

## Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union

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This Report reviews existing monitoring mechanisms in the European Union, Council of Europe and United Nations, and proposes a monitoring mechanism that could be used by the European Union in the fields of fundamental rights, rule of law and democracy. We submit it to the European Commission as we consider it is relevant to the themes of the present consultation. The Report has been funded by the Open Society European Policy Institute.



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## Introduction

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”  
(Article 2, Treaty on European Union (TEU)).

This Report outlines a possible model for a new European Union (EU) mechanism to monitor implementation of the EU’s fundamental values, which include the rule of law, democracy and fundamental rights. **Section I** provides an overview and comparative analysis of different approaches to monitoring at the Council of Europe (CoE), EU and United Nations (UN) levels. A more detailed examination of each mechanism’s key characteristics is provided in the Annex. This Section concludes by evaluating coverage of the CoE, EU and UN mechanisms with a view toward considering how an EU-level mechanism might provide added value. **Section II** examines the context in which discussions about a new EU mechanism are taking place, looking at some key mechanisms currently in existence for the protection of the rule of law, democracy and fundamental rights in the EU. **Section III** discusses the possibility to create a new mechanism under existing powers and evaluates a range of possible options for a new EU monitoring mechanism, including a consideration of issues such as competence, possible legal bases and feasibility. Finally, **Section IV** considers some of the specific characteristics of an ideal monitoring body.

The Report comes amid recent proposals to consolidate the social dimension of the EU and to “rebalance the governance of Economic and Monetary Union to better address problems of divergence between Eurozone countries’ employment and social situations”.<sup>1</sup> For example, in his State of the Union Address 2012, President of the European Commission, José Manuel Durão Barroso, called for greater political union and commented that “A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy”.<sup>2</sup> The Report also comes at a time of increasing calls for a new mechanism to monitor the EU’s fundamental values. For example, President Barroso highlighted recent challenges to these values and noted that “these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments – not just the alternative between the “soft power” of political persuasion and the “nuclear option” of article 7 of the Treaty”.<sup>3</sup>

Later that month, the Foreign Ministers of the ‘Future of Europe Group’ presented their Final Report, which similarly included suggestions to strengthen the EU as “a community of values”, noting that “The possibilities to ensure respect for the fundamental values under Article 2 of the TEU should be strengthened. To this end, a new, light mechanism should be introduced enabling the Commission to draw up a report in the case of concrete evidence of violations of the values under Article 2 of the TEU

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<sup>1</sup> See László Andor, European Commissioner responsible for Employment, Social Affairs and Inclusion, ‘Strengthening the social dimension of the Economic and Monetary Union’ (European Commission - SPEECH/13/774, 2 October 2013) available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-774\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-774_en.htm). See also, ‘Strengthening the social dimension of the Economic and Monetary Union: frequently asked questions’ (European Commission - MEMO/13/837, 2 October 2013) available at: [http://europa.eu/rapid/press-release\\_MEMO-13-837\\_en.htm/](http://europa.eu/rapid/press-release_MEMO-13-837_en.htm/).

<sup>2</sup> See ‘State of the Union Address 2012’ by José Manuel Durão Barroso, President of the European Commission (European Parliament plenary session /Strasbourg, 12 September 2012, Speech/12/596) at page 10, available at: [http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm).

<sup>3</sup> State of the Union Address 2012 above n2 at page 10.

and to make recommendations or refer the matter to the Council. It should only be triggered by an apparent breach in a member state of fundamental values or principles, like the rule of law”.<sup>4</sup>

This year, in March 2013, the foreign ministers of Denmark, Finland, Germany and the Netherlands also called for a new mechanism to be established to safeguard the fundamental values of the EU and to ensure compliance among member states.<sup>5</sup>

In April 2013, the Council of the EU took note of this call and had a comprehensive discussion on the topic, at a session on General Affairs.<sup>6</sup> In June 2013, the Justice and Home Affairs Council, considering that “respecting the rule of law is a pre-requisite for the protection of fundamental rights”, 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” and to engage in a consultation process during 2013 and to report back to the Council.<sup>7</sup>

