidence, which it explained thus :

The Union looks to its Member States to take active steps to safeguard the Union's shared values and states, on this basis, that as a matter of principle it has confidence in:

- the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles,
- the authority of the European Court of Justice and of the European Court of Human Rights.

Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and *may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union*. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.⁵²

In effect, the insistence of the European Parliament on the "principle of confidence" excluded the establishment of a mechanism for the permanent monitoring of fundamental rights within the EU Member States, which by its very nature might instead be interpreted as a sign of distrust. The vote of 20 April 2004, however, is to be replaced in its historical context: adopted at the eve of the enlargement of the Union to ten new Member States, including eight former communist countries, the Parliament understandably may have wished to avoid creating the impression that new conditions would henceforth be imposed on the new Members, through a mechanism that could be interpreted as a gesture of suspicion.

covering the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart publ., Oxford and Portland Oregon, 2005.

⁵² European Parliament legislative resolution on the Commission communication 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 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12 (emphasis added).

Only at the very end of the 2004-2009 legislature did the Parliament return to its practice of adopting regular reports on the situation of fundamental rights in the Union.⁵³ In the resolution it adopted on 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, the Parliament noted that "as the directly elected representative of the citizens of the Union and guarantor of their rights, [it] believes that it has a clear responsibility to uphold [the principles listed in Article 6 of the EU Treaty, which states that the European Union is based on a community of values and on respect for fundamental rights], in particular as the Treaties in their current form greatly restrict the individual's right to bring actions before the Community courts and the European Ombudsman".⁵⁴ The Parliament also "deplore[d] the fact that the Member States continue to refuse EU scrutiny of their own human rights policies and practices and endeavour to keep protection of those rights on a purely national basis, thereby undermining the active role played by the European Union in the world as a defender of human rights and damaging the credibility of the EU's external policy in the area of the protection of fundamental rights". Noting that Article 7 of the EU Treaty "provides for an EU procedure to make sure that systematic and serious violations of human rights and of fundamental freedoms do not take place in the EU, but that such a procedure has never been used notwithstanding the fact that violations do take place in the Member States, as proven by the judgments of the [European Court of Human Rights]", the Parliament requested the EU institutions to "establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty".⁵⁵

2.3.2. Recent initiatives

Indeed, there are now growing expectations that the EU institutions will improve their ability to monitor compliance with the values on which the Union is founded. It has been noted repeatedly that, whereas candidate countries are subject to a rigorous assessment as to their compliance with these values as defined by the Copenhagen European Council of June 1993, once they join the Union, such monitoring is in effect significantly less effective. The "nuclear option" of Article 7 TEU requires a high threshold to be passed: a "clear risk of a serious breach" of the values listed in Article 2 TEU must be found to exist for a recommendation to be addressed to the Member State in question (Art. 7(1) TEU), or a "serious and persistent breach" of such values must be identified by the European Council acting unanimously for sanctions to be taken (Art. 7(2) TEU). Moreover, since the Member States have the final word in the adoption of recommendations (Council) or the imposition of sanctions (European Council and Council), the procedure is political rather than legal: the only role of the Court of Justice of the European Union in the procedure could be to assess whether the procedural conditions prescribed by Article 7 TEU have been complied with.⁵⁶

These two factors explain why Article 7 TEU is largely perceived as inapplicable in practice.

⁵³ See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, of 5.12.2008); and the Resolution of the European Parliament of 14 January 2009 on the situation of fundamental rights in the Union 2004-2008 (2007/2145(INI)).

⁵⁴ Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145 (INI)), Preamble, para. B.

⁵⁵ *Id.*, operational paragraphs 3 and 5.

⁵⁶ This stands in contrast with the similar procedure that was provided for in the Treaty on the European Union adopted by the Parliament in a symbolic vote of 18 February 1984 (the so-called "Spinelli Treaty"), which anticipated that the European Court of Justice would be tasked with assessing whether the EU Member States complied with the values on which the Union was founded: when the Treaty of Amsterdam was negotiated in 1996-1997, such an option was deliberately excluded by the Intergovernmental conference (see W. Sadurski, "Adding bite to a bark: the Story of Article 7 E.U., Enlargement and Jörg Haider", *Columbia Journal of European Law*, 2009-2010, vol. 16, p. 391, at p. 405).

At the same time however, a number of crises in recent years have illustrated the need to improve the ability of the Union to monitor compliance of the Member States with the values of Article 2 TEU: they include the allegedly discriminatory decision adopted by the French government, in July 2010, to return Roma illegally staying on the French territory to their country of origin and to dismantle the settlements where they were residing; the measures adopted by the Government of Hungary since April 2010, including the approval of a new constitution, relying on the dominant presence of Fidesz, the political party of Prime Minister Orbán, in the Hungarian parliament until February 2015⁵⁷; and most recently, the measures adopted by the Polish Government since the October 2015 elections in Poland. Indeed, the growing impatience of the public opinion vis-à-vis the inability of the EU to act swiftly and decisively in such instances is illustrated by the launch of a European Citizen Initiative ("[Wake Up Europe!](#)"), requesting the European Commission to make use of Article 7 TEU against Hungary to react to what are alleged to be illiberal measures taken by the Hungarian Government.⁵⁸

These various episodes, and particularly the concerns raised by developments in Hungary, led the Commission to seek to introduce a new tool, the Rule of Law Framework, in a communication of 11 March 2014.⁵⁹ The communication establishing this new mechanism explains how the Commission intends to examine, at a preliminary stage, whether there are grounds for using its power of issuing a reasoned proposal under Article 7 (1) or 7 (2) TEU. This tool is essentially meant to bridge the gap between situations which occur within the scope of application of Union law and thus may justify the introduction of infringement proceedings against the Member State in question under Article 258 TFEU (whether because of an alleged violation of EU primary or secondary law, or because fundamental rights appear to be violated by certain measures adopted by the national authorities in the implementation of Union law), and situations which may justify reliance on Article 7 TEU, because of a "clear risk of a serious breach" of the values listed in Article 2 TEU or because there are reasons to believe that a Member State is in "serious and persistent breach" of such values, whether or not such a risk or suspected breach occur outside the scope of application of EU law.

The Rule of Law Framework was activated for the first time on 13 January 2016, when the Commission sought to react to developments in Poland, in particular the political and legal dispute concerning the composition and the powers of the Constitutional Tribunal following the refusal of the newly elected government to appoint three members of the Tribunal elected under the former majority and shortening the mandate of its current president and

⁵⁷ On these measures, see M. Bankuti, G. Halmai and K.L. Scheppele, "Hungary's Illiberal Turn -- Disabling the Constitution", *Journal of Democracy*, 2012, pp. 138-146. The Parliament adopted a number of resolutions expressing its concern in this regard: see in particular European Parliament resolution of 10 March 2011 on media law in Hungary (2011/2510(RSP)); European Parliament resolution of 16 February 2012 on the situation in Hungary (2012/2511(RSP)); European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)); European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)).

⁵⁸ On 30 November 2015, the European Commission agreed to register the ECI "Wake Up Europe!", though Commissioner Jourova in charge of Justice stated a few days later that "there is no threat to democracy, the rule of law and fundamental rights in Hungary", which suggests that the Commission may have already decided not to use its powers under Article 7 TEU in the case of Hungary. The fact that the ECI was registered is nevertheless remarkable: in accepting that the ECI may be admissible, the Commission agreed that the exercise of its powers under Article 7 TEU may be considered as the submission of a "proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties" (Article 11(4) TEU), an interpretation which is not obvious from the terms of the Treaty. In registering the "Wake Up Europe !" initiative, the Commission has considered that it "does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties" (Regulation (EU) No. 211/2011 on the citizens' initiative, OJ L 65, 11.3.2011, p. 1, Art. 4(2) (b)).

⁵⁹ COM(2014) 158 final, of 11.3.2014. (For a corrigendum due to a mistake in the English version, see COM(2014) 158 final/2, of 19.3.2014).

vice-president and the adoption of the Law of 22 December 2015 amending the law of 25 June 2015 on the Constitutional Tribunal; and the changes in the law on the Public Service Broadcasters. The "structured dialogue", the first phase envisaged in the Rule of Law Framework, is still ongoing at the time of writing. Basing itself on an opinion of the Venice Commission of the Council of Europe adopted on 11 March 2016 (which found the Law of 22 December 2015 to be incompatible with the requirements of the rule of law⁶⁰), the College of Commissioners examined a draft Rule of Law Opinion on 18 May 2016, and empowered First Vice-President Timmermans to adopt the Opinion by 23 May, "unless significant progress is made by the Polish authorities to resolve the concerns expressed by the European Commission before that date"⁶¹. On 1 June 2016, the Commission adopted an Opinion concerning the rule of law in Poland.⁶²

Although the Rule of Law Framework may be seen as a response of the Commission both to various resolutions of the European Parliament⁶³ and to a request of the Justice and Home Affairs Council,⁶⁴ the Member States appear to have reservations about the role that the Commission sees for itself in the Framework it has proposed. In a legal opinion it adopted at the request of the Council on 27 May 2014, the Council Legal Service has taken the view that "there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU".⁶⁵ This position seems to be endorsed by the Council of the EU. Instead, in what it presumably would see as an alternative to the Commission's proposal, the Council developed a political dialogue on the rule of law in the Union, to be held annually. In 2014, under Italian Presidency of the Council, the Council expressed its intention "to encourage the culture of "respect for rule of law" through a constructive dialogue among the Member States ... by promoting the political dialogue within the Council in respect of the principles of objectivity, non discrimination, equal treatment, on a non-partisan and evidence-based approach"; such dialogue, in addition, is conceived as having to be "developed in a synergic way, taking into account existing instruments and expertise in this field".⁶⁶ In sum, instead of a procedure led by the Commission on the basis of information it collects, the Council appears to have a preference for a peer review process, focused on the exchange of good practices rather than on a punitive approach.⁶⁷

However, while the Treaties do not provide for a monitoring of the compliance of Member States with the values of Article 2 TEU, Article 7 TEU defines clear roles for the Commission and the Parliament: both the Commission and the Parliament may request that the Council

⁶⁰ European Commission for Democracy through Law (Venice Commission), Opinion n° 833-2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Council of Europe doc. CDL-AD(2016)001-e.

⁶¹ European Commission, Press release [IP/16/1828](#) of 18 May 2016.

⁶² European Commission, Press release [IP/16/2015](#) of 1 June 2016.

⁶³ In various resolutions, the European Parliament requested that Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law. These include: resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) ([2013/2078\(INI\)](#)); resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the EP resolution of 16 February 2012) ([2012/2130\(INI\)](#)); resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law ([2014/2006\(INI\)](#)).

⁶⁴ On 6 June 2013, noting that "respecting the rule of law is a prerequisite for the protection of fundamental rights", the Justice and Home Affairs Council called on the Commission to "take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues" (Council doc. 10168/13).

⁶⁵ Council doc. 10296/14.

⁶⁶ Council doc. 15206/14, para. 16.

⁶⁷ The second "rule of law dialogue" was organized on 24 May 2016 by the Dutch Presidency of the EU as part of the EU's General Affairs Council. The dialogue was dedicated to migrant integration and EU fundamental values.

determine whether there exists in a Member State a clear risk of a serious breach of these values by a Member State (Art. 7(1) TEU); the Commission may propose to the European Council that it determines the existence of a serious and persistent breach by a Member State of such values, and the European Parliament must give its consent to such determination (Art. 7(2) TEU). More implies less. It would appear contradictory with the tasks assigned by the Treaty to the Commission, to interpret the Treaty as prohibiting the establishment by the Commission, of a procedure which -- without imposing binding obligations on the Member State concerned -- leads a dialogue to precede the launching of a procedure under Article 7 TEU.

2.3.3. A proposal for strengthening monitoring of compliance with Article 2 TEU

The Commission and the Parliament should be allowed to strengthen their ability to discharge their role under Article 7 TEU. This author suggests that **the most effective and the most economical route would be for the Commission and for the Parliament to agree to request from the Fundamental Rights Agency that it provides conclusions, on an annual basis, on the situation of democracy, the rule of law and fundamental rights in the Union. This would allow these institutions to fulfil their duties under Article 7 TEU in a way that would guarantee a consistent, objective, impartial and non-selective assessment of the situation of the Member States.**

Addressing such a request to the Fundamental Rights Agency would be consistent with Article 4(1)(d) of Regulation No. 168/2007 establishing the Agency, which provides that it shall, *inter alia*, "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions ..., either on its own initiative or at the request of the European Parliament, the Council or the Commission". Indeed, it is the task of the Agency "to provide the relevant institutions, bodies, offices and agencies of the [Union] with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".⁶⁸ In its resolution of 8 September 2015 on the situation of fundamental rights in the Union (2013-2014), the Parliament requests that the Commission propose "a revision of the FRA Regulation in order to grant the FRA wider powers and greater human and financial resources, so that it can monitor the situation in Member States and publish an annual monitoring report containing a detailed evaluation of each Member State's performance" (OP 10, c)). However, it is unclear whether Regulation No. 168/2007 as it is currently drafted needs revision for the Agency to play a supportive role in the monitoring required for the values of Article 2 TEU to be effectively upheld. Such a revision of the Founding Regulation of the Agency is not currently envisaged, and it is likely that it would meet with opposition from the Member States, which would have to adopt any amendment to the Regulation by unanimity. A much more realistic route, would be to request from the Agency that it uses the powers it currently has under Regulation No. 168/2007, along the lines suggested here.

The need for an independent expertise to support the roles of the Parliament and the Commission in the procedures provided for in Article 7 TEU is broadly acknowledged. The Parliament, which since 2001 has developed a practice of adopting regular reports on the situation of fundamental rights in the EU (although this practice was interrupted between 2004 and 2009), and the Commission, by adopting its communication on "A new EU framework to strengthen the Rule of Law" on 11 March 2014, both have developed tools

⁶⁸ Art. 2 of Council Regulation (EC) No. 168/2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1 (hereafter "Founding Regulation of the Fundamental Rights Agency").

that would allow them to fulfil these roles -- and indeed, these mechanisms could exist in combination, with or without coordination between them.⁶⁹ However, neither the Parliament nor the Commission have the resources and the capacity to truly perform such a monitoring function across the 28 Member States. It is unclear, moreover, whether they would be perceived as sufficiently neutral and impartial if they were to develop such a practice on a systematic basis. (Indeed, it is for these two reasons -- lack of expertise across all national legal systems and risks of politicization -- that the Parliament requested, in 2001, the establishment of a network of independent jurists to assist it in its monitoring function, and it is this proposal that was again floated in a study commissioned in 2013 by the Parliament.⁷⁰)

It is against this background that the role of the Fundamental Rights Agency may have to be strengthened, in order to ensure that the Agency can contribute more effectively to this form of monitoring. When the negotiations took place, between October 2004 and December 2006, on the content of what was to become the Regulation establishing the Fundamental Rights Agency,⁷¹ a consensus was reached that the Agency should not be tasked with any "monitoring" role: in other terms, it was not to supervise compliance by the Member States with the requirements of fundamental rights. This may be explained by two factors. One was the desire to preserve the purely political character of the sanctions' mechanism of Article 7 of the EU Treaty. Another was the very active role of the Council of Europe in the debate on the establishment of the Fundamental Rights Agency: the Council of Europe was not in favor of the emergence, within the European Union, of a body that, they feared, might duplicate the role of the monitoring bodies of the Council of Europe.⁷²

The context has now changed significantly. There is now a growing recognition that the conditions for the adoption of sanctions under Article 7 TEU, or even for a finding that there exists a "clear risk of a serious breach" of the values of Article 2 TEU, are too stringent, and that another form of monitoring, more flexible but at the same time more systematic, should be introduced. Moreover, the Fundamental Rights Agency and the Council of Europe have been cooperating closely with one another in recent years, and the fears of duplication or of competition seem to have largely disappeared. Indeed, in May 2014, the Council of Europe and the EU have restated their commitment to "furthering synergies between the EU and Council of Europe monitoring and advisory bodies, and between Council of Europe

⁶⁹ It can hardly be said that the Council has done the same, since the annual dialogue on the rule of law has no pretence of monitoring compliance of the Member States with the values of Article 2 TEU.

⁷⁰ *The triangular relationship between fundamental rights, democracy and rule of law in the EU*, cited above. See para. 6 of the conclusions of the study, suggesting that the Parliament "set up an interdisciplinary platform of academics with proven in-depth expertise on rule of law, democracy and fundamental rights aspects and covering the 28 EU Member States to feed into the European Parliament's annual report on fundamental rights and other related policy and legislative works of the EP. The network would issue an annual scientific report on the situation of fundamental rights, democracy and rule of law across the Union. The platform could be linked to the Directorate General Internal Policies of the Union of the European Parliament, yet it should be fully independent from Parliament and national parliaments."

⁷¹ The negotiations on this instrument effectively started with the presentation by the Commission of a public consultation document on 25 October 2004 (COM(2004) 693 final).

⁷² See, in particular, the intervention of the Deputy Secretary General of the Council of Europe Ms de Boer-Buquicchio at the public hearing organized by the Commission on 25 January 2005 (emphasizing the specific monitoring role of the Council of Europe bodies) and Resolution 1427(2005) adopted by the Parliamentary Assembly of the Council of Europe on 18 March 2005, in which the PACE also stressed the specificity of the Council of Europe's monitoring role: 'Such monitoring is carried out by several well-established independent human rights bodies with recognised expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically. Through these mechanisms, the Council of Europe monitors compliance with all the human rights obligations of its member states (including the twenty-five member states of the European Union), identifies issues of non-compliance, addresses recommendations to member states and, in the case of the European Court of Human Rights, issues judgments binding on states parties whenever these standards are not respected' (at para. 4).

standards and EU legislation, on the basis of the 2007 Memorandum of Understanding, which provides that 'the EU regards the Council of Europe as the Europe-wide reference source for human rights'.⁷³ Consistent with the 2007 Memorandum of Understanding between the two organisations, the two organisations 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)".

The Fundamental Rights Agency would be ideally placed to collect the results of the monitoring performed by the Council of Europe bodies as well as by other international human rights monitoring bodies (in particular from the United Nations human rights system and from the International Labour Organisation), and to process such information in order to ensure that the Commission and the Parliament may rely on an uncontested source of information, allowing both to fully contribute to ensuring compliance with Article 2 TEU. It also could complement the results of the findings from these monitoring bodies, particularly by supplementing them with empirical data concerning the effective enjoyment of fundamental rights. Far from weakening the monitoring bodies of the Council of Europe or, *mutatis mutandis*, from undermining the role of the United Nations human rights monitoring bodies, this would strengthen the findings of such bodies, increasing the weight and the relevance of their findings by feeding them into the procedures provided for by Article 7 TEU.

In providing annual conclusions at the request of the Parliament and the Commission on the situation of democracy, the rule of law and fundamental rights in the EU, the contribution of the Fundamental Rights Agency, more specifically, could consist in:

(a) **ensuring comparability** between different Member States, by collecting information from various regional and international human rights monitoring mechanisms assessing the situation of fundamental rights in the countries concerned;

(b) linking the information collected with a set of **indicators**, allowing to monitor progress in the improvement of the legal and institutional framework (structural indicators), in the design and implementation of policies aimed at the full realization of fundamental rights (process indicators), and in the results obtained (outcome indicators);

(c) relying on the various methodologies developed by the Fundamental Rights Agency in recent years (including not only legal analyses, but also quantitative surveys and qualitative studies involving individual interviews, focus group discussions or media monitoring⁷⁴), and building on the links between the FRA and independent national human rights institutions established by the Member States, **complementing** the information collected from the various regional and international monitoring mechanisms in particular in order to assess effective compliance with fundamental rights "on the ground".

The following paragraphs examine three questions that such a proposal may raise. These questions concern, respectively: whether this development would lead the institutions of the Union to move beyond the competences they are attributed under the Treaties (1.3.4.);

⁷³ 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.

⁷⁴ See Fundamental Rights Agency, [FRA Research: Providing robust, comparable data and analysis](#), Factsheet, August 2011.

whether notions such as "democracy" and the "rule of law" are sufficiently well understood for the Fundamental Rights Agency to base its conclusions on them (1.3.5.); and which indicators could be used to examine the situation of democracy, the rule of law and fundamental rights in the EU (1.3.6.).

2.3.4. The question of the legal basis

The first question is whether a specific legal basis is required for such an initiative, or Regulation No. 168/2007 establishing the Fundamental Rights Agency needs to be amended to allow the Agency to support the Commission and the European Parliament in fulfilling their functions under Article 7 TEU.

Article 2 of the Founding Regulation (No. 168/2007) defines the objectives of the Agency as having to "provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights". It could be argued that, since the Commission and the European Parliament play a role in the activation of Article 7 TEU, it would be consistent with the objectives of the Agency thus defined to assist these institutions in what, after all, falls within their spheres of competence. However, the Founding Regulation also states that: "The Agency shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law" (Article 3(3)). This restrictive delimitation of the scope of the mandate of the Agency may be seen as creating an obstacle to the ability of the Agency to assess generally the situation of fundamental rights in the EU Member States, outside the scope of application of EU law. Moreover, the Founding Regulation does not task the Agency with a specifically monitoring role (to assess compliance with fundamental rights, in particular, of the Member States).

It is important to note however that, by providing the Commission and the Parliament with the information required to allow these institutions to fulfil their functions under Article 7 TEU, the Agency would not itself make a determination as to whether or not the values of Article 2 TEU have been breached or risk being breached. This determination may only be made in accordance with the procedures defined in Article 7 TEU. However, this does not exclude that the Agency may play a supportive role in this regard.

Indeed, when, in 2005, it was envisaged in the original proposals of the Commission concerning the establishment of a Fundamental Rights Agency that the Agency could be invited to provide its 'technical expertise' in the context of Article 7 TEU,⁷⁵ the Legal Service of the Council of the Union⁷⁶ took the view that such a possibility would 'go beyond Community competence', and that, moreover, it would be incompatible with Article 7 TEU itself insofar as this provision would not allow for the adoption of implementation measures and was, in that sense, self-executing. However, the compromise solution was to append to the Regulation establishing the Agency a Declaration of the Council confirming the possibility that the Agency be involved in the implementation of Article 7 TEU, without any reference being made to Article 7 TEU in the text of the Regulation itself.⁷⁷ The said

⁷⁵ See Article 4(1) (e) of the Draft Council Regulation establishing a European Union Agency for Fundamental Rights and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, as proposed by the Commission in COM (2005) 280 final of 30.06.05.

⁷⁶ Doc. 13588/05JUR 425 JAI 363 COHOM 36 (26 October 2005).

⁷⁷ This Declaration states: 'The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a

Declaration refers to the fact that the Fundamental Rights Agency might contribute to the implementation of Article 7 TEU since, under the earlier version of this article in force at the time (prior to its reformulation by the Treaty of Lisbon), it was provided that independent persons" could be called upon "to submit within a reasonable time limit a report on the situation in the Member State in question" in order to determine whether there exists a "clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)", among which principles are human rights and fundamental freedoms. This precedent does show that, provided the Agency is not given a monitoring role (a competence to make a final determination as to whether the situation in a Member State is compatible with its obligations under Union law), its involvement in the procedures established by Article 7 TEU cannot be excluded as a matter of principle.

Moreover, the precedent is also useful in that it confirms that, whereas Regulation No. 168/2007 establishing the Fundamental Rights Agency links its mandate to fundamental rights as protected in the legal order of the Union (then the European Community),⁷⁸ rather than to the values of Article 2 TEU, this limitation was not seen as excluding that the Agency might play a supportive role in the implementation of Article 7 TEU. It is this role that should now be explicitly confirmed.

2.3.5. Defining "democracy" and "rule of law"

The question arises as to should notions such as "democracy" and "rule of law" should be defined (since these notions are referred in Article 2 TEU in addition to the reference to fundamental rights) in order to assess whether the values listed in Article 2 TEU are under threat, and may justify either the use of the procedures prescribed in Article 7 TEU, or the reliance on a new mechanism such as the Rule of Law Framework proposed by the Commission.

"Democracy" can be seen as the result of compliance with fundamental rights recognized in both international and European human rights law and in the Charter of Fundamental Rights. These rights include, in particular: freedom of expression and information and pluralism of the media (Article 11 of the Charter), all of which contribute to creating a public sphere in which citizens, the media and opposition political parties may flourish; freedom of assembly and association (Article 12), through which discontent with governmental policies may be expressed; the right to education and respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions (Article 14), which contributes to pluralism in a democratic society and equips citizens to take part in public deliberation; and of course, the right to vote and to stand as a candidate at elections held at regular intervals. It is perhaps on this last point that the Charter of Fundamental Rights is least well equipped, however, to serve as a benchmark to assess developments within the Member States with a view to ensuring that they continue to comply with the values set forth in Article 2 TEU: like the other rights of Title V of the Charter (including, for instance, the right of access to documents, which also contributes to a democratic society), the right to vote and to stand as a candidate at elections is only stipulated with respect to the right of citizens of the Union, in whichever Member State they may be residing, as regards

report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met'.

⁷⁸ Article 3(2) of the Founding Regulation of the Agency provides that "The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union [this corresponds to what is now Article 6(3) TEU]". At the time when the Regulation was adopted, the Charter of Fundamental Rights was devoid of any binding legal value, and therefore could not provide the reference point for the fulfilment by the Agency of its mandate.

elections to the European Parliament (Article 39) and municipal elections (Article 40). With that proviso, however, the content of the value of "democracy" can be assessed, relatively uncontroversially, based on the existing catalogues of fundamental rights.

Requesting from the Fundamental Rights Agency that it collects information on the state of democracy in the Member States (as part of the values of Article 2 TEU), in order to allow the Commission and the Parliament to fulfil their roles under Article 7 TEU, should not be limited to the wording of the Charter of Fundamental Rights itself: it will be recalled in this regard that the mandate of the Agency is defined in relation to the full range of fundamental rights recognized in the legal order of the Union, and is not limited to the Charter itself.⁷⁹

As to the "rule of law", its definition may be further clarified (beyond the elements listed by the Parliament in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), OP 17) on the basis of the benchmarks and standards put forward by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, in the "Rule of Law checklist" it adopted at its 106th plenary session of 11-12 March 2016.⁸⁰ The checklist includes references to six benchmarks, including five key criteria (legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, and access to justice) and specific challenges linked to corruption and data collection and surveillance. This document seeks to improve the understanding of the "Rule of Law", as referred to both in Article 2 TEU (to which reference is made) and in the Preamble of the Statute of the Council of Europe, beyond the conflicting interpretations that this notion has been given in different legal systems ("Rule of Law", "Rechtsstaat", "Etat de droit", "prééminence du droit"), a problem also highlighted in a study prepared for the European Parliament.⁸¹ According to the Venice Commission, "the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".⁸² The definition provided seeks to move beyond a purely formalistic concept of the Rule of Law, which, properly understood, cannot simply mean that authorities should act in accordance with certain procedures, but should also include a reference to substantive values. It is in this spirit that the Venice Commission includes among the core elements of the "Rule of Law" not only procedural requirements ((1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts), but also substantive components ((5) Respect for human rights; and (6) Non-discrimination and equality before the law).

2.3.6. Adopting appropriate indicators

Indicators allowing to examine the situation of democracy, the rule of law and fundamental rights should ensure that the principles of objectivity, non discrimination and equal treatment are complied with, and that the monitoring is performed in a non-partisan way and is based on sound evidence. Such indicators should also address not only the *legal and*

⁷⁹ See Art. 3(2) of the Founding Regulation of the Agency.

⁸⁰ Council of Europe doc. CDL-AD(2016)007, Study No. 711/2013 (Strasbourg, 18 March 2016).

⁸¹ See *The triangular relationship between fundamental rights, democracy and rule of law in the EU. Towards an EU Copenhagen mechanism*, study supervised by the Policy Department Citizens' Rights and Constitutional Affairs and prepared at the request of European Parliament's Committee on Civil Liberties, Justice and Home Affairs (PE 493.03, October 2013).

⁸² European Commission for Democracy through Law (Venice Commission), Rule of Law checklist, cited above, para. 15.

institutional developments and *policy initiatives* adopted by the Member States, but also *outcomes* -- the actual impacts of regulatory and policy frameworks on individuals under the States' jurisdiction.

Inspiration could be sought from the human rights indicators framework designed by the United Nations Office of the High Commissioner for Human Rights, which makes a distinction between structural, process and outcome indicators (table 2)⁸³.

Table 3. The structural-process-outcomes indicators framework in international human rights law

Category of indicator	Structural indicators	Process indicators	Outcome indicators
What does it serve to measure?	Goodwill of the State in establishing an institutional and legal framework	Efforts made by the State in order to move from the framework to implementation	Results achieved: success in achieving objectives
How indicative is it of the State's compliance with its obligations?	Depends on the State		Depends on the State, but also on internal and external factors or constraints
Examples	• Ratification of international instruments • Legal recognition of the right • Empowering courts to monitor compliance • Adoption of a national strategy • Establishment of a national human rights institution	• Financing of policies aimed at implementing the right • Number of complaints filed • Proportion of the population reached by public programmes • Percentage of national budget going to education, health, etc.	• Reported cases of arbitrary deprivation of life • Percentage of the population without access to adequate housing • Percentage of children attending school at different levels of education

Whereas a wealth of information sources exist concerning the adequacy of the legal and institutional framework (**structural indicators**) as well as the policies adopted by States to ensure effective implementation of fundamental rights (**process indicators**), the results obtained by States (which **outcome indicators** should serve to measure) are generally less appropriately monitored by existing Council of Europe or United Nations mechanisms. This imbalance is especially striking as regards civil and political rights. Yet, due to its particular expertise which allows it to combine social scientific approaches with legal analysis, the Fundamental Rights Agency is uniquely well positioned to fill this gap, as illustrated by the past contributions of the Agency such as the EU minorities and discrimination survey (EU-MIDIS) and Roma Pilot Surveys or the EU-wide survey on violence against women.⁸⁴

The proposal also seeks to maximize the potential use by the Fundamental Rights Agency of its links to independent human rights institutions established within the Member States. In its resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014), the Parliament encourages the Commission to develop, "in cooperation with the FRA and national human rights bodies in the Member States, as well as with input from

⁸³ Office of the High Commissioner for Human Rights, Report on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework (HRI/MC/2006/7, 11 May 2006). See also, inter alia, Committee on the Rights of the Child, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) (CRC/GC/2003/5, 27 November 2003), paras. 48-50.

⁸⁴ See on the methodology used for this survey Fundamental Rights Agency, [Technical Report: Violence against women: An EU-wide survey. Survey methodology, sample and fieldwork](#) (March 2014).

the broadest civil society representation, a database that collates and publishes all available data and reports on the situation regarding fundamental rights in the EU and in individual Member States" (OP 9, g)).

This author considers that, rather than the Commission, such a task should be trusted to the Fundamental Rights Agency. The Management Board of the Agency is composed of, *inter alia*, one "independent person appointed by each Member State, having high level responsibilities in an independent national human rights institution or other public or private sector organisation".⁸⁵ Moreover, the Agency already has within its missions to cooperate with "governmental organisations and public bodies competent in the field of fundamental rights in the Member States, including national human rights institutions".⁸⁶ Finally, the Regulation establishing the Agency provides that it shall cooperate with the Council of Europe⁸⁷: indeed, the Regulation specifically states that the Agency shall "take account, where appropriate, of information collected and of activities undertaken" by, *inter alia*, "the Council of Europe, by referring to the findings and activities of the Council of Europe's monitoring and control mechanisms and of the Council of Europe Commissioner for Human Rights"⁸⁸; and a specific Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe was concluded in 2008 in order to clarify the framework of such cooperation.⁸⁹

2.3.7. Conclusion

For all these reasons, the Fundamental Rights Agency is uniquely well positioned to draw up conclusions (for instance, on an annual basis) on the situation of democracy, the rule of law and fundamental rights in the Member States. Such conclusions would complement the monitoring by Council of Europe, International Labour Organisation and United Nations human rights mechanisms, in order to ensure comparability of data across the Member States and to develop indicators that would cover not only legal and institutional developments (structural indicators), but also policy choices (process indicators) and, through empirical research, the results achieved (outcome indicators). Without resulting in the Fundamental Rights Agency itself assessing whether there exists a clear risk of a serious breach of the values of Article 2 TEU, or a serious and persistent breach of the same, the presentation by the Agency of such conclusions would allow the Parliament and the Commission to fulfil their mandate under Article 7 TEU.

The conclusions prepared by the Fundamental Rights Agency could also feed into the annual debate that the Council henceforth intends to hold on the rule of law: in its resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014), the Parliament, while welcoming such debates, expresses its concern that such debates "are not the most effective way to resolve any noncompliance with the fundamental values of the European Union", and it expresses the hope that the Council will in the future "base its debates on the results of annual and specific reports by the European Commission, the European Parliament, civil society, the Council of Europe and its Venice Commission and other parties involved, institutional or otherwise" (OP 11). The approach described here would allow for such a development.

⁸⁵ Founding Regulation of the Fundamental Rights Agency, Art. 12(1)(a).

⁸⁶ Founding Regulation of the Fundamental Rights Agency, Art. 8(2)(a).

⁸⁷ Founding Regulation of the Fundamental Rights Agency, Art. 9.

⁸⁸ Founding Regulation of the Fundamental Rights Agency, Art. 6(2)(b).

⁸⁹ OJ L 186, 15.7.2008, p. 7.

2.4. The material conditions for an EU Fundamental Rights Strategy: mobilizing resources to finance the realization of fundamental rights

2.4.1. Combating corruption

In its resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014), the Parliament reiterates its request, already contained in a resolution adopted in October 2013,⁹⁰ for a European action plan (or strategy) against organised crime, corruption and money laundering (OP 147). The Parliament also "calls on the EU and the Member States to provide for measures to support and protect whistle blowers who denounce illegal actions" (OP 163).

In 2011, as a follow-up to a report which highlighted major gaps in the implementation of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector,⁹¹ and following requests both from the European Council (expressed in the Stockholm Programme adopted on 10-11 December 2009) and from the Parliament,⁹² the Commission established the "EU Anti-Corruption Report", a new mechanism to monitor and assess Member States' efforts against corruption in order to identify trends and best practices but also to address general recommendations as to how the EU framework could be improved and tailor-made recommendations where deficiencies are identified.⁹³

Two issues deserve particular attention here. First, the protection of whistle-blowers denouncing illegal activities occurring within corporations should be ensured. A study of the impacts of the OECD Anti-Bribery Convention between its entry into force in 1999 and 1 June 2014 highlighted that self-reporting by companies (31 % of the cases) played a far more important role in detecting corruption than whistleblowers addressing public authorities or media coverage (2 % and 5 % respectively), or even than investigations by public authorities themselves (13 %). However, in the 137 cases where corruption was detected through self-reporting (out of a total of 427 corruption cases reported for the 41 States parties (including 263 individuals and 164 companies) over a fifteen-year period), this was the result of internal auditing procedures (31 % of the cases), of due diligence being performed in the context of mergers and acquisitions (28 %), or of whistleblowers' actions addressed to the head of the company (17 %). This highlights the importance of setting up effective due diligence systems within companies, but also of strong protection of whistleblower protection against reprisals: the establishment of such mechanisms, the OECD noted, "will enable the company to elicit early, bona fide information of misconduct that could potentially save the company from both the risk of corruption and the costs involved in exposure and sanctioning".⁹⁴

Following the Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure published by the Commission on 28 November 2013⁹⁵, a significant part of the inter-institutional dialogue focused on the need to ensure that the strengthening of the protection of trade secrets does not extend to the situations

⁹⁰ European Parliament resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) ([2013/2107\(INI\)](#)), OP 2.