On 3 July 2013, the European Parliament adopted MEP Rui Tavares’ ‘Report on the situation of fundamental rights: standards and practices in Hungary’.<sup>8</sup> The Parliament resolution set out various recommendations, including suggestions to the EU institutions “on setting up a new mechanism to enforce Article 2 TEU effectively” and requested that “Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirements of democracy and the rule of law”.<sup>9</sup>

More recently, on 4 September 2013, Vice-President of the European Commission and EU Justice Commissioner, Viviane Reding, referred to recent events, which she suggested, “quickly took a systemic dimension and revealed systemic rule of law problems”.<sup>10</sup> Commissioner Reding noted that these situations have “highlighted the strength of the EU institutions, but also a number of shortcomings in the tools available to remedy a true rule of law crisis”, and she set out proposals for improvement, which will be discussed further below.<sup>11</sup> This was followed on 11 September 2013 by the State of the Union address in which President Barroso called again for “a robust European mechanism to influence the equation when basic common principles are at stake” which “should be based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks”.<sup>12</sup>

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<sup>4</sup> Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain (17 September 2012), at pages 8-9, available at: [http://www.auswaertiges-amt.de/EN/Europa/Aktuell/120918-Zukunftsgruppe\\_Warschau\\_node.html](http://www.auswaertiges-amt.de/EN/Europa/Aktuell/120918-Zukunftsgruppe_Warschau_node.html).

<sup>5</sup> See Jones Hayden, ‘EU Is Urged to Set Up Mechanism to Protect Basic Values’ (Bloomberg, 8 March 2013) available at: <http://www.bloomberg.com/news/2013-03-08/eu-is-urged-to-set-up-mechanism-to-protect-basic-values.html>.

<sup>6</sup> See Council of the European Union, Press Release, 3235th Council meeting, General Affairs (ref: 8577/13) (22 April 2013) available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/genaff/136915.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/136915.pdf) at page 8.

<sup>7</sup> See Council of the European Union, ‘Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union’ (Justice and Home Affairs Council meeting, 6 and 7 June 2013) at paras. 9-11, available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/137404.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf).

<sup>8</sup> Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Rui Tavares), ‘Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) (dated 24 June 2013) available at: <http://www.europarl.europa.eu/plenary/en/reports.html>.

<sup>9</sup> 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)) at paras. 73-84.

<sup>10</sup> See speech by Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, ‘The EU and the Rule of Law – What next?’ (Centre for European Policy Studies/Brussels, 4 September 2013, Speech/13/677) at page 6, available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm).

<sup>11</sup> Reding speech above n10 at page 7.

<sup>12</sup> See ‘State of the Union address 2013’ by José Manuel Durão Barroso, President of the European Commission (European Parliament plenary session/Strasbourg, 11 September 2013, Speech 13/684) at pages 10-11, available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm).

A recent study, requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), examines existing EU-level mechanisms which assess respect for rule of law, democracy and fundamental rights by EU member states; and proposes a new mechanism "covering the triangular relationship between rule of law, democracy and fundamental rights, which could be named the 'Copenhagen Mechanism'" and which should be "built upon the existing Article 7 TEU, and should particularly focus on developing the phases preceding its preventive and corrective arms".<sup>13</sup>

### ***The European Commission Consultation October 2013***

On 7 October 2013, the European Commission launched a debate on the future of EU justice policy ahead of the 'Assises de la Justice' forum.<sup>14</sup> The aim is assist the Commission in setting out EU justice policy after the Stockholm Programme, which set out the EU's agenda for the area of justice, freedom and security for 2010-2014.<sup>15</sup> It will also contribute to the justice segment of the 'Communication on future initiatives in the field of justice and home affairs policies' to be presented by the Commission in early 2014 and which will be discussed at the European Council in June 2014.<sup>16</sup> As part of the launch, the Commission issued several discussion papers.<sup>17</sup> Ideas tabled include a new mechanism for resolving future rule of law crises in the member states; and suggestions for reinforcing compliance with the Charter of Fundamental Rights of the European Union (the Charter) by the EU institutions and member states when implementing EU law.<sup>18</sup>