⁹¹ Report adopted on the basis of Article 9 of of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector COM(2011) 309 final of 6.6.2011.

⁹² European Parliament resolution of 4 December 2003 on the Commission Communication on a comprehensive EU policy against Corruption, (COM(2003) 317 - [2003/2154\(INI\)](#)).

⁹³ Commission Decision of 6.6.2011 establishing an EU Anti-corruption reporting mechanism for periodic assessment, COM(2011) 3673 final.

⁹⁴ OECD Foreign Bribery Report. An Analysis of the Crime of Bribery of Foreign Public Officials, 2014, p. 17.

⁹⁵ COM(2013) 813 final, 2013/0402 (COD).

when the alleged acquisition, use or disclosure of the trade secret is carried out, *inter alia*, "for making legitimate use of the right to freedom of expression and information", and "for the purpose of revealing an applicant's misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest".⁹⁶ As a result of the insistence of the Parliament on this point in the co-decision procedure, the Preamble of the directive as agreed between the Parliament and the Council⁹⁷ refers to the fact that "The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies in a case where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this Directive". Consistent with this approach, the directive provides that no action shall be taken when the use or disclosure of trade secrets was "for revealing misconduct, wrongdoing (*acte répréhensible*) or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest" (article 5, b)).

Second, strengthening the fight against money laundering will also significantly help combating corruption. In this regard, the adoption of the 2015 EU Anti-Money Laundering and Terrorist Financing Directive is a welcome development.⁹⁸ The directive imposes on financial institutions and other obliged entities a due diligence obligation, which should at least include "development of internal policies, controls and procedures, including model risk management practices, customer due diligence, reporting, record-keeping, internal control, compliance management including, where appropriate with regard to the size and nature of the business, the appointment of a compliance officer at management level, and employee screening"; and "where appropriate with regard to the size and nature of the business, an independent audit function to test the internal policies, controls and procedures" that have been established, with the approval of the senior management.⁹⁹ The approach adopted by the European legislator is broadly in line with the recommendations of the Financial Action Task Force (FATF), an independent intergovernmental body established in 1989 to support the fight against money laundering, in the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (AML/CFT standards).¹⁰⁰

The 2015 EU Anti-Money Laundering and Terrorist Financing Directive is exemplary in a number of ways. First, it provides that, whereas "obliged entities" "know, suspect or have reasonable grounds to suspect" that funds result from criminal activity or are related to terrorist financing should report their suspicion to the authorities, this may not apply to "notaries, other independent legal professionals, auditors, external accountants and tax advisors *only to the strict extent that* such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in,

⁹⁶ Art. 4(2), a) and b), of the draft proposal by the Commission.

⁹⁷ 2013 0402 (COD), PE-CONS 76/15, see <http://data.consilium.europa.eu/doc/document/PE-76-2015-INIT/en/pdf>.

⁹⁸ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73–117 (hereinafter referred to as the "EU Anti-Money Laundering and Terrorist Financing Directive").

⁹⁹ EU Anti-Money Laundering and Terrorist Financing Directive, Article 8.

¹⁰⁰ The [recommendations](#) were initially drawn up in 1990; they were most recently updated in 2012, and have been endorsed by 180 countries.

or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings" (emphasis added).¹⁰¹ In addition, another provision of the same instrument shields the directors or employees from any liability (for instance, for violation of their duties of confidentiality towards their client) if they divulge information that they suspect may be revealing money laundering, "even in circumstances where they were not precisely aware of the underlying criminal activity and regardless of whether illegal activity actually occurred".¹⁰² The Directive thus seeks to carefully delineate the scope of the legal professional privilege that may be invoked by such professionals, balancing the confidentiality of the lawyer-client relationship against the need to combat money laundering.

Second, the effectiveness of the fight against money laundering requires that the authorities be able to identify the beneficial owner. The Anti-Money Laundering and Terrorist Financing Directive provides in this regard that the EU Member States must ensure that "corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held".¹⁰³

Third, the recent directive provides that where legal persons are found to have breached their obligations under the national law implementing the directive, "sanctions and measures can be applied to the members of the management body and to other natural persons who under national law are responsible for the breach".¹⁰⁴ This is key, of course: in order for the AML/CFT standards to be truly effective, the incentives of bankers should be aligned with the legal duties imposed on the financial institutions themselves. As long as prosecuting authorities will remain hesitant to impose sanctions on the bank executives themselves, as individuals, these executives will remain tempted to treat the risk of their institution being fined for lack of due diligence in dealing with funds of suspect origin as a mere "business risk", that may be worth taking as long as the benefits outweigh the potential costs to the institution.

2.4.2. Combating tax evasion and tax avoidance

In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the European Parliament "calls on the Commission and Member States to put an end to tax competition and effectively combat harmful tax practices, and tax evasion and avoidance in the EU, which harm Member States' capacity to harness to a maximum their available resources in order fully to realise economic, social and cultural rights" (OP 151). A September 2015 European Parliament study¹⁰⁵ estimates that the revenues lost by the EU Member States from profit shifting by corporations alone (i.e. tax avoidance strategies by companies artificially shifting profits to the jurisdictions with the most favorable tax regimes) amount to 50-70 billion euros per year, as estimate the authors describe as conservative. The losses to States increase to 160-190 billion euros if additional issues, such as special arrangements or inefficiencies in tax collection are taken into account.

¹⁰¹ Article 34(2) of the EU Anti-Money Laundering and Terrorist Financing Directive.

¹⁰² Article 37 of the EU Anti-Money Laundering and Terrorist Financing Directive.

¹⁰³ Art. 20(1) of the EU Anti-Money Laundering and Terrorist Financing Directive.

¹⁰⁴ Art. 58(4) of the EU Anti-Money Laundering and Terrorist Financing Directive, cited above.

¹⁰⁵ Bringing transparency, coordination and convergence to corporate tax policies in the European Union, Part I: Assessment of the magnitude of aggressive corporate tax planning, [Research paper](#) by Dr Robert Dover, Dr Benjamin Ferrett, Daniel Gravino, Prof. Erik Jones and Silvia Merler (prepared at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) for the European Parliament's Committee on Economic and Monetary Affairs (ECON)).

Measures have been taken in recent years to improve transparency and to combat tax avoidance by multinational groups. Transparency may be seen both as a means to avoid the erosion of the tax base of states, by making it more difficult for large multinational groups to resort to tax optimizing strategies by working across jurisdictions, and as a means to reduce the opportunities for corruption. The new 2013 Accounting Directive¹⁰⁶ provides that "large undertakings and public-interest entities which are active in the extractive industry or logging of primary forests should disclose material payments made to governments in the countries in which they operate", in order to ensure a transparency comparable to that required from an undertaking participating in the Extractive Industries Transparency Initiative (EITI).¹⁰⁷ Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms introduces a form of country-by-country reporting for credit institutions and investment firms; each of these institutions is required to "disclose annually, specifying, by Member State and by third country in which it has an establishment", the name, nature of activities, and their geographical location; the turnover; the number of employees on a full time equivalent basis; the profits or losses before tax; the taxes on profits or losses; and the public subsidies received.¹⁰⁸ Building on the existing legislative framework that provides for administrative cooperation between the EU Member States in the field of taxation¹⁰⁹, Directive 2014/107 extended the cooperation between tax authorities to automatic exchange of financial account information¹¹⁰.

In 2015, in part as the result of the "Luxleaks" scandal involving tax rulings by the Luxembourg tax authorities, the Council adopted on 8 December 2015 a new directive requiring member states to exchange information automatically on advance cross-border tax rulings, as well as advance pricing arrangements by which tax authorities define how they will assess the pricing applied to transfers of goods or services between companies: this information will be stored by the European Commission in a secure central directory, and will be accessible to all EU Member States.¹¹¹ The purpose is ultimately to avoid a situation in which companies play tax jurisdictions against one another, by choosing to declare their profits in the jurisdictions with the most advantageous tax regime, thus eroding the tax base of States. The new rules will apply from 1 January 2017.

Finally, the Commission presented two further initiatives in 2016. In January 2016, it proposed that multinational groups located in the EU or with operations in the EU, with a total consolidated revenue equal or higher than 750 million euros, will be obliged to file the country-by-country report, which the receiving authority shall be made accessible to all EU Member States¹¹². The report filed should include information for every tax jurisdiction in which the multinational group does business on the amount of revenue, the

¹⁰⁶ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19.

¹⁰⁷ See Preamble, para. 44, and chapter 10 of the directive (articles 41-48).

¹⁰⁸ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338. See Article 89.

¹⁰⁹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011, p. 1.

¹¹⁰ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 359 of 16.12.2014, p. 1.

¹¹¹ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332, 18.12.2015, p. 1.

¹¹² Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, [COM\(2016\) 25 final](#) of 28.1.2016.

profit or loss before income tax, the income tax paid and accrued, the number of employees, the stated capital, the retained earnings and the tangible assets. On 12 April 2016, the Commission presented a proposal according to which large multinational companies, with a turnover of 750 million euros, which are active in the single market and have a permanent presence in the EU, would have to disclose publicly the income tax they pay within the European Union, country by country¹¹³. The proposal also envisages that these companies would be asked to disclose taxes paid on activities outside the European Union, and this information would have to be provided on a disaggregated (country-by-country) basis as regards the so-called tax havens, i.e., tax jurisdictions that do not abide by tax good governance standards. To be adopted, the proposal requires to be approved by the European Parliament and by qualified majority by the Council of the EU.

The recent initiatives of the Commission are presented as a contribution to the OECD's *Base Erosion and Profit Shifting (BEPS)* plan. However, there are certain differences between the recent proposals of the Commission on country-by-country reporting (CbCR) and the OECD's CbCR, which corresponds to the BEPS Action 13. In particular, whereas BEPS Action 13 envisages country-by-country reporting as a general rule, the Commission considers CbCR only as regards the EU Member States, and aggregate reporting as regards all the other countries where a company has activities, except for countries considered as 'tax havens'.

¹¹³ Proposal for a Directive of the European Parliament and the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, [COM\(2016\) 198 final](#) of 12.4.2016.

3. A MORE INCLUSIVE UNION: STRENGTHENING THE COMMITMENT TO NON-DISCRIMINATION

KEY FINDINGS

- Divergences between the EU Member States continue to obstruct the completion of the anti-discrimination legal framework in the Union, despite the increased pressure to make progress that results from the accession of the EU to the UN Convention on the Rights of Persons with Disabilities.
- Although the Charter of Fundamental Rights commits the EU to prohibit discrimination on grounds of membership of a national minority, and although a number of tools could be mobilized to that effect, the EU still has no strategy on the protection and promotion of the rights of national, ethnic and linguistic minorities. The only exception concerns the Roma, building on the 2013 Council Recommendation on effective Roma integration measures in the Member States.
- Despite the request made by the European Parliament in this regard, the Commission did not propose a legislative instrument to combat violence against women in the Union. It did, however, propose that the EU accede to the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which could significantly support further efforts of the Union in this area.
- In response to the call of the European Parliament for an EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, the Commission presented on 8 December 2015 a *List of Actions by the Commission to advance LGBTI equality*. Although an important step in other regards, the document falls short of expectations in certain domains:
 - It does not take a firm position as to whether legislation or policies that prioritize "marriage" (as defined by the respective domestic laws of the EU Member States) or that grant certain advantages to "married couples", should be considered as a prohibited form of discrimination against same-sex couples.
 - It does not unambiguously provide an interpretation of the Free Movement Directive (Directive 2004/38/EC) guaranteeing the freedom of movement of same-sex couples. It does not draw explicitly the implications from the requirement that the Family Reunification Directive (Directive 2003/86) be interpreted in line with the prohibition of discrimination on grounds of sexual orientation and with the right to respect for family life.
 - It does not include a commitment to push for the harmonization of criminal law across the EU in order to combat certain forms of homophobia and transphobia, particularly hate crimes motivated by homophobia and transphobia or hate speech directed against LGBTI persons.
- In order to further the integration of persons with disabilities, and in line with the EU's international obligations under the Convention on the Rights of Persons with Disabilities, the Commission proposed on 2 December 2015 a new directive to improve the accessibility for products and services in the Union. The so-called "European Accessibility Act" could be further improved however, particularly as regards the question of what should be considered a disproportionate burden for the economic operator.

3.1. Completing the anti-discrimination framework

The Parliament reiterates in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), its support for the strengthening of the anti-discrimination legislative framework, as proposed by the Commission already in 2008 in the form of a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (OP 44).¹¹⁴ No progress has been made in this regard, despite the adoption by the Committee on the Rights of Persons with Disabilities of Concluding Observations on the initial report submitted by the European Union under the Convention on the Rights of Persons with Disabilities, in which it recommended "that the European Union adopt its proposed horizontal directive on equal treatment, extending protection against discrimination to persons with disabilities, including by the provision of reasonable accommodation in all areas of competence".¹¹⁵ Though the adoption of the directive by some Member States under an enhanced cooperation procedure was envisaged, the Council of the EU confirmed its hope to achieve the unanimity required under Article 19 TFEU. Certain Member States consider that the proposal is overly ambitious, and they question whether it complies with the principles of subsidiarity and proportionality, particularly insofar as it aims to address education and social protection -- as would indeed be requirement to put an end to what has become known as the "hierarchy of grounds".¹¹⁶

3.2. Strengthening the protection of the rights of minorities

The Treaty of Lisbon introduced, for the first time in the European Treaties, "the rights of persons belonging to minorities", in listing these rights among the values on which the Union is founded.¹¹⁷ In addition, the EU Charter of Fundamental Rights prohibits any discrimination based, *inter alia*, on grounds of membership of a national minority (art. 21), and it states that the Union shall respect cultural, religious and linguistic diversity (art. 22).¹¹⁸ In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament "invites the EU institutions to elaborate a comprehensive EU protection system for national, ethnic and linguistic minorities in order to ensure their equal treatment, taking into account the relevant international legal standards and existing good practices, and calls on the Member States to ensure effective equality of these minorities, particularly on issues of language, education and culture" (OP 51).

No steps have been taken to date towards following up on this request. In part, this may be the result of a misunderstanding concerning what such a protection of minorities in the EU may look like, and the legal bases that could provide a departure point. Whereas Article 19 TFEU enables the Council to protect ethnic and religious minorities from discrimination, it does not refer to minorities as such, although it would be relevant to the protection of ethnic or religious minorities from discrimination. However, in addition to the fact that

¹¹⁴ See the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ([COM\(2008\)0426](#)), and the position of the Parliament on this proposal, adopted on 2 April 2009 (OJ C 137 E, 27.5.2010, p. 68).

¹¹⁵ UN doc. CRPD/C/EU/CO/1 (2 October 2015), para. 19.

¹¹⁶ More details can be found in the Fundamental Rights Agency's annual report, [Fundamental Rights Report 2016](#) (Wien, May 2016), pp. 59-60.

¹¹⁷ Article 2, inserted into the Treaty on European Union by the Treaty of Lisbon. The reference to the rights of persons belonging to minorities was already present in the Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 but failed to achieve ratification. The reference to the rights of persons belonging to minorities was not agreed upon during the European Convention convened in February 2002, but was the result of the Intergovernmental Conference of 2003-2004, at the insistence of Hungary.

¹¹⁸ See also Art. 3(3) of the Treaty on European Union, as amended by the Treaty of Lisbon (referring to cultural and linguistic diversity within the Union).

legislative measures based on this provision require unanimity within the Council of the EU, Article 19 TFEU (or its predecessor, Article 13 EC) have not until now been read to support the adoption of legislative instruments providing group-based protection as is generally done in international law in the area of the rights of minorities.

Indeed, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹¹⁹ and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation¹²⁰ remain within a traditional non-discrimination approach. Neither the Racial Equality Directive nor the Employment Equality Directive, for instance, require that Member States allow the use of statistical data in order to establish a presumption of discrimination. Both directives also leave it to the EU Member States to choose whether or not to adopt positive action measures in favour of certain disadvantaged groups, whose integration may not be realised only by relying on the prohibition of (direct and indirect) discrimination. It may be argued however, that in certain cases of systematic inequality – or of what might be called structural discrimination – positive action should not only be allowed, but obligatory, in favour of groups who are politically powerless and thus cannot influence the political process in their favour in order to obtain the adoption of such measures. The International Convention for the Elimination of All Forms of Racial Discrimination,¹²¹ which all the EU Member States have ratified, not only provides in Article 1(4) that positive action measures will not be considered discriminatory in the meaning of the Convention,¹²² but also suggests (in Article 2(2)) that the adoption of such measures may be required under certain conditions. In its General recommendation XXVII on discrimination against Roma adopted in 2000, the Committee for the Elimination of Racial Discrimination, although not making explicit reference to Article 2(2) ICERD, encourages the State Parties to 'take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies', and to 'adopt and implement, whenever possible, at the central or local level, special measures in favour of Roma in public employment such as public contracting and other activities undertaken or funded by the Government, or training Roma in various skills and professions'.¹²³

Already in 2005, in its resolution on the communication of the Commission entitled 'Non-discrimination and equal opportunities for all – a framework strategy',¹²⁴ the European

¹¹⁹ OJ L 180 of 19.7.2000, p. 22.

¹²⁰ OJ L 303 of 2.12.2000, p. 16.

¹²¹ Opened for signature by the UN General Assembly Res. 2106(XX) of 21 December 1965; entered into force on 4 January 1969.

¹²² Article 1(4) provides that: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

¹²³ Committee for the Elimination of Racial Discrimination, General recommendation XXVII on discrimination against Roma adopted at the fifty-seventh session (2000), in: *Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 219, paras. 28-29. Similarly, in its General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), adopted in 2002, the CERD Committee recommends the adoption of 'special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education', as well as to 'educate the general public on the importance of affirmative action programmes to address the situation of victims of descent-based discrimination' and to take 'special measures to promote the employment of members of affected communities in the public and private sectors'. See Committee for the Elimination of Racial Discrimination, General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), adopted at the sixty-first session in 2002, in: *Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 226, paras. 1, f) and h), and 7, jj).

¹²⁴ COM(2005)0224.

Parliament insisted that: "if blatant inequalities of an 'endemic', 'structural or even 'cultural' nature are to be remedied and a seriously compromised balance is thus to be restored, it may be necessary in certain cases for a temporary exception to be made to the concept of equality based on the individual in favour of group-based 'distributive justice' through the adoption of 'positive' measures". It thus stated that "notwithstanding cultural, historical or constitutional considerations, data collection on the situation of minorities and disadvantaged groups is critical and that policy and legislation to combat discrimination must be based on accurate data".¹²⁵ This is echoed in the resolution adopted by Parliament on 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), which "calls on the Commission and the Council to acknowledge the need for reliable and comparable equality data to measure discrimination, disaggregated according to discrimination grounds, in order to inform policy-making, evaluate the implementation of EU anti-discrimination legislation and better enforce it" (OP 48). However, apart from the preparation of a study mapping the existing legal framework and good practices in the European Union and the production of a European Handbook on Equality Data, which could lead to a publication by the end of 2016, no further action has been taken on this front.

A new approach seems to be required. Rather than the adoption of further anti-discrimination legislation based on Article 19 TFEU, which seems neither legally nor politically feasible in order to strengthen the protection of "national, ethnic and linguistic minorities" as requested by the European Parliament, it may be recommended to rely on other competences attributed to the EU as tools in the implementation of such a policy on minorities.¹²⁶ In the area of education for instance, the EU may encourage cooperation between Member States and supplement their action, 'while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity' (Art. 165 TFEU). Under Article 167 TFEU, the EU may encourage cooperation between Member States and, if necessary, support and supplement their action in the field of culture. It may legislate in order to promote the freedom to provide services throughout the Union (Articles 56 and 59(1) TFEU).¹²⁷ It may adopt measures establishing the internal market, including by harmonising national rules (Articles 114 and 115 TFEU). The EU could also fund certain programmes or encourage coordination between the initiatives adopted by the Member States.

The potential of EU law has remained unfulfilled until now, in the absence of a systematic attempt to exercise the existing competences in order to implement the values of the Council of Europe Framework Convention for the Protection of National Minorities, including those values which are replicated in the EU Charter of Fundamental Rights. This is largely

¹²⁵ European Parliament resolution on non-discrimination and equal opportunities for all - A framework strategy (2005/2191(INI)), 8 May 2006 (rapp. T. Zdanoka), paras. 7 and 14.

¹²⁶ See for a full list, Bruno de Witte, 'The constitutional resources for an EU minority policy', in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union. The Way Forward*, LGI Books, Budapest, 2004, pp. 109-124; and see the European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), adopted on 8 June 2005 and based on the report A6-0140/2005 of 10 May 2005 (rapp. Cl. Moraes). See also EU Network of Independent Experts on Fundamental Rights, Thematic Comment n°3: the rights of minorities in the Union (April 2005), available at: http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.

¹²⁷ The audiovisual media services directive (Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1) refers on a number of occasions to the need to preserve and enhance cultural diversity in the Union. For instance, the directive allows Member States to opt for "an active policy in favour of a specific language", and they "remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as those rules are in conformity with Union law..." (Preamble, para. 78).

due to the mistaken perception that the Union requires a specific competence to legislate on the rights of minorities¹²⁸: it does not. Removing this misunderstanding, and requesting from the Commission that it prepares a study listing the various legal bases on which a strategy to improve the protection of the rights of minorities in the EU, would be a first step towards implementing this part of the resolution adopted by Parliament on 8 September 2015.

3.3. Strengthening the protection of the Roma against discrimination

Specific attention has been given to the situation of the Roma minority, because of the structural discrimination they face in the related fields of employment, education, healthcare and housing, in a number of EU Member States. In order to encourage the adoption by Member States of effective strategies for the integration of the Roma, the Commission adopted an EU Framework for National Roma Integration Strategies (NRIS) up to 2020 in 2011.¹²⁹ On 9 December 2013, the Council adopted a recommendation on effective Roma integration measures in Member States.¹³⁰ By the end of 2015, all Member States with the exception of Malta had drawn up either a National Strategy for Roma Integration or a set of measures concerning the integration of their Roma populations. These strategies are assessed by the European Commission on a regular basis, based on an annual reporting by the Member States.¹³¹

In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament calls on the Commission to "provide for monitoring and better coordination of the implementation" of the recommendation (OP 55). In 2012, a Working Party on Roma integration was already set up with a view to strengthening monitoring of the NRISs. The WP is coordinated by the Fundamental Rights Agency. It currently involves 17 Member States¹³² and the Commission. It developed an indicators framework on Roma integration, which is meant to support self-assessment at national level of the effectiveness of the Roma integration strategies, as well as to improve accountability and comparability at European level. It is anticipated that the monitoring mechanism will be further improved in 2016, using the 2013 Council Recommendation as a framework, and giving priority to the collection of ethnically desegregated or socio-economic proxy data as a means to measure progress. The Fundamental Rights Agency will play a leading role in this process, and its next multi-country Roma survey (currently being finalized) should support this.

3.4. Preventing and combating violence against women and girls

Declaration no. 19 on Article 8 of the TFEU states that "In its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims". The

¹²⁸ The [webpage](#) of the Commission on minorities states: "The Commission has no general power as regards minorities". Although the statement is literally true, it is misleading insofar as taking action in order to improve the protection of minority rights does not require that such "general power" be attributed to the EU.

¹²⁹ COM(2011) 173 final O.J. L 76/68, 22.3.2011.

¹³⁰ OJ C 378, 14.12.2013.

¹³¹ See, for the most recent set of assessments, Communication of the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Region, Report on the implementation of the EU Framework for National Roma Integration Strategies 2015, COM(2015) 299 final of 17.6.2015.

¹³² These are AT, BE, BG, CZ, EL, ES, FI, FR, HR, HU, IE, IT, NL, PT, RO, SK, UK.

prevention and combating of violence against women and girls has relied primarily hitherto on Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims,¹³³ on Directive 2011/99/EU on the European protection order in criminal matters,¹³⁴ and on Regulation 606/2013/EU of 12 June 2013 on mutual recognition of protection measures in civil matters.¹³⁵ The Commission also adopted a communication in 2013 titled "Towards the elimination of female genital mutilation".¹³⁶

In part as a result of the important EU-wide survey carried out by the Fundamental Rights Agency documenting the extent of violence against women in the European Union,¹³⁷ the 5-6 June 2014 JHA Council adopted [conclusions](#) in which it calls for the Commission and the EU Member States to "develop and implement, and further improve where they already exist, comprehensive, multidisciplinary and multi-agency coordinated action plans, programmes or strategies, as appropriate, to prevent and combat all forms of violence against women and girls".

In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament requests that the Commission "submit a proposal for an act establishing measures to promote and support the action of Member States in the field of prevention of violence against women and girls, including female genital mutilation" (OP 62), and that it "propose a legislative initiative to prohibit violence against women in the EU" (OP 63).

No such initiative is currently under preparation by the Commission. The Commission however did propose that the European Union accede to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which is in force since 1 August 2014 and addresses the prevention of violence against women, the protection of victims and the prosecution of perpetrators.¹³⁸ Accession by the Union to this Convention shall place the Union under supervision of the Group of experts on action against violence against women and domestic violence (GREVIO), a group of between 10 and 15 independent experts tasked with the implementation of this Convention by its Parties. Under Article 7(1) of the Convention, the Union shall also be expected to "take the necessary legislative and other measures to adopt and implement State-wide (*sic*) effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women". The implication is that the Commission shall have to explore the various legal bases that, within the EU treaties, could allow to develop a strategy to prevent and punish violence against women in its various forms. This will undoubtedly stimulate action by the EU in this field. The Commission argues that accession of the EU to the Istanbul Convention will "oblige Member States to collect and send accurate and comparable data to Eurostat", improving the ability of the EU to design "effective policies and awareness-raising

¹³³ OJ L 315, 14.11.2012, p. 57.

¹³⁴ OJ L 338, 21.12.2011, p. 2.

¹³⁵ OJ L 181 of 29.6.2013. This Regulation seeks to ensure that victims of violence (including in particular domestic violence) or persons at risk and who benefit from a protection measure taken in one Member State enjoy the same level of protection in other Member States to which they would move. See also Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, OJ L 263, 3.9.2014, p. 10.

¹³⁶ COM(2013) 233 final of 25.11.2013.

¹³⁷ The [study](#) was published in March 2014. It concluded, inter alia, that one in three women in the EU had experienced physical or sexual violence, or both since she was 15 years old.

¹³⁸ CETS No. 210, open for signature on 11.5.2011. See the proposals of the Commission that the European Union accede to the Istanbul Convention, COM(2016) 109 final, and COM(2016) 111 final, both of 4.3.2016. Article 75(1) of the Convention provides for the accession of the European Union.

campaigns". In addition, "as a member of the Committee of the parties (representatives of those who have ratified), the EU would participate in electing the Group of experts and adopting recommendations concerning the implementation of the Convention", thus strengthening "the EU's international role in the fight against violence against women".¹³⁹

In addition, the Commission has been taking non-legislative initiatives to combat violence against women in the EU. Such initiatives include encouraging Member States to improve data collection in this area, since violence against women remains vastly under-reported and thus underestimated; encouraging the exchange of best practices across Member States, for instance as to awareness-raising campaigns and treatment programmes for offenders, within its [Mutual Learning Programme in Gender Equality](#); and the funding of NGOs working in this area, particularly under the Rights, Equality and Citizenship programme.¹⁴⁰ The Commission is also working to follow-up on the FRA survey on woman's experiences of violence and develop accurate and comparable data on gender-based violence at the EU level, as included in Eurostat's Annual Work Programme for 2016.

3.5. Prohibiting discrimination against trans and intersex people

In its resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, the Parliament suggests that "the Commission should issue guidelines specifying that transgender and intersex persons are covered under 'sex' in Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation".¹⁴¹ Sex equality is one of the fundamental human rights the observance of which the Court of Justice has a duty to ensure.¹⁴² It is already the view of the Court that the instruments implementing the principle of equal treatment between men and women should be interpreted widely in order to afford a protection against discrimination to trans persons.¹⁴³ These instruments include in particular, the 2006 Gender Equality Recast Directive¹⁴⁴ and the 2004 directive on access to goods and services without discrimination.¹⁴⁵ In the [List of Actions by the Commission to advance LGBTI equality](#) presented on 8 December 2015, the Commission pledges to monitor these instruments to ensure that implementation by Member States is aligned with the case law of the Court of Justice of the European Union on gender reassignment.

It follows that the various legislative bases allowing the EU legislature to adopt measures implementing the principle of equal treatment without discrimination on grounds of sex could be used to adopt measures protecting trans persons from discrimination. This includes not only Article 19 TFEU, but also Article 157 TFEU, which provides that the EU Member States shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

¹³⁹ [Factsheet](#) on the Istanbul Convention (March 2016).

¹⁴⁰ See [European Commission Actions to Combat Violence against Women](#) (March 2016).

¹⁴¹ Para. 4, C., II.

¹⁴² Case 149/77, *Defrenne* [1978] ECR 1365, paragraphs 26 and 27, and Case C-13/94, *P. v S. and Cornwall City Council* [1996] ECR I-2143, paragraph 19.

¹⁴³ Case C-13/94, *P. v. S. and Cornwall City Council* judgment of 30 April 1996, [1996] ECR I-2143; Case C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, judgment of 7 January 2004, [2004] ECR I-541; Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, judgment of 27 April 2006, [2006] ECR I-3585.

¹⁴⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23.

¹⁴⁵ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37.

3.6. Strengthening the protection of the rights of lesbians, gays, bisexual and intersex (LGBTI) people

3.6.1. Introduction

As illustrated by the adoption on 31 March 2010 by the Committee of Ministers of the Council of Europe of Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity,¹⁴⁶ a recommendation agreed upon by consensus by the 47 Member States of the Council of Europe, there is now a strong European consensus regarding the need to combat discrimination on grounds of sexual orientation and gender identity. In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament reiterated its previous calls¹⁴⁷ to the Commission "to put forward an action plan or strategy at EU level for equality on grounds of sexual orientation and gender identity" (OP 85). In response, Commissioner for Justice and Gender Equality Věra Jourová published the [*List of Actions by the Commission to advance LGBTI equality*](#), referred to above. The intentions expressed in this *List of Actions* remain vague on a number of points. Four especially seem to deserve consideration.

3.6.2. Discrimination against same-sex couples as discrimination based on sexual orientation

At present, States remain free to choose whether or not to allow same-sex partners to marry. This was the position adopted by the European Court of Human Rights in its judgment of 24 June 2010 in the case of *Schalk & Kopf v. Austria*,¹⁴⁸ where the applicants unsuccessfully challenged the refusal of the Austrian authorities to allow them to marry, founding their application Articles 12 (right to marry) and 14 (non-discrimination in the enjoyment of the rights and freedoms of the ECHR) of the European Convention of Human Rights.¹⁴⁹ The judgment delivered by the Court on 21 July 2015 in the case of *Oliari and Others v. Italy* does not fundamentally alter this view, although the Court found in this case that Italy was in violation of Article 8 ECHR because of its failure to ensure that the applicants, who were three same-sex couples, "have available a specific legal framework providing for the recognition and protection of their same-sex unions".¹⁵⁰ (The gap identified in this judgement has now been filled, with the adoption in Italy of a law recognizing same-sex civil unions, which enters into force on 5 June 2016¹⁵¹). Thus, whereas recognition of same-sex marriage is not required at this point in time under European human rights law, international human rights law does impose that same-sex

¹⁴⁶ Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies. The Recommendation also contains an appendix detailing the measures to be taken in various fields, which the Member States are encouraged to take into account and to disseminate as widely as possible.

¹⁴⁷ See in particular European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity ([2013/2183\(INI\)](#)) (where the Parliament notes that it has already "asked 10 times for a comprehensive European Union policy instrument for equality on grounds of sexual orientation and gender identity" (Preamble, I)).

¹⁴⁸ Eur. Ct. HR, *Schalk & Kopf v. Austria* (Appl. no. 30141/04) judgment of 24 June 2010.

¹⁴⁹ While acknowledging that the institution of marriage had undergone 'major social changes' since the Convention was adopted, the Court considered that it had 'deep-rooted social and cultural connotations' that differ largely between societies and that, with only six of the forty-seven contracting states allowing same-sex marriage, there was 'no European consensus' on the issue. While recognizing for the first time that 'family life' under Article 8 ECHR applied to de facto relationships between two persons of the same sex, the Court also concluded that there was no obligation to grant access to marriage to same-sex couples based on Art. 14 in combination with Art. 12. Because the Convention must be read as a whole, and its articles construed in harmony with one another, given the conclusion that Art. 12 did not impose an obligation to grant access to marriage to same sex-couples, it could not be implied from Art. 14 taken in conjunction with Art. 8.

¹⁵⁰ Eur. Ct. HR (4th sect.), *Oliari and Others v. Italy* (Appl. nos. 18766/11 and 36030/11), judgment of 21 July 2015, para. 185.

¹⁵¹ Law n° 76 of 20 May 2016, *Gazzetta Ufficiale*, 21.5.2016.

couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognized if they had access to marriage; or that, failing such official recognition, the *de facto* durable relationships they enter into leads to extending to them such advantages.¹⁵² In its resolution of 8 September 2015, the Parliament notes that the rights of LGBTI people are "more likely to be safeguarded if they have access to legal institutions such as cohabitation, registered partnership or marriage" (OP 86). This is now a clear obligation under the European Convention on Human Rights.

This situation raises the question whether the prohibition of discrimination on grounds of sexual orientation shall extend to differences in treatment between married couples and non-married couples, in the EU Member States where marriage is not open to same-sex couples. The *List of Actions* does not express the position of the Commission on this question. It is clear that differences of treatment between opposite-sex couples (whether married or not) on the one hand and same-sex couples on the other hand cannot be tolerated, since such differences in treatment are considered to amount to discrimination on grounds of sexual orientation in the case-law of the European Court of Human Rights.¹⁵³ In addition however, where marriage is reserved to opposite-sex couples, any advantage enjoyed by married couples and denied to non-married couples should be considered as direct discrimination on grounds on sexual orientation.

Indeed, where differences in treatment between married couples and unmarried couples have been recognized as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate *choice* not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows *a contrario* that advantages recognized to married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

Thus, legislation or policies that prioritize "marriage" (as defined by the respective

¹⁵² Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity states on this point : 'Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live' (para. 25).