The Rule of Law paper<sup>19</sup> highlights the need to strengthen the EU's ability to act in situations which cannot be adequately addressed by infringement proceedings.<sup>20</sup> It identifies the following situations as priorities: those raising "serious concerns relating to the respect of the rule of law" where the issues are of a "systematic and structural nature" and where there are "no more safeguards at national level available to remedy the situation".<sup>21</sup> The paper suggests addressing crises "upstream of the launching of any formal procedures under article 7 TEU", for example, by giving "formal notice" to member states.<sup>22</sup> It also recommends drawing on existing expertise by enhancing cooperation with the European Commission for Democracy through Law (the Venice Commission) and judicial networks in the EU.<sup>23</sup> As to solutions requiring treaty amendment, the paper suggests: expanding the role of the Court of Justice of the European Union (CJEU); lowering the thresholds for triggering at least the first stage of the Article 7 TEU procedure; and/or expanding the mandate of the EU Agency for Fundamental Rights.<sup>24</sup>

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<sup>13</sup> European Parliament, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism' (2013) (PE 493.031) at page 6, available at:

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET%282013%29493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf).

<sup>14</sup> European Commission Press Release, 'Completing the European area of Justice: Tell us what comes next' (Brussels, 7 October 2013, IP/13/919) available at: [http://europa.eu/rapid/press-release\\_IP-13-919\\_en.htm](http://europa.eu/rapid/press-release_IP-13-919_en.htm).

<sup>15</sup> Press Release above n14. On the Stockholm Programme, see

[http://europa.eu/legislation\\_summaries/human\\_rights/fundamental\\_rights\\_within\\_european\\_union/jl0034\\_en.htm](http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/jl0034_en.htm).

<sup>16</sup> Press Release above n14. See also letter from President Barroso to European Parliament President Martin Schulz (11 September 2013) available at: [http://ec.europa.eu/commission\\_2010-2014/president/pdf/20130911-letter-to-schulz\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/pdf/20130911-letter-to-schulz_en.pdf).

<sup>17</sup> Available at: [http://ec.europa.eu/justice/events/assises-justice-2013/discussion\\_papers\\_en.htm](http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm).

<sup>18</sup> Press Release above n14.

<sup>19</sup> 'Assises de la Justice – Discussion Paper 4: Rule of Law' available at: [http://ec.europa.eu/justice/events/assises-justice-2013/files/rule\\_of\\_law\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/rule_of_law_en.pdf).

<sup>20</sup> Rule of Law Discussion Paper above n19 at page 2.

<sup>21</sup> Rule of Law Discussion Paper above n19 at pages 2-3.

<sup>22</sup> Rule of Law Discussion Paper above n19 at page 3.

<sup>23</sup> Rule of Law Discussion Paper above n19 at page 3.

<sup>24</sup> See Rule of Law Discussion Paper above n19 at pages 3-4 for further details.

The Fundamental Rights paper<sup>25</sup> notes achievements to date, such as the ‘Charter Strategy’, discussed further below, whereby the Charter is systematically applied when preparing and adopting EU law; that the CJEU has found on two occasions that EU law provisions did not comply with the Charter and has referred to the Charter in more than 100 cases; and that EU institutions rely on information from the EU Agency for Fundamental Rights when developing EU law and policy.<sup>26</sup> The paper also highlights several challenges, such as the need to maintain momentum towards EU accession to the European Convention on Human Rights (ECHR);<sup>27</sup> the need to strengthen compliance with the Charter throughout the legislative process;<sup>28</sup> and the need to ensure that member states uphold fundamental rights when they implement EU law.<sup>29</sup> Proposals include removing some or all of the limitations in Article 51 of the Charter to make it directly applicable in the member states so that citizens could assert their fundamental rights before national courts in any context, rather than only when EU law is implemented; and a greater role for the EU Agency for Fundamental Rights to allow it to look more widely at all fundamental rights.<sup>30</sup>

As can be seen from the above, this Report comes at a time of increased debate about a possible model for a new mechanism to monitor implementation of the EU’s fundamental values of the rule of law, democracy and fundamental rights.