¹⁵³ In a judgment of 2 March 2010 adopted in the case of *Kozak v. Poland* (application No. 13102/02), the European Court of Human Rights found that a same-sex partner should be able to succeed to a tenancy held by their deceased partner. In line with the judgment it delivered on 24 July 2003 in the case of *Karner v. Austria* (Appl. N° 40016/98), the Court unanimously held that the blanket exclusion of persons living in same-sex relationships from succession to a tenancy was in breach of the Article 14, taken in conjunction with Article 8 (the right to respect for private and family life). It rejected the government's argument that the discriminatory treatment was necessary to protect the family founded on a "union of a man and a woman", as stipulated in Article 18 of the Polish Constitution. The Court stated that there is a need for governments to recognise "developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life". Furthermore, it asserted that laws adversely affecting the "intimate and vulnerable sphere of an individual's private life" need strong justifications, which had not been satisfied in this case. The position affirmed by the Court is further reiterated in Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, cited above, which provides that 'Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights' (Appendix, para. 23), and that 'Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation' (para. 24).

domestic laws of the EU Member States) or that grant certain advantages to "married couples", should be considered as a prohibited form of discrimination against same-sex couples unless these couples may benefit from the same degree of recognition or be granted the same advantages, for instance under legislation recognizing legal partnerships or similar forms of civil unions.

3.6.3. Ensuring mutual recognition of civil status documents (including legal gender recognition, marriages and registered partnerships) and their legal effects

In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament requests the Commission to "submit a proposal for an ambitious regulation to ensure mutual recognition of civil status documents (including legal gender recognition, marriages and registered partnerships) and their legal effects, in order to reduce discriminatory legal and administrative barriers for citizens who exercise their right to free movement" (OP 86).

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)¹⁵⁴ defines the conditions under which the citizens of the Union and their family members may move and reside freely within the territory of the Member States. In the next few years, questions will increasingly emerge as to whether the directive also benefits same-sex couples, allowing them to benefit from the family reunification provisions of the directive.

The Free Movement Directive grants a number of rights of free movement and of temporary or permanent residence to a) the citizens of the Union who move to or reside in a Member State other than the State of which they have the nationality, and to b) their family members (Art. 3). A 'family member', for the purposes of the directive, is a) the 'spouse', b) 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State', and c) certain descendants or dependent ascendants of either the citizen of the Union who has exercised his or her right to free movement or of his/her spouse or partner (Art. 2).

The Free Movement Directive could be made more hospitable to same-sex couples, however. In its current form, it raises three separate questions.

A first question that arises under the directive is whether the same-sex married person (whose marriage with another person of the same sex is valid under the laws of one of the 10 EU Member States that currently recognize same-sex marriage¹⁵⁵) should be considered a 'spouse' of the citizen of the Union having moved to another EU Member State for the purposes of the directive, by the host Member State, thus imposing on this State to grant the spouse an automatic and unconditional right of entry and residence. This author considers that any refusal to do so would constitute a direct discrimination on grounds of sexual orientation, in violation of Article 21 of the Charter of Fundamental Rights. However, despite this requirement of non-discrimination on grounds of sexual orientation, some EU

¹⁵⁴ 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.

¹⁵⁵ These States are Belgium, Denmark, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. Finland has legislated to recognize same-sex marriage from 2017.

Member States still appear hostile to the recognition of same-sex marriage concluded abroad, and might refuse to consider as 'spouses', for the purposes of family reunification, the same-sex married partner of a citizen of the Union having exercised his/her free movement rights in the forum State. As suggested by the Parliament's resolution, a clarification of the obligations of the EU Member States under the Free Movement Directive, as regards the recognition of same-sex married couples, may therefore be required.

A second question is raised in the situation where a couple, formed of two persons of the same sex, although they cannot marry in their State of origin, has access to registered partnership, or to some equivalent form of civil union, and where such an institution has been entered into. In this case, the Free Movement Directive states that only when the host State "treats registered partnerships as equivalent to marriage" in its domestic legislation, should it treat registered partnerships concluded in another Member State as equivalent to marriage for the purposes of family reunification. The same rule would seem to be imposed on host member States where same-sex couples may marry. In total, 24 EU Member States are in this situation at the time of writing: 14 Member States have established forms of registered partnership in their domestic legislation with effects equivalent to marriage – i.e., with consequences identical to those of marriage with the exception of the rules concerning filiation and adoption¹⁵⁶—, and 10 Member States allow for same-sex marriage. In the other Member States, either there exists no registered partnership equivalent to marriage, or whichever institution does exist does not produce effects equivalent to marriage. These States are in violation of Article 8 ECHR. Under the Free Movement Directive however, the only obligation imposed on the host Member State is then to 'facilitate entry and residence' of the partner, where the partners share a same household (Art. 3(2), a)), or because the existence of a registered partnership establishes the existence of a 'durable relationship, duly attested' (Art. 3(2), b)). In this respect, the Free Movement Directive may have to be further improved to ensure full equality of treatment between same-sex couples and opposite-sex couples in the enjoyment of freedom of movement.

A third question arises in the hypothesis where (again in violation of the requirements of Article 8 ECHR) no form of registered partnership is available to the same-sex couple in the State of origin, and where the relationship between two partners of the same sex therefore is purely *de facto*. In this case, the obligation of the host member State is to 'facilitate entry and residence' of the partner, provided either the partners share the same household (Art. 3(2), a)), or there exists between them a 'durable relationship, duly attested' (Art. 3(2), b)). This obligation, which requires from the host State that it carefully examines the personal circumstances of each individual seeking to exercise his or her right to family reunification, is not conditional upon the existence, in the host member State, of a form of registered partnership considered equivalent to marriage. In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a 'durable relationship' may be proven. While this may be explained by the need not to artificially restrict such means, the risk is that the criteria relied upon by the administration may be arbitrarily applied, and lead to discrimination against same-sex partners, which have been cohabiting together or are engaged in a durable relationship. Further guidance on how these provisions should be implemented would facilitate the task of national administrations. It would also contribute

¹⁵⁶ These are Austria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Luxembourg, Malta and Slovenia. Some countries (Belgium, France, the Netherlands and the United Kingdom), while they allow same-sex marriage, also have a form of civil union or registered partnership available in their legislation.

to legal certainty, and limit the risks of arbitrariness and discrimination against same-sex households or relationships.

In its [*List of Actions by the Commission to advance LGBTI equality*](#), 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". This remains exceedingly vague. The Commission could be encouraged to strengthen the freedom of movement of same-sex couples in the three separate situations outlined above, by making more explicit its understanding of the requirements of the Free Movement Directive.

3.6.4. The right to family reunification and sexual orientation

The resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) makes no reference to the prohibition of discrimination on grounds of sexual orientation in the enjoyment of the right to family reunification of third country nationals. The 2003 Family Reunification Directive¹⁵⁷ ensures in principle that the spouse will benefit from family reunification (Art. 4(1)a). It is for each Member State to decide whether it shall extend this right also to unmarried or registered partners of the sponsor. However, although they are recognized a margin of appreciation in this regard, the Member States should take into account, in implementing the directive, their obligations under Articles 7 and 21 of the Charter of Fundamental Rights, that guarantee the right to respect for private and family life and prohibit any discrimination, inter alia, on grounds of sexual orientation.

These provisions should be interpreted in accordance with the case-law of the European Court of Human Rights, which recognizes that same-sex couples form a "family life" in the meaning of this expression that appears in Article 8 of the European Convention on Human Rights.¹⁵⁸ Where, by denying the possibility for the partner to join the sponsor, a State does not allow a durable partnership to continue, this would result in a disruption of the right to respect for private life such that this would constitute a violation of Article 8 ECHR or Article 7 of the Charter of Fundamental Rights where the relationship could not develop elsewhere, for instance due to harassment against homosexuals in the countries of which the individuals concerned are the nationals or where they could establish themselves, or simply because of the disruption having to change his/her place of residence might mean to the sponsor. In addition however, the directive should be implemented without discrimination on grounds of sexual orientation.

A first implication is that the same-sex "spouse" of the sponsor (where the marriage between two persons of the same sex has been validly concluded) should be granted the same rights as would be granted to an opposite-sex "spouse". A second implication is that if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners, this should benefit all such partners, and not only opposite-sex partners. In addition, while the Family Reunification Directive implicitly assumes that it is not discriminatory to grant family reunification rights to the spouse of the sponsor, without extending the same rights to the unmarried partner of the sponsor, even where the country of origin of the individuals concerned does not allow for two persons of the same sex to marry, the result of this regime is that family

¹⁵⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3.10.2003, p. 12.

¹⁵⁸ Eur. Ct. HR (1st sect.), *Schalk and Kopf v. Austria* (Appl. N° 30141/04) judgment of 24 June 2010.

reunification rights are more extended for opposite-sex couples, which may marry in order to be granted such rights, than it is for same-sex couples, to whom this option is not open. In the view of this author, this solution may be questioned, although it corresponds to the explicit terms of the directive : even though, in the current state of development of international human rights law, it is acceptable for States to restrict marriage to opposite-sex couples, reserving certain rights to married couples where same-sex couples have no access to marriage may be seen as a form of discrimination on grounds of sexual orientation. A third implication is that, if an EU Member State decides to grant the benefits of the provisions of EU law on the free movement of persons to the partners of a third-country national residing in another Member State (and which that other Member State treats as family members), this may not be restricted to opposite-sex partners. While these are implications that may be seen to derive from the requirement that the EU Member States implement the Family Reunification Directive consistent with the requirements of non-discrimination and the right to respect for family life, the existing text could be improved in order to remove any doubt that could remain in this regard.

3.6.5. Combating homophobia through the use of criminal law

Although the *List of Actions* presented by the Commission does refer to the exchange of best practices in the area of homophobic and transphobic hate speech and crime (for which the Commission-led EU High level group on racism, xenophobia and other forms of intolerance would constitute the appropriate forum), no legislative initiative is announced in this regard. Yet, in line with Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity,¹⁵⁹ reliance on the criminal law may not be excluded for combating certain forms of homophobia and transphobia, particularly hate crimes motivated by homophobia and transphobia or hate speech directed against LGBTI persons.

The cautious position of the Commission may be justified by the important obstacles any legislative initiative in this area would face. Article 83(1) TFEU allows for the adoption of directives establishing minimum rules concerning "the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". While homophobic hate crimes and hate speech directed against LGBTI persons are not listed among the criminal offences that present these characteristics,¹⁶⁰ a flexibility clause allows the Council acting unanimously, "on the basis of developments in crime, [to] adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph".¹⁶¹ There exists a precedent in this regard in the context of the right against racism and xenophobia.¹⁶² Due to the unanimity requirement within the Council, it is however very unlikely that this provision shall be relied upon in order to achieve an approximation of the laws of the EU Member States in the definition of hate crimes and homophobic hate speech, and of the minimum sanctions that should be imposed to such crimes.

However, in order to allow EU instruments to be sanctioned through criminal law, Article 83(2) TFEU provides that, "in an area which has been subject to harmonisation measures,

¹⁵⁹ See Appendix, paras. 1-3 (on prosecuting hate crimes and taking into account the bias motive related to sexual orientation or gender identity as an aggravating circumstance) and paras. 6-8 (on combating hate speech in the media).

¹⁶⁰ See Art. 82 § 1, al. 2, TFEU.

¹⁶¹ Art. 82 § 1, al. 3, TFEU.

¹⁶² Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55-58).

directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". If it were to appear that the instruments adopted on the basis of Article 19 TFEU or Article 157 TFEU, respectively to combat discrimination on grounds of sexual orientation or on grounds of sex/gender identity, are ineffective because of the failure of the Member States to provide for sanctions that are sufficiently dissuasive and proportionate to the seriousness of discriminatory conduct, Article 83(2) TFEU thus could make it possible for the Council of the EU to require that discrimination be defined as a criminal offence in domestic legislation. Under this provision however, the adoption of directives for the approximation of the criminal laws of the EU Member States should take place through the same procedures than for the adoption of the harmonization measures themselves: as regards the criminalization of discrimination on grounds of sexual orientation therefore, in accordance with Article 19 TFEU, this requires the Council of the EU to act unanimously, with the consent of the European Parliament.

3.7. Promoting the rights of persons with disabilities

The Parliament's resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) expresses strong support for the adoption of an EU Accessibility Act (OP 93, 98 and 178). The Commission proposed this European Accessibility Act on 2 December 2015, in the form of a new Directive on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services.¹⁶³ The initiative aims to improve the accessibility of a number of products and services for persons with disabilities, including in particular as regards ICT products, and it discusses in detail the obligations on manufacturers, importers, distributors and service providers.

The initiative is part of the European Disability Strategy 2010-2020,¹⁶⁴ but it is also explicitly presented as a requirement under the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party. In particular, Article 9 of the UNCRPD obliges the EU, to the extent of its competences, to take appropriate measures to ensure accessibility; and Article 3 refers to accessibility as a general principle of the Convention that should be considered in relation to the enjoyment of the rights and fundamental freedoms stated in the Convention. Indeed, the Committee on the Rights of Persons with Disabilities also expressed its support for the adoption of a European Accessibility Act, while recommending that the said Act be aligned with the requirements of the Convention on the Rights of Persons with Disabilities, "as developed in the Committee's general comment No. 2 (2014) on accessibility, including effective and accessible enforcement and complaint mechanisms".¹⁶⁵

The European Accessibility Act is a welcome and important proposal, however it could be even more ambitious in its scope. It applies to the development of new services and products. But accessibility requirements should also be gradually imposed on *existing* services and products that are already on the market. Moreover, the material reach of the directive (the list of products and services concerned) could be expanded. For instance,

¹⁶³ COM(2015) 615 final of 2.12.2015, 2015/0278(COD). The proposed directive relies on Article 114(1) TFEU as its legal basis. This provides for the ordinary legislative procedure to be used for the adoption of measures aimed at the establishment and functioning of the internal market. It is thus an option that is more politically feasible than to rely on Article 19 TFEU, which requires unanimity within the Council.

¹⁶⁴ European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final. See also the Action Plan 2010-2015 (Initial plan to implement the European Disability Strategy 2010-2020, List of Actions 2010-2015), SEC(2010) 1324 final. On 23 December 2015, the European Commission published a public consultation on the mid-term review of the European Disability Strategy 2010-2020. The consultation was closed on 18 March 2016. However, its results are still not known at the time of writing.

¹⁶⁵ UN doc. CRPD/C/EU/CO/1 (2 October 2015), para. 29.

Inclusion Europe, an NGO that defends the rights of persons with intellectual disabilities, noted that the health sector was not adequately covered: "if medical products, services, and facilities are not accessible, or the staff employed in these services is not trained to understand and communicate with persons with intellectual disabilities, the Directive will not bring a real positive change to the lives of hundreds of thousands of Europeans".¹⁶⁶

Perhaps even more problematic, is the approach the draft directive takes to the question of what should be considered a disproportionate burden for the economic operator. Article 12(2) of the draft directive states that accessibility requirements apply "to the extent that they do not impose a disproportionate burden on the economic operators concerned". However, Article 12(3) then adds that "In order to assess whether compliance with accessibility requirements regarding products or services imposes a disproportionate burden, the economic operators shall take account, of the following: (a) the size, resources and nature of the economic operators; (b) the estimated costs and benefits for the economic operators in relation to the estimated benefit for persons with disabilities, taking into account the frequency and duration of use of the specific product or service." This creates the risk of confusion. Cost-benefit analysis, although it is alluded to in (b), is in fact irrelevant to the duty of reasonable accommodation, from which accessibility requirements are derived. All that should matter is whether complying with such requirements imposes on the operator a burden that it does not have the financial ability to shoulder: it is otherwise indifferent that the increased costs of production are high, in comparison to the benefits to the persons whose access to the service or the product would be improved. Moreover, it is inconsistent to take into account "the frequency and duration of use of the specific product or service": if persons with disabilities do not use a product or a service, or do so only infrequently, it may be precisely because it is not accessible. But it would be rather paradoxical if the lack of accessibility were to justify a lack of investment into improving accessibility.

¹⁶⁶ Inclusion Europe's [position](#) about the proposed European Accessibility Act (Brussels, 25 January 2016).

4. A MORE PROTECTIVE UNION: SAFEGUARDING THE RIGHTS OF THE MOST VULNERABLE

KEY FINDINGS

- The Commission has not proposed a successor to the EU Agenda on the Rights of the Child, initiated in 2006 and the second version of which was phased out in 2014. This is despite the fact that there exists a strong consensus on this issue in all the EU Member States, and that all EU Member States are parties to the UN Convention on the Rights of the Child, which provides a robust normative baseline for further action.
- Consistent with a request of the European Parliament, the Commission proposed a revision of the audiovisual media services directive (Directive 2010/13), which includes guarantees of the independence of national audiovisual regulators, and would ensure that they operate in a transparent and accountable manner and have sufficient powers. The proposal, however, does not include provisions to safeguard the pluralism of the media. It offers to align the grounds for prohibiting hate speech to those of the 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia, however this definition is narrower than that suggested by the Council of Europe's European Commission against Racism in December 2015.
- The *Schrems* case on which the CJEU delivered its judgment on 6 October 2015 further drew the attention on the issue of mass surveillance by public authorities, including secret services. Recent decisions of the European Court of Human Rights confirm that indiscriminate or "mass" surveillance, since it is untargeted by definition, cannot be considered to comply with the requirements of necessity and proportionality that apply to all interferences with the right to respect for private life; such form of indiscriminate surveillance also results in a considerable diversion of resources of law enforcement agencies, at the expense of more targeted forms of surveillance.
- Although the Parliament has called for an initiative to improve the rights of detainees in the EU and to ensure that the EU Member States fully implement the recommendations of the Council of Europe's Committee for the Prevention of Torture, no such proposal was made by the Commission. The Fundamental Rights Agency could be requested to take into account the findings of monitoring bodies of the Council of Europe and of the United Nations in annual conclusions on the situation of fundamental rights in the EU, in order to strengthen the incentives for Member States to faithfully implement the recommendations from these bodies.
- No progress was achieved on the proposal presented by the Commission in 2013 for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings. However, insofar as they act in the scope of application of Union law -- as when they execute a European arrest warrant --, the EU Member States are bound to comply with the requirement to provide legal aid. The CJEU may already be led to conclude that the failure to provide legal aid, if it results in depriving the persons requested in EAW proceedings from a right to a dual defence, is in violation of fundamental rights as recognized in the EU legal order.
- A number of developments took place in the area of migration and asylum in 2015 and 2016. On 4 May 2016, the Commission proposed to complement the existing Dublin system (Regulation (EU) No 604/2013) with a corrective allocation mechanism, which would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers. The proposal introduces as a

permanent feature the reallocation mechanism agreed by the Council as an emergency measure in September 2015. The dismal implementation of the emergency relocation programme, however, illustrates the limited political will of the EU Member States to show solidarity with Greece and Italy.

- The EU-Turkey statement of 18 March 2016 is intended to end the irregular migration from Turkey to the EU and make the smuggling of migrants from Turkey less attractive. The key legal question that arises is whether Turkey may be considered a "safe third country" in the meaning of Article 38 of the 2013 (Recast) Asylum Procedures Directive, since, according to Article 61(1) of the Law on Foreigners and International Protection, Turkey does not extend the protection of the Geneva Convention on the status of refugees to persons (such as Syrian refugees) who are not fleeing from European countries.

4.1. Supporting the rights of the child

4.1.1. The EU Agenda on the Rights of the Child

The resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) calls on the Commission to propose "an ambitious and comprehensive successor to the EU Agenda on the Rights of the Child in 2015" (OP 83). The EU Agenda on the Rights of the Child, initially established in a 2006 communication of the Commission¹⁶⁷ and redefined in a 2011 communication, was phased out in 2014.¹⁶⁸ Whereas the Coordinator on the Rights of Child hosted within DG Justice (a position initially established in 2006 when the Agenda was first adopted) has continued to work to convene the Commission's interservice working group on the rights of the child and to liaise with a number of stakeholders to ensure mainstreaming and promotion of the rights of the child, the Commission appears to have no intention, at present, to propose a successor to the 2011 Agenda on the Rights of the Child.¹⁶⁹ In addition, the Coordinator of the Rights of Child is assisted by two full-time support staff (including one contract-based policy assistant). She therefore has too few resources to effectively ensure that the rights of the child are effectively taken into account in the full range of legislative and policy initiatives of the Commission.

4.1.2. Investing in children: combating child poverty

The 2013 Commission Recommendation 'Investing in children: breaking the cycle of disadvantage'¹⁷⁰ contains a number of recommendations addressed to the Member States towards designing and implementing policies to "address child poverty and social exclusion, promoting children's well-being", in particular through the setting up of multi-dimensional strategies at national level. This is an important contribution, both ambitious and relying on a rights-based approach. However, as implied by the concern expressed in Parliament's resolution of 8 September 2015, the follow-up leaves much to be desired. For the follow-up to the recommendation to be effectively monitored, it would be necessary to set clear time-bound targets at domestic level, and for this to feed into a peer review mechanism at EU level, for instance within the informal Member States' Working Group on the Rights of Child, that has been in place since 2013. Such national implementation measures should

¹⁶⁷ Communication from the Commission, Towards an EU strategy on the rights of the child, COM(2006) 367 final, 4.7.2006.

¹⁶⁸ COM(2011) 60 final of 15.2.2011.

¹⁶⁹ Work is currently being done within DG Justice towards a comprehensive approach on children and migration; however, this may lead to the adoption of a communication or a List of Actions.

¹⁷⁰ Commission Recommendation (2013/112/EU) of 20 February 2013 Investing in children: breaking the cycle of disadvantage. OJ L 59, 2.3.2013, p. 5.

also be better supported by policies developed at the level of the EU, including in particular within the "European semester". The most recent assessment of progress under the European semester, for instance, refers to the specific needs of children and the fight against child poverty where anti-poverty policies are discussed ("Concerns about the effects of increasing numbers of children affected by poverty have seen some Member States step up the corresponding social benefits"), as well as as regards the integration of migrants and refugees ("Given the high share of children and young people (about 26%), education systems in particular need to adapt quickly and offer tailored programmes for basic and linguistic skills")¹⁷¹; but such references, desirable though as they may be, remain sporadic and ad hoc.

The most significant studies published by the Fundamental Rights Agency in the area of children's rights since the adoption of the resolution of 8 September 2015 are a [study](#) on violence against children with disabilities and a [handbook](#), jointly prepared with the Council of Europe and the European Court of Human Rights, on the rights of the child. The first study highlights that children with disabilities face various forms of exclusion from society, all too often "institutionalized" and living in facilities far from their families. The study also documents how children with disabilities are denied access to basic services, such as health care and education, and face stigma and discrimination. It brings to light the sexual, physical and psychological violence they are subjected to.

4.1.3. Conclusion

The rights of the child is one area in which, in comparison to the agenda it had set for itself ten years ago when the first Agenda on the Rights of the Child was adopted, the Union has been lowering its ambitions. This is paradoxical. This an issue on which there exists a strong, cross-party, consensus in all the EU Member States. All EU Member States are parties to the UN Convention on the Rights of the Child, and therefore the normative baseline on which to operate is well-established -- indeed, the Parliament has repeatedly called for the EU to accede to the UN CRC¹⁷², which is already considered by the Court of Justice to be part of the fundamental rights acquis of the Union¹⁷³. Clearly, a renewed commitment to move towards fulfilling the promises of the UN CRC in the law- and policy-making of the Union is now required. Such a commitment could take the UN CRC's promises as a benchmark, and identify the range of initiatives, both legislative and political, that the EU could take in order to contribute to its full implementation by the EU Member States.

4.2. Creating an open society

In its resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013-2014), the Parliament refers (in OP 23) to its resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU.¹⁷⁴ In that resolution, the Parliament called on the Commission to review and amend the audiovisual media services directive (AVMSD)¹⁷⁵ in order to "extend its scope to minimum standards for the respect,

¹⁷¹ Communication of the Commission to the European Parliament, the Council, the European Central Bank and the Eurogroup, 2016 *European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011*, COM(2016) 95 final/2 of 7.4.2016 (revised version of document COM(2016) 95 final of 08.03.2016 in view of additional information on Cyprus), at p. 12.

¹⁷² European Parliament resolution of 16 January 2008: Towards an EU strategy on the rights of the child, (2007/2093(INI)), para. 17; European Parliament resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child, (2014/2919(RSP)), para. 38.

¹⁷³ Case C-540/03, *Parliament v Council*, [2006] ECR I-5769, para. 37.

¹⁷⁴ (2011/2246(INI)).

¹⁷⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision

protection and promotion of the fundamental right to freedom of expression and information, media freedom and pluralism, and to ensure the full application of the Charter of Fundamental Rights, of the ECHR and of the related jurisprudence on positive obligations in the field of media". Specifically, the Parliament made two recommendations, requesting that the revision of the AVMSD would ensure that "the national regulatory authorities are fully independent, impartial and transparent as regards their decision-making processes, the exercise of their duties and powers and the monitoring process, effectively funded to carry out their activities, and have appropriate sanctioning powers to ensure that their decisions are implemented"; and that it would include "provisions on transparency on media ownership, media concentration, conflict of interest rules to prevent undue influence on the media by political and economic forces, and independence of media supervisory bodies".¹⁷⁶

The Commission has proposed a revision of the audiovisual media services directive on 25 May 2016¹⁷⁷. The proposal seems to meet the first request of the Parliament, since it includes a provision guaranteeing the independence of audiovisual regulators by ensuring that they are legally distinct and functionally independent from the industry and government, operate in a transparent and accountable manner which is set out in a law and have sufficient powers. Specifically, whereas Article 30 of the AVMSD in its current version only provides for a form of cooperation between the regulatory bodies of the Member States for the application of the directive, this provision would be significantly strengthened following the proposal of the Commission, to define a set of minimum conditions the regulatory bodies would have to fulfill. Thus, the independent national regulatory authorities shall have to be "legally distinct and functionally independent of any other public or private body" (Art. 30(1)); they shall exercise their powers "impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition" (Art. 30(2)); they shall "not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law" (Art. 30(2)); their "competences and powers ..., as well as the ways of making them accountable shall be clearly defined in law" (Art. 30(3)); they shall have "adequate enforcement powers to carry out their functions effectively" (Art. 30(4)); finally, "the Head of a national regulatory authority or the members of the collegiate body fulfilling that function within a national regulatory authority, may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. A dismissal decision shall be made public and a statement of reasons shall be made available" (Art. 30(4)). The independence of the national regulatory authorities shall be further supported by the establishment of the European Regulators Group for Audiovisual Media Services (ERGA), which would bring together the national independent regulatory authorities in the field of audiovisual media services: although the ERGA was already created by Commission Decision of 3 February 2014¹⁷⁸, the formal

of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1. The directive ("AVMSD") is based on the EU's powers to coordinate Member States laws to bring about the freedom to provide services in the internal market (Article 53(1) TFEU in conjunction with Article 62 TFEU). It codifies the original Council Directive 89/552/EEC as amended by Directives 97/36/EC and 2007/65/EC. It covers both rules for 'television broadcasting' and for on-demand audiovisual media services.

¹⁷⁶ European Parliament resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU ([2011/2246\(INI\)](#)), paras. 34-35.

¹⁷⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final of 25.5.2016.

¹⁷⁸ Commission Decision C(2014) 462 final of 3 February 2014 on establishing the European Regulators Group for Audiovisual Media Services.

recognition of the ERGA in the text of the AVMSD itself shall enhance its status, and further contribute to protecting these authorities from interference with their mandate.

In contrast, the proposal of the Commission for the revision of the AVMSD does not appear to meet the second request of the Parliament. However, the pluralism of the media is acknowledged to make an important contribution to democratic societies, and the Member States are under a duty to preserve media pluralism, as stipulated in Article 11(2) of the Charter of Fundamental Rights, in implementing the AVMSD. The Preamble of the AVMSD, in its current version, is explicit about this, noting that "the instruments chosen by Member States [in the establishment of independent national regulatory authorities] should contribute to the promotion of media pluralism".¹⁷⁹ The proposal of the Commission for a revision of the AVMSD echoes this, mentioning that "national regulatory authorities [should] exercise their powers impartially and transparently and in accordance with the objectives of this Directive, *in particular media pluralism*, cultural diversity, consumer protection, internal market and the promotion of fair competition".¹⁸⁰

Finally, as it relates to the impacts on fundamental rights of the proposal of the Commission for a revision of the AVMSD, it is relevant to note that the proposal offers to align the grounds for prohibiting hate speech to those of the Framework Decision on combating certain forms and expressions of racism and xenophobia¹⁸¹ which defines hate speech as "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin"¹⁸². The Commission proposes in this regard to replace Article 6 of the AVMSD in order to provide that "Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

This definition of "hate speech" is however more restrictive than the definition advocated by the European Commission against Racism, the relevant Council of Europe expert body. In a recommendation it adopted on 8 December 2015¹⁸³, ECRI proposed to define "hate speech" as "the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes "race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation"¹⁸⁴. This definition is broader than the definition that the European Commission proposes to insert into the AVMSD, both because it goes beyond "incitement to violence or hatred" to cover other forms of hate speech (including for instance negative stereotyping or stigmatization) and because it refers to uses of hate speech that are not limited to an intention to incite the commission of acts of violence, intimidation, hostility or discrimination, but include "such use that can

¹⁷⁹ Preamble, para. 94.

¹⁸⁰ Article 30(2), of the text as it would be revised following the proposal of the Commission (emphasis added).

¹⁸¹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 6.12.2008, p. 55.

¹⁸² Council Framework Decision 2008/913/JHA, Art. 1(1) (a). In addition, Council Framework Decision 2008/913/JHA requires that Member States make it a criminal offence to publicly condone, deny or grossly trivialise crimes of genocide, crimes against humanity and war crimes.

¹⁸³ ECRI General Policy Recommendation n°15 on combating hate speech, CRI(2016) 15 (Strasbourg, 21 March 2016).

¹⁸⁴ ECRI Policy Recommendation n°15, Preamble, para. 6.

reasonably be expected to have that effect"¹⁸⁵. ECRI's Policy Recommendation on combating hate speech, moreover, lists a set of procedural safeguards that could significantly facilitate the fight against hate speech in the media, that could inspire the EU Member States in the implementation of the AVMSD, or the work of the ERGA in the exchange of good practices.

4.3. Mass surveillance

In the case of *Maximillian Schrems v. Data Protection Commissioner*, the Court of Justice of the European Union found that Commission Decision 2000/520/EC of 26 July 2000 adopted pursuant to Directive 95/46¹⁸⁶ on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce¹⁸⁷ was invalid¹⁸⁸. The case originated in a complaint filed with the Irish Data Protection Commissioner by Mr Schrems, an Austrian national residing in Austria. Mr Schrems alleged that the personal data he transmitted to Facebook Ireland were transferred to Facebook Inc. in the United States and were processed there, although (as it appeared from Edward Snowden's revelations concerning the practices of the National Surveillance Authority) the law and practice in force in the U.S. "did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities"¹⁸⁹. Both Article 25(1) of the Personal Data Protection Directive and recital 57 of its Preamble, provide that transfers to a third country of personal data collected or processed in the EU may take place only if the third country ensures an adequate level of protection. Article 25(6) of Directive 95/46/EC provides to that effect that the Commission may find that a third country ensures an adequate level of protection for the protection of the private lives and basic freedoms and rights of individuals, taking into account its domestic law or of the international commitments it has entered into. In its judgment of 6 October 2015, the Court of Justice logically concludes that, "in order for the Commission to adopt a decision pursuant to Article 25(6) of Directive 95/46, it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order"¹⁹⁰. However, since the Commission did not in fact state that the United States ensures an adequate level of protection of personal data, its decision is found to be invalid.

The *Schrems* decision is only one of the recent judicial pronouncements that concern the dangers associated with mass surveillance. In the case of *Zakharov v. Russia*, the European Court of Human Rights agreed to examine an application filed by a journalist and NGO activist who alleged that, under the Russian legislation, the Russian authorities could resort to secret surveillance measures, in conditions that he considered incompatible with the requirements of Article 8 of the European Convention on Human Rights¹⁹¹. Although individual applicants before the European Court of Human Rights in principle must demonstrate that they have been personally affected by the measure they complain of, the Court considered that "the secrecy of surveillance measures [should] not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and of the Court"; therefore, in the absence of adequate remedies allowing an individual who suspects that he or she was subjected to secret surveillance to challenge any such measures as may have been applied to him, the Court agreed to

¹⁸⁵ ECRI Policy Recommendation n°15, Explanatory Memorandum, para. 10.

¹⁸⁶ 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), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

¹⁸⁷ OJ 2000 L 215, p. 7.

¹⁸⁸ Case C-362/14, Judgment of 6 October 2015 (ECLI:EU:C:2015:650).

¹⁸⁹ Case C-362/14, Judgment of 6 October 2015, para. 28.

¹⁹⁰ Para. 96.

¹⁹¹ Eur. Ct. HR (GC), *Zakharov v. Russia*, judgment of 4 Dec. 2015 (Appl. n° 47143/06).

consider that such individual may apply to the Court¹⁹². The Court examined the guarantees provided in Russian legislation, and concluded that the legal provisions governing interceptions of communications in Russia "do not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance"¹⁹³.

In the subsequent case of *Szabó and Vissy v. Hungary*,¹⁹⁴ in response to an application filed by staff members of an NGO critical of the government, the Court confirmed that "in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them, ... under certain circumstances, an individual may claim to be a victim on account of the mere existence of legislation permitting secret surveillance, even if he cannot point to any concrete measures specifically affecting him"¹⁹⁵. On the merits, it took the view that "in matters affecting fundamental rights it would be contrary to the rule of law ... for a discretion granted to the executive in the sphere of national security to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference"¹⁹⁶. Indeed, the Court added, "it would defy the purpose of government efforts to keep terrorism at bay, thus restoring citizens' trust in their abilities to maintain public security, if the terrorist threat were paradoxically substituted for by a perceived threat of unfettered executive power intruding into citizens' private spheres by virtue of uncontrolled yet far-reaching surveillance techniques and prerogatives"¹⁹⁷. It concluded that Hungary was in violation of the European Convention on Human Rights: "Given that the scope of the measures could include virtually anyone, that the ordering is taking place entirely within the realm of the executive and without an assessment of strict necessity, that new technologies enable the Government to intercept masses of data easily concerning even persons outside the original range of operation, and given the absence of any effective remedial measures, let alone judicial ones, the Court concludes that there has been a violation of Article 8 of the Convention"¹⁹⁸. European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs¹⁹⁹, is listed by the Court among the documents that shaped its views on the safeguards that should accompany secret surveillance measures, alongside, in particular, the Report on the Democratic oversight of the Security Services adopted by the European Commission for Democracy through Law (Venice Commission) at its 71st Plenary Session (Venice, 1-2 June 2007).²⁰⁰

The issue of mass surveillance is of major importance to the rule of law in the context of fight against terrorism, and it is also a major area in which the ability to rebuild the trust of the citizens in the institutions is being tested. Indiscriminate or "mass" surveillance, by definition, since it is untargeted, cannot be considered to comply with the requirements of necessity and proportionality that apply to all interferences with the right to respect for private life; such form of indiscriminate surveillance also results in a considerable diversion of resources of law enforcement agencies, at the expense of more targeted (and arguably more effective) forms of surveillance.