## **Section I: The Protection of the Rule of Law, Democracy and Fundamental Rights in the CoE, UN and EU**

Section I provides an overview and comparative analysis of different approaches to monitoring. It is structured around the different characteristics of a monitoring mechanism, including, for example, the composition of the monitoring body, its working methods and the procedures for follow-up etc. The aim is to demonstrate the range of available approaches to each of these elements in order to provide information and inspiration to policy makers determining the shape of a future EU monitoring mechanism. The Section concludes by evaluating coverage of the CoE, EU and UN mechanisms with a view toward considering how an EU-level mechanism might provide added value.

This Section considers existing mechanisms within the CoE (the European Commission for Democracy through Law (the Venice Commission); the Commissioner for Human Rights; the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); the European Commission against Racism and Intolerance (ECRI); and the Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (PACE Monitoring Committee)); the EU (the European Union Agency for Fundamental Rights (FRA)); and the UN (the Universal Periodic Review (UPR); the Special Procedures; and the Human Rights Treaty Bodies System).

An Annex contains an overview table providing a more detailed examination of each mechanism’s key characteristics. In addition, a separate and more detailed narrative of the mechanisms reviewed in this Report is also available.

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<sup>25</sup> ‘Assises de la Justice – Discussion Paper 5: Fundamental Rights’ available at: [http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental\\_rights\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental_rights_en.pdf).

<sup>26</sup> Fundamental Rights discussion paper above n25 at pages 1-2.

<sup>27</sup> Fundamental Rights discussion paper above n25 at page 2.

<sup>28</sup> Fundamental Rights discussion paper above n25 at page 2.

<sup>29</sup> Fundamental Rights discussion paper above n25 at page 3.

<sup>30</sup> Fundamental Rights discussion paper above n25 at page 3.

## **A. Overview of CoE, UN and EU Mechanisms by Characteristic<sup>31</sup>**

### ***Composition of the Monitoring Body***

Generally, composition of the monitoring mechanisms is based on member state representation. Some mechanisms include one member per member state. For example, this is the case for the Venice Commission, the CPT, ECRI and the EU FRA Management Board; whereas only one individual is elected CoE Human Rights Commissioner. The independent experts for the Venice Commission and ECRI are selected by the member states, whilst the CoE Human Rights Commissioner and the CPT members are appointed by the CoE Parliamentary Assembly Committee of Ministers. The CoE PACE Monitoring Committee is composed of a selected group of the Parliamentary Assembly. In the UN bodies, the UPR Working Group is composed of the 47 member states of the Human Rights Council (which are elected by the UN General Assembly) and chaired by the HRC President. In contrast, the Special Procedures and Human Rights Treaty Bodies both focus on individual expertise. The Special Procedures mandate-holders are independent experts whose appointments are completed on HRC approval (though they can be nominated by a wide range of stakeholders, and both a Consultative Group and the HRC President are involved in the appointment process), but who serve in their personal capacities. The Human Rights Treaty Bodies are committees of independent experts nominated and elected by member states. Most monitoring bodies work closely with other third parties to complement their work, such as stakeholders, consultants, international organisations and/or other countries. This is particularly so for the Venice Commission, ECRI, the PACE Monitoring Committee, the EU FRA, and the UN mechanisms.