¹⁹² Para. 171.

¹⁹³ Para. 302.

¹⁹⁴ Eur. Ct. HR (4th sect.), *Szabó and Vissy v. Hungary*, judgment of 12 January 2016 (Appl. n° 37138/14).

¹⁹⁵ Para. 33.

¹⁹⁶ Para. 65.

¹⁹⁷ Para. 68.

¹⁹⁸ Para. 89.

¹⁹⁹ ([2013/2188\(INI\)](#)). See now also European Parliament resolution of 29 October 2015 on the follow-up to the European Parliament resolution of 12 March 2014 on the electronic mass surveillance of EU citizens ([2015/2635\(RSP\)](#)).

²⁰⁰ Council of Europe doc. CDL-AD(2007)016-e.

4.4. Protecting fundamental rights in judicial procedures and in detention

In the judgment it delivered on 5 April 2016 in the Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, the Court of Justice of the European Union took the view that national authorities of a Member State should refuse to execute a European Arrest Warrant delivered by the judicial authorities or another Member State if there exists a real risk that the person against who the arrest warrant is delivered will be subject to inhuman or degrading treatment in the emitting State, in violation of Article 4 of the Charter of Fundamental Rights.²⁰¹ This is a highly significant decision. Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States provides in its Preamble that "the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union [now Art. 2 TEU], determined by the Council pursuant to Article 7(1) of the said Treaty [now Art. 7(2) TEU] with the consequences set out in Article 7(2) thereof [now Art. 7(3) TEU]" (para. 10). However, the text of the Framework Decision itself states clearly that it "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" (Art. 1(3)), and it follows from Articles 6(1) and 6(3) TEU that Member States are bound to comply with fundamental rights, as listed in the Charter of Fundamental Rights and as included among the general principles of Union law, in the implementation of Union law. It follows that they cannot set aside the requirements of fundamental rights, even when they seek to discharge a duty to cooperate with other EU Member States in accordance with the principle of mutual recognition. The Court thus rightly rejects the view according to which only if a Member State has been found to be in serious and persistent breach of the values of Article 2 TEU, may a request to surrender a person subject to a European Arrest Warrant be (temporarily) denied.

This, it might be added, is also a requirement imposed on the EU Member States, as Contracting Parties to the European Convention on Human Rights, under this instrument: in the case of *Avotiņš v. Latvia*²⁰², where the question arose of the duty of national courts to examine whether the recognition and enforcement of judgments under the 'Brussels I' Regulation was compatible with fundamental rights, the Grand Chamber of the European Court of Human Rights confirmed that whereas domestic could give "full effect" to a mutual recognition mechanism established by EU law in all the cases "where the protection of Convention rights cannot be considered manifestly deficient", where "a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law", these courts "cannot refrain from examining that complaint on the sole ground that they are applying EU law".²⁰³

It is also noteworthy that the Court of Justice expresses this view taking into account, inter alia, a judgement delivered on 10 March 2015 by the European Court of Human Rights in the case of *Varga and Others*, according to which Hungary was in violation of the prohibition of inhuman and degrading treatment under Article 3 of the European Convention on Human Rights because of the overcrowding of prison cells. The judgment was a "pilot judgment",

²⁰¹ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment of 5 April 2016 (ECLI:EU:C:2016:198), para. 88.

²⁰² Eur. Ct. HR (GC), *Avotiņš v. Latvia*, judgment of 23 May 2016 (Appl. no. 17502/07).

²⁰³ Para. 116.

representative of a total of 450 similar applications filed against Hungary before the European Court of Human Rights, alleging inhuman or degrading conditions of detention in that country: the Court thus considered that the six applicants before it in the *Varga and Others* case were indicative of a broader structural problem.²⁰⁴ The Court of Justice also was alerted to the reports of the European Committee for the Prevention of Torture, which the European Court of Human Rights also relied on, documenting the poor conditions of detention in overcrowded prisons in Hungary at various times between 2009 and 2013.²⁰⁵

The judgement delivered by the Court of Justice in *Pál Aranyosi and Robert Căldăraru* illustrates the links between mutual recognition, mutual confidence, and the need for harmonization measures or measures ensuring approximation of laws in order to facilitate judicial cooperation. In 2011, the Commission has suggested that, whereas the Council of Europe had developed European Prison Rules in 2006,²⁰⁶ "future European Union action in this field could play a part in ensuring equivalent prison standards for the proper operation of the mutual recognition instruments".²⁰⁷ This, in effect, is supported by the Parliament in its resolution of 8 September 2015, where it recalls that "the abuse of custodial measures results in prison overcrowding across Europe which violates the fundamental rights of individuals and compromises the mutual trust necessary to underpin judicial cooperation in Europe" (OP 154) and thus "regards it as essential that the EU adopt an instrument which guarantees that the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT) and the judgments of the ECtHR are implemented" (OP 153).

No initiative has been taken to implement these points of the resolution adopted by the Parliament. The most realistic approach towards implementing this recommendation of the Parliament would consist in requesting that the Fundamental Rights Agency, in the annual conclusions on the situation of fundamental rights in the European Union that it may be requested to provide, take into account the findings of monitoring bodies of the Council of Europe and of the United Nations, in order to strengthen the incentives for Member States to faithfully implement the recommendations from these bodies. Whereas a refusal to execute an arrest warrant -- or, more generally, to recognize a decision adopted by a judicial authority in one Member State -- requires an individual assessment of the situation concerned and cannot be based on a mere presumption following from general assessments of the situation of fundamental rights in a Member State, such general assessments are nevertheless useful guides to national authorities who are asked to cooperate in the Area of Freedom, Security and Justice; and a Member State which deliberately ignores repeated recommendations to address certain deficiencies regarding fundamental rights under its jurisdiction should be made aware that it may face the threat of other Member States' refusal to cooperate.

4.5. Ensuring access to justice: legal aid

In its resolution of 8 September 2015, the Parliament, deploring "the lack of access to legal aid in many Member States and the fact that this affects the right of access to justice of those who lack sufficient resources", "regards it as essential that the EU adopt a strong and comprehensive directive on legal aid" (OP 162).

²⁰⁴ Eur. Ct. HR, *Varga and Others v. Hungary* (Appl. nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 et 64586/13), judgment of 10 March 2015.

²⁰⁵ The Court of Justice refers to these findings in paras. 43 and 44 of its judgment.

²⁰⁶ See [Recommendation Rec \(2006\)2](#) of the Committee of Ministers to the member states on European Prison Rules.

²⁰⁷ European Commission, *Green Paper: Strengthening mutual trust in the European judicial area - A Green Paper on the EU criminal justice legislation in the field of detention*, [COM\(2011\) 327 final](#), of 14.6.2011, p. 12.

A distinction should be made here between legal aid in civil and commercial litigation, and legal aid in criminal procedures. As regards the former, a 2003 Directive (Directive 2002/8/EC)²⁰⁸ seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The directive is premised on the idea, expressed in the 6th Recital of its Preamble, that "Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice". The directive defines that an appropriate level of legal aid should guarantee: (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings; (b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs directly related to the cross-border nature of the dispute (covering interpretation; translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means); (c) the fees to persons mandated by the court to perform acts during the proceedings. Moreover, in Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid provided shall cover (d) the costs incurred by the opposing party, if such costs would have been covered by legal aid had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.²⁰⁹

Directive 2002/8/EC is based on Articles 61(c) and 67 EC.²¹⁰ It is limited in two ways. First, it aims at facilitating access to justice in cross-border disputes within the EU, as a means to promote the achievement of the internal market. Secondly, it only benefits Union citizens who are domiciled or habitually resident in the territory of a Member State and third-country nationals who habitually and lawfully reside in a Member State²¹¹; under the directive, these categories of litigants must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by the directive.

As regards the right to legal aid in criminal proceedings, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings²¹² guarantees access to a lawyer to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent national authorities that they are suspected or accused of having committed a criminal offence (whether or not they are deprived of liberty) until the conclusion of the criminal proceedings. The directive states

²⁰⁸ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26 of 31.1.2003, p. 41.

²⁰⁹ See Art. 3(2) and 6 of the Directive.

²¹⁰ These provisions related to judicial cooperation in civil matters. Following the entry into force of the Lisbon Treaty, Article 81(2)(e) of the TFEU now allows for the adoption of legislative measures, "particularly when necessary for the proper functioning of the internal market, aimed at ensuring ... effective access to justice".

²¹¹ Article 4 of the directive provides explicitly that "Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State".

²¹² Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities (OJ L 294, 6.11.2013, p. 1). The directive is adopted on the basis of Article 82(2) TFEU, which provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The 'rights of individuals in criminal procedure' is one of the areas in which minimum rules may be established.

that it is "without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR".²¹³ However, the Commission adopted on 27 November 2013 a recommendation on the right to legal aid for suspects or accused persons in criminal proceedings²¹⁴ which aims to ensure that suspects or accused persons (and requested persons under the European arrest warrant procedure) should be granted legal aid "if they lack sufficient financial resources to meet some or all of the costs of the defence and the proceedings as a result of their economic situation ('means test'), and/or when such aid is required in the interests of justice ('merits test')".²¹⁵ The Recommendation specifies that the Member States should inform the Commission on the measures taken to implement the Recommendation within 36 months following notification.

On the same day that it issued this Recommendation, the Commission also adopted a proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings²¹⁶. The proposal contributes to the implementation of the Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings adopted by the Council on 30 November 2009²¹⁷. It is based on Article 82(2) TFEU. This provision allows the adoption of directives establishing "minimum rules", in particular concerning the rights of individuals in criminal proceedings, "to the extent necessary to facilitate the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension". It would appear from discussions within the Council that, whereas some Member States favor broadening the scope of the proposed directive to cover also the right to ordinary legal aid of suspected or accused persons in criminal proceedings, subject to an assessment of the means of the person (means test) and/or whether it is in the interests of justice (merits test) (though some States consider that "it should be always in the interest of justice to grant the right to legal aid to persons who are suspected or accused of having committed a serious offence"), other Member States take the view that "granting provisional legal aid for minor offences, such as minor traffic offences or minor public order offences, would be disproportionate" and requested the exclusion of those offences from the scope of the Directive.²¹⁸

No developments seem to have taken place since the end of the Italian presidency of the Council of the second semester of 2014. It should be noted however that in all situations that fall under the scope of application of Union law, the right to an effective judicial remedy as stipulated under Article 47 of the Charter of Fundamental Rights should be respected. In the case of *Edwards*, the Court of Justice was asked to interpret the instruments that implement in Union law the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("Aarhus Convention"),²¹⁹ Article 9 of which provides that the procedures established to allow judicial review of the decisions affecting the environment "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and *not prohibitively*

²¹³ Id., Art. 11. See the Preamble of the directive, par. 48: "Pending a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights."

²¹⁴ COM(2013) 8179 final of 27.11.2013, OJ C 378 of 24.12.2013, p. 11.

²¹⁵ Recommendation, para. 4.

²¹⁶ COM(2013) 824 final, of 27.11.2013.

²¹⁷ OJ C 295, 4.12.2009, p. 1.

²¹⁸ Proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings : First reading, state of play, Council of the EU doc. 15490/14 (DROIPEN 129, COPEN 278, CODEC 2241), 17.11.2014.

²¹⁹ The Convention was approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

expensive" (§ 4 (emphasis added)). The Court noted that "the requirement that the cost should be 'not prohibitively expensive' pertains ... to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law".²²⁰ It follows that a requirement that judicial proceedings should not be "prohibitively expensive" "means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result":²²¹ the national courts must ensure that "the cost of proceedings ... neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable".²²² Among the factors that national courts may take into account in this regard, are "the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the [public interest, such as the protection of the environment, that the private claim may contribute to,] the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages",²²³ as well as the existence of a national legal aid scheme or a costs protection regime.²²⁴

The proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings seeks to implement a fundamental right, stated explicitly in Article 47(3) of the Charter of Fundamental Rights as well as in Article 6(3)(c) ECHR and in Article 14(3)(d) of the International Covenant on Civil and Political Rights. Insofar as they act in the scope of application of Union law -- as when they execute a European arrest warrant --, the EU Member States are bound to comply with the requirement to provide legal aid. Whereas the proposal for a directive on the issue is justified by the finding that "requested persons in European Arrest Warrant proceedings do not always have access to legal aid in the Member States" and that therefore the right to a lawyer in both the executing and the issuing State may be jeopardized²²⁵, the Court of Justice of the European Union may already be led to find that the failure to provide legal aid in such circumstances, thus depriving the persons requested in EAW proceedings from a right to a dual defence, is in violation of fundamental rights as recognized in the EU legal order.

4.6. Safeguarding the rights of asylum-seekers and refugees

The rights of asylum-seekers and refugees have been a particular focus of attention in 2015 and 2016, as a result of the increased number of refugees fleeing conflict arriving at the borders of the EU Member States. In its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), the Parliament "calls for the establishment of an effective and harmonised EU asylum system for the fair distribution of asylum seekers among Member States" (OP 117). Earlier in the year, it had already adopted a resolution on 8 April 2015 reiterating the need for the Union to base its response to the latest tragedies in the Mediterranean on solidarity and fair sharing of responsibility

²²⁰ Case C-260/11, *Edwards*, judgment of 11 April 2013, para. 33.

²²¹ *Id.*, para. 35.

²²² *Id.*, para. 40.

²²³ *Id.*, para. 42.

²²⁴ *Id.*, para. 46.

²²⁵ Proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, of 27.11.2013, Explanatory Memorandum, at para. 11.

and to step up its efforts in this area towards those Member States which receive the highest number of refugees and applicants for international protection in either absolute or relative terms.

4.6.1. The relocation and resettlement schemes: fairly distributing the burden

Relocation of refugees from Italy and Greece, the primary countries of arrival, was initially agreed upon by consensus. Based on a proposal made by the Commission on 27 May 2015, the representatives of the Governments of the Member States meeting within the Council adopted a Resolution on 20 July 2015 on the relocation of 24 000 persons from Italy and 16 000 from Greece within a period of two years. This initial decision was in derogation from the "Dublin III" Regulation (which in principle would designate Italy and Greece as the States responsible for the examination of the asylum claims filed by persons arriving at their borders).²²⁶ It was formally confirmed by Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.²²⁷ This was then followed by Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, for an additional 120 000 persons to be relocated.²²⁸ These decisions were based on Article 78(3) TFEU, which provides that, in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt provisional measures for the benefit of the Member States concerned. In addition to the emergency relocation mechanisms, the Commission presented in September 2015 a proposal for a Regulation establishing a permanent crisis relocation mechanism and amending the Dublin Regulation²²⁹. In substance, the proposal seeks to complement the Dublin mechanism (which, in Regulation No. 604/2013, does not allow for a derogation) by adding a crisis mechanism for the relocation of applicants in clear need of international protection. This would make it unnecessary to decide on emergency relocation mechanisms on an ad hoc basis in times of crisis, where one or more EU Member States are confronted with a sudden influx of persons seeking international protection.

Eight months after it was agreed upon however, the emergency relocation programme appear to be largely ineffective. By 15 March 2016, out of the total of 160,000 persons who were anticipated to be relocated from Greece and Italy in other Member States, only 937 had been relocated. As to the EU resettlement scheme agreed in July 2015, it was intended to benefit over a period of two years 22,504 people in need of international protection from the Middle East, Horn of Africa and Northern Africa, but by 15 March 2016, only 4,555 people have been resettled²³⁰. According to the successive reports presented

²²⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ([OJ L 180, 29.6.2013, p. 31](#)).

²²⁷ OJ L 239 of 15.9.2015, p. 146.

²²⁸ OJ L 248 of 24.9.2015, p. 80. The Commission initially proposed that 54,000 persons be relocated from Hungary, however Hungary did not wish to enter into the scheme; as a result, the decision provides that these 54,000 will after one year also be proportionally relocated from Italy and Greece to other Member States unless new developments lead the Commission to propose to amend the Council decision in order to include other countries facing a large influx of refugees as beneficiaries of the relocation decision.

²²⁹ Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, COM(2015) 450 final of 9.9.2015.

²³⁰ Communication from the Commission to the European Parliament, the European Council and the Council, First Report on relocation and resettlement, COM(2016) 165 final of 16.3.2016.

by the European Commission, by mid-April 2016, only an additional 208 persons were relocated, and 1,122 additional persons were resettled; by mid-May, the last data available at the time of writing, a total of 1,500 persons has been relocated (909 from Greece and 591 from Italy), far short of the anticipated 160,000; and 6,321 people have been resettled (mainly from Turkey, Jordan and Lebanon), which again is significantly less than the agreed 22,504 under the July scheme²³¹.

The relocation and resettlement programmes are only one part of a broader challenge facing the Union in the area of migration and asylum. It is against the background of the refugee crisis that the Commission adopted a communication "Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe"²³² presenting its views on how the existing Union framework on asylum should be reformed, to allow the EU Member States to better respond to situations such as those it has been confronted with in 2015, and to establish a fair system for determining the Member State responsible for examining asylum applications. The communication also announced the intention of the Commission to make proposals to reinforce the Eurodac system, to achieve greater convergence in the asylum system, to prevent secondary movements, and to establish an enhanced mandate for the European Asylum Support Office (EASO). The European Parliament generally welcomed these proposals, while expressing its concern that, under the decisions on emergency relocation adopted by the Council, "Member States of first arrival still have to handle the more complicated claims for international protection (and appeals), have to organise longer periods of reception, and will have to coordinate returns for those ultimately not entitled to international protection"; emphasizing that "any new system for the management of the Common European Asylum System must be based on solidarity and a fair sharing of responsibility", the Parliament suggested that, "in addition to the criteria contained in the Relocation Decisions, namely the GDP of the Member State, the population of the Member State, the unemployment rate in the Member State, and the past numbers of asylum seekers in the Member State, consideration should be given to two other criteria, namely, the size of the territory of the Member State and the population density of the Member State", and that "the preferences of the applicant should, as much as practically possible, be taken into account when carrying out relocation; recognises that this is one way of discouraging secondary movements and encouraging applicants themselves to accept relocation decisions, but that it should not stop the relocation process".²³³

On 4 May 2016, a month after it published its communication on the reform of the Common European Asylum System, the Commission presented three important legislative proposals, in line with the intentions expressed in the communication. Probably the most significant of these is its proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).²³⁴ The proposed Regulation has three objectives. First, it seeks

²³¹ See the Second Report on relocation and resettlement, COM(2016) 222 final, of 12.4.2016; and the Third Report on relocation and resettlement, COM(2016) 360 final, of 18.5.2016.