### ***Triggering the Monitoring Process***

Monitoring may be on-going, or in response to a request, information or a complaint. All of the monitoring bodies considered in this Report engage in on-going monitoring of some kind. The Human Rights Commissioner, the CPT, ECRI and the EU FRA engage in on-going monitoring or human rights awareness-raising activities. The UPR periodically reviews all UN member states; the UN Human Rights Treaty Bodies monitor implementation of the nine core international human rights treaties; and the UN Special Procedures report on human rights from a thematic or country-specific perspective. The CoE PACE Monitoring Committee automatically initiates its monitoring process six months after a state's accession to the CoE. Some bodies may, however, also be alerted to specific issues by other bodies or member states (Human Rights Commissioner) or specifically act upon requests from these parties (EU FRA). Other bodies work more often with specific triggers. These can include requests from member states or other national or international organisations for comment on legislation or policy (the Venice Commission); communications from different sources, or invitations from governments and requests from UN bodies for country visits (UN Special Procedures); or individual complaints (the Human Rights Treaty Bodies System). Some can also engage in thematic research on their own initiative (Venice Commission, Special Procedures) or hold general discussions (UN Treaty Bodies System).

### ***Collecting Information***

Information for the monitoring mechanisms is collected in several ways. One of the most common activities is to conduct country visits, which, for example, facilitate meetings with governments and other stakeholders such as NGOs, civil society organisations and experts, and may allow them to

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<sup>31</sup> Note that each Treaty Body's and each Special Procedure's specific procedures and working methods may differ from the general approach described here.

engage in additional fieldwork, such as surveys. For example, the CPT conducts visits to places of detention to privately interview persons deprived of their liberty. Only the UPR does not appear to conduct these visits; instead, the UPR engages in analysis of UN documents (compilation prepared by the OHCHR) and information provided by states and other stakeholders. The EU FRA relies on their network of experts, FRANET, for data collection from the field while it conducts the desk-based legal analysis of, for example, national legislation, court judgments and academic commentary.

Desk-based research is also undertaken by other monitoring bodies, including the Venice Commission, the Human Rights Commissioner and ECRI. Information provided by the state under review and other stakeholders is analysed in general by all mechanisms. Most CoE bodies also consider international legal instruments and national legislation or court judgments. Many also work closely with civil society organisations and/or other intergovernmental bodies to contribute to their understanding, including via dialogue processes.

### ***Applicable Standards***

The standards applicable to the monitoring process vary depending on the mechanism at issue. The CoE mechanisms refer to CoE documents such as the CoE statute (especially the PACE Monitoring Committee), their own standards, reports, guidelines and opinions, and CoE conventions such as, in case of the CPT, the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and, more widely, the ECHR and the case law of the European Court of Human Rights (ECtHR). The EU FRA refers to many of those documents, as well as the Charter of Fundamental Rights, the EU Treaties, and relevant EU secondary legislation. They also take into account other standards agreed upon in European documents, such as those from the Organization for Security and Cooperation in Europe (e.g. Venice Commission, EU FRA), and principles formulated in international or regional law or by other entities, such as national authorities or other international, regional or national organisations such as the UN, other intergovernmental organisations and NGOs (EU FRA, Venice Commission, Human Rights Commissioner, ECRI).

The basis for review under the UPR is the Charter of the UN, the Universal Declaration of Human Rights, the human rights instruments to which a state is party, and voluntary pledges and commitments made by states, and also takes into account international humanitarian law. The UN Treaty Bodies specifically monitor the nine core international human rights treaties; and the Special Procedures generally consider internationally-recognised human rights standards related to their mandate and international conventions to which the state is party.

### ***Procedure for Assessment***

The procedure for assessment for the different mechanisms generally includes a form of dialogue (oral and/or written) with the government in question. For some mechanisms, this dialogue is opened by the member state requesting an examination or advice, for example, the Venice Commission. Information exchange with governments and other stakeholders often takes place in person (Venice Commission, Human Rights Commissioner, CPT, ECRI and EU FRA (through their network)). The UN mechanisms also engage in oral and/or written dialogue with governments and other stakeholders at various stages of their work (UPR, Special Procedures and the Human Rights Treaty Bodies