²³² COM(2016) 197 final, of 4.4.2016.

²³³ European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), op. paras. 17-19.

²³⁴ COM(2016) 270 final, of 4.5.2016. See also, presented on the same day, the Proposal for a Regulation of the European Parliament and Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final of 4.5.2016;

to improve the effective functioning of the Dublin system, which currently appears to be hampered by the complexity of the rules on the determination of responsibility as well as by the duration of procedures. The Commission proposes to simplify the Dublin system by removing the cessation of responsibility clauses, and to significantly shorten the time limits for sending requests, receiving replies and carrying out transfers between Member States, so as to ensure a smoother functioning of the system. Second, aware that in the current system "a limited number of individual Member States had to deal with the vast majority of asylum seekers arriving in the Union, putting the capacities of their asylum systems under strain", the Commission proposes to complement the existing Dublin system with a corrective allocation mechanism, which would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers. This would ensure a fairer allocation of the burden. Third and finally, the proposals of the Commission aim to "discourage abuses and prevent secondary movements of the applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry and remain in the Member State determined as responsible".²³⁵

4.6.2. The EU-Turkey agreement

On 18 March 2016, building on the EU-Turkey Joint Action Plan which was activated on 29 November 2015, the EU and Turkey reached an agreement that is intended to end the irregular migration from Turkey to the EU and make the smuggling of migrants from Turkey less attractive. The [statement](#) of the Members of the European Council and Turkey provides that, from 20 March 2016, all new irregular migrants crossing from Turkey to the Greek islands will be returned to Turkey; that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU (this is now colloquially referred as the "One for One (1:1) scheme"); that Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU; and that, once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated. In exchange for its contribution to stemming the flow of irregular migrants to the EU, the EU agree to fund the Facility for Refugees in Turkey for a total of 6 billion euros. In addition, Turkish citizens should be allowed to enter the EU without visas by June 2016, and the process of accession of Turkey to the EU is re-launched.

The first assessments of the agreement were rather positive, at least as regards the ability for the arrangement to stem the flow of refugees arriving in Europe through irregular routes controlled by smugglers: a month after the EU-Turkey statement of 18 March 2016, the European Commission noted a "substantial decrease in the numbers leaving Turkey for Greece: in the three weeks preceding the application of the EU-Turkey Statement to arrivals in the Greek islands, 26,878 persons arrived irregularly in the islands -- in the three subsequent weeks 5,847 irregular arrivals took place. Smugglers are finding it increasingly difficult to induce migrants to cross from Turkey to Greece".²³⁶

However, the situation is in flux, and it is too early to assess the long-term impacts of the agreement. From the point of view of the implications on fundamental rights, two key

and the Proposal for a Regulation of the European Parliament and Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final of 4.5.2016.

²³⁵ Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), cited above, Explanatory Memorandum, pp. 3-4.

²³⁶ Communication from the Commission to the European Parliament, the European Council and the Council, First Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 231 final of 20.4.2016.

requirements of the Charter of Fundamental Rights and of international law are to be considered. First, the collective expulsion of aliens is prohibited under all circumstances.²³⁷ Such a collective expulsion is "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".²³⁸ This is why the Commission insists in presenting the agreement with Turkey that "People who apply for asylum in Greece will have their applications treated on a case by case basis, in line with EU and international law requirements and the principle of *non-refoulement*. There will be individual interviews, individual assessments and rights of appeal. There will be no blanket and no automatic returns of asylum seekers."²³⁹

Secondly, no person may be returned to a State where he or she runs a real risk of ill-treatment or torture, or of other serious violations of human rights. This follows from the absolute protection of the right to life, under Article 2 of the Charter of Fundamental Rights and Article 2 ECHR, and from torture or inhuman or degrading treatment or punishment, under Article 4 of the Charter of Fundamental Rights and Article 3 ECHR. It is the consistent position of the European Court of Human Rights that "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the [State party to the ECHR] to safeguard him or her against such treatment is engaged in the event of expulsion".²⁴⁰

The EU-Turkey statement of 18 March 2016 is presented as fully consistent with these requirements. The agreement is premised on the idea that refugees arriving in Greece from Turkey may be returned to Turkey either because Turkey is the "first country of asylum" for these persons, or because it is a "safe third country". Under Article 35 of the 2013 (Recast) Asylum Procedures Directive,²⁴¹ a country "can be considered to be a first country of asylum for a particular applicant if: (a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, provided that he or she will be readmitted to that country". The United Nations High Commissioner for Refugees has set out clear conditions under which the concept of "first country of asylum" may be used, emphasizing in particular the vagueness of the terms "sufficient protection" and how it has been subject to widely diverging interpretations across the EU Member States.²⁴² According to UNHCR, beyond the absence of persecution or the risk of serious harm, and in addition to the protection from refoulement, "sufficient protection" requires "compliance, in law and practice, of the previous state with relevant international refugee and human rights standards, including

²³⁷ Article 19(1) of the Charter of Fundamental Rights; the provision corresponds to Article 4 of Protocol No. 4 to the European Convention on Human Rights.

²³⁸ Eur. Ct. HR (3rd sect.), *Čonka v. Belgium* (Appl. no. 51564/99), judgment of 5 February 2002, para. 59.

²³⁹ [EU-Turkey Agreement: Questions and Answers](#) (19 March 2016). The EU-Turkey statement of 18 March 2016 is also very clear on this point: "This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR." See <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

²⁴⁰ Eur. Ct. HR, *Chahal and Others v. United Kingdom*, judgment of 15 November 1996, para. 80.

²⁴¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60.

²⁴² UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept* (23 March 2016), see: <http://www.unhcr.org/56f3ec5a9.pdf>.

adequate standards of living, work rights, health care and education", as well as access to a right of legal stay; assistance of persons with specific needs; and timely access to a durable solution. UNHCR also notes that a correct interpretation of Article 35(b) of the Asylum Qualification Directive "implies that the individual concerned must have enjoyed protection and not merely that protection *may* be available to him or her".²⁴³

Under Article 38 of the 2013 (Recast) Asylum Procedures Directive, the EU Member States may designate a country through which an asylum-seeker has passed before arriving in the Union as a "safe third country", provided five conditions are fulfilled in the country thus designated as "safe": first, life or liberty should not be threatened on account of race, religion, nationality, membership of a particular social group, or on account of one's political opinion; secondly, there should be no risk of serious harm as defined in Article 15 of the Qualification Directive,²⁴⁴ which designates by this expression the imposition of the death penalty or execution, torture or inhuman or degrading treatment or punishment, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict; third, the principle of *non-refoulement* of the Geneva Convention of 28 July 1951 relating to the Status of Refugees should be fully respected²⁴⁵; fourth, the prohibition of removal in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; fifth and finally, there exists a possibility to request refugee status and, if recognized a refugee, to receive protection in accordance with the Geneva Convention.

The claim to asylum filed by an asylum-seeker who has transited by a "safe third country" may be considered inadmissible, following which the asylum-seeker will be returned to that country. However, doubts have been expressed as to whether Turkey could be considered a "safe third country" under Article 38 of the Asylum Procedures Directive. It has been noted by the director of the refugee program of Human Rights Watch that "any Syrian, Iraqi, or Afghan returned to Turkey would not be allowed to request refugee status there because Turkey excludes non-Europeans from qualifying for refugee status".²⁴⁶ That element alone, which appears confirmed by the assessment of the UNHCR²⁴⁷, would exclude considering Turkey as a "safe third country" under the directive: that, indeed, was the position adopted by a Greek appeals tribunal on 20 May 2016, which opposed the return of a Syrian refugee to Turkey. Moreover, serious questions arise as to the human rights record of Turkey, which has been suddenly worsening in recent months. Finally, for the concept of "safe third country" to be applied by Greece in order to return refugees to Turkey, a number of safeguards should be built into Greek law, in accordance with Article 38(2) of the Asylum Qualification Directive: although, following the EU-Turkey agreement of 18 March 2016, Greece did adapt its legislation on asylum to provide a legal framework for the implementation of the 'first safe country of asylum' and 'safe third country' principles (the vote took place on 1 April 2016), it should be verified whether the safeguards included are sufficient and operate in practice.

²⁴³ Id., p. 5.

²⁴⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337 of 20.12.2011, p. 9.

²⁴⁵ According to Article 33(1) of the Geneva Convention on the status of refugees, "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

²⁴⁶ B. Frelick, [Is Turkey Safe for Refugees?](#) (22 March 2016).

²⁴⁷ UNHCR notes that Article 61(1) of the Law on Foreigners and International Protection (LFIP) in Turkey limits refugee status to 'a person who as a result of events occurring in European countries' has a well-founded fear of being persecuted. See UNHCR, *Legal considerations...*, cited above, fn. 28.

5. CONCLUSIONS AND RECOMMENDATIONS

KEY FINDINGS

- The emergence of a fundamental rights policy of the Union requires that such rights are seen not only as limitations imposed on the EU institutions or on the EU Member States, but also as guiding action; that the Charter of Fundamental Rights operates as a bridge between the Union and international human rights law, rather than as a screen; and that the two layers composing the system of protection of fundamental rights in the EU -- the legal requirement to comply with fundamental rights in the scope of application of Union law (Article 6(1) and (3) TEU) and the political requirement to remain faithful to the values on which the Union is founded (Article 2 TEU) -- be gradually united.
- These various obstacles could be largely removed by tasking the Fundamental Rights Agency with the preparation of an annual report on the situation of fundamental rights in the EU that could be taken as a basis to identify gaps in the legal order of the EU, that could call for legislative or policy initiatives, but also to allow the Commission and the European Parliament to better exercise their role under Article 7 TEU. Such a report could form the basis of a robust, but depoliticized -- and robust *because* depoliticized -- approach to fundamental rights in the EU. Such a report could fulfil this role if it feeds into a policy process, in which both the Commission and the Parliament would draw the political conclusions from the findings it would present.

The EU has a Charter of Fundamental Rights, and it has fundamental rights tools; but it has no fundamental rights policy. For such a policy to emerge, three major obstacles should be overcome. First, fundamental rights are seen, for the most part, as prohibiting certain actions. Yet, although they do impose limits on institutions and on Member States, they also could be seen as empowering -- stimulating the presentation of legislative proposals, guiding policy initiatives, providing a focal point for inter-institutional dialogue as well as for negotiations between the EU Member States within the Council. All EU Member States are members of the Council of Europe. They have ratified a large number of human rights treaties, both at regional and at universal level. They have agreed to use the EU Charter of Fundamental Rights as an authoritative, albeit partial, codification of the fundamental rights acquis within the EU. However, they still see fundamental rights as somehow externally imposed on them, as if the choice to be bound by fundamental rights has not been theirs. As a result, the potential of fundamental rights as a compass for action and mobilization of efforts is entirely missed.

A second obstacle is that the EU Charter of Fundamental Rights operates in practice to obfuscate other sources of fundamental rights, particularly international and regional human rights instruments that States have acceded to, but also fundamental rights that belong to the common constitutional traditions of the Member States. This was not the intention of the drafters of the Charter, nor was it the objective sought by the Member States when, in 2007, they agreed on the Treaty of Lisbon -- but it is the reality that emerges from the practice of the EU institutions, including the Court of Justice of the European Union. This again is a missed opportunity: instruments such as the Council of Europe's Social Charter or the Convention on the Rights of the Child, or even the Convention on the Rights of Persons with Disabilities (to which the European Union is a party), have much to offer to help shape a consensus on how the competences of the EU

can best be exercised, for the benefit of the European citizens and of third-country nationals residing in the EU.

A third obstacle is that, in part due to the disjuncture between the "legal" role played by the Charter of Fundamental Rights and Article 6 TEU on the one hand, and the more "political" role played by Articles 2 and 7 TEU on the other hand concerning the values on which the Union is founded, monitoring compliance with these values (democracy, the rule of law and respect for human rights) has been perceived as a politicized exercise, to be left to politicians and diplomats rather than to independent human rights experts. The result is that even the invocation of the Charter is perceived as suspect, as if fundamental rights in the Union were bound to be instrumentalized.

This study takes the view that requesting from the Fundamental Rights Agency that it deliver an annual report on the situation of fundamental rights in the Union, covering both the practice of EU institutions and developments within the EU Member States, and referring explicitly to the "rule of law" and "democracy" components of the values on which the Union is founded, could represent the best way forward. Such a report could achieve three objectives. First, by systematically comparing the situation of fundamental rights in the EU Member States in a number of areas -- from the integration of the Roma to the rights of the child and from the protection of privacy to pluralism in the media --, such a report could highlight areas in which discrepancies exist between countries: areas in which human rights standards appear to diverge. Provided there is political will and a legal basis can be identified, such a finding may lead to the initiation of legislative proposals. If there is no political will or if there is no legal basis for legislative action, the comparison at least can trigger a learning process, in which best practices developed in some Member States may emulate other Member States to follow suit. Thus, fundamental rights could gradually become a guide for action -- not simply a restraint on action.

Second, in preparing such a report, the Fundamental Rights Agency could systematically read the requirements of the Charter of Fundamental Rights in the light of international human rights law, and move beyond the Charter itself to take into account the full fundamental rights acquis of the EU. In addition to significantly improving the credibility of the Union in multilateral fora such as the United Nations Human Rights Council, this would ease the relationships with the Council of Europe, allowing a division of labour between the two European organisations: whereas the standards are borrowed from the Council of Europe instruments and whereas the findings of the Council of Europe monitoring bodies shall feed into the annual report on the situation of fundamental rights in the EU, the European Union would be supporting full compliance with these standards and ensuring that the recommendations of Council of Europe bodies are effectively implemented. This is in the interest of integration within the European Union itself: both in the establishment of the internal market and in the area of freedom, security and justice, mutual trust can only be maintained, thus favouring cooperation between national administrations, law enforcement agencies and justice systems, if each partner is confident that the other partners comply with the same set of basic human rights requirements.

Third, tasking the Fundamental Rights Agency with the preparation of such an annual report depoliticizes fundamental rights, and is a safeguard against the risk of instrumentalization. The Agency, it should be recalled, is independent by design. The composition of its Management Board and of its Executive Board, as well as its decision-making procedures, shield it from outside influences, while at the same time allowing the Agency to maintain strong connections with civil society. By discharging their functions under Article 7 TEU on the basis of a report prepared by the Fundamental Rights Agency,

the Commission and the European Parliament would in effect be strengthening their ability to act: they could not be accused of instrumentalizing the reference to the values of the Union in the pursuit of a political agenda, if they simply base their positions on the findings of an independent agency. Their role is to draw the political conclusions from certain findings concerning the rule of law, democracy and human rights; it is not to produce such findings by themselves.

Far from being revolutionary, such a development would be relatively easy to achieve. The Fundamental Rights Agency already produces an annual report on fundamental rights, and although it cannot be excluded that Regulation No. 168/2007 establishing the Agency will have to be amended for it to contribute further in the way advocated here, such a conclusion is not necessarily obvious: as noted above, when the Agency was established, it was understood that, despite the absence of any reference in the Founding Regulation to Article 7 TEU, a role of the Agency in the implementation of that procedure was not necessarily excluded.

Two changes would be required, however, for the annual report on fundamental rights of the Fundamental Rights Agency to fulfil the role anticipated here. First, insofar as the report would examine the situation of fundamental rights in the EU Member States, it would need to go beyond the areas in which the Member States act in the scope of application of EU law: a systematic comparison would have to be provided, covering also the areas outside that scope. This would be necessary both in order to provide an objective and reliable baseline on which the Commission and the Parliament could rely in order to discharge their functions under Article 7 TEU; and in order to identify areas in which further initiatives of a legislative or of a policy nature may be required, in order to cement mutual trust by preventing the emergence of divergent approaches towards fundamental rights between Member States.

Second, the annual report would need to form the basis of the monitoring role of the Commission and of the European Parliament under Article 7 TEU, as well as guide the Commission in its identification of potential initiatives it could take, particularly in the roles assigned to it by Articles 289(1) and 294(2) TFEU defining the ordinary procedure for the adoption of legislative acts of the Union. In other terms, the report should enter into a policy cycle: the political conclusions should be drawn from the analysis it shall present to the institutions.

The concerns raised in recent years by developments concerning the rule of law in Hungary and in Poland, the breakdown of solidarity between the EU Member States in the management of the so-called "refugee crisis" faced by the European Union since mid-2015, and the failure to make significant progress, for instance, on the non-discrimination agenda of the Union, on the integration of fundamental rights considerations in economic governance or on the rights of the child: these are symptoms of a deeper problem, which is the inability of the Union to invent its way out of the crises it faces by building on its values. The European Parliament has a crucial role to play in recalling the Union to its promises, that make it more than an internal market combined with an area of freedom, security and justice -- a Union of rights.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS C

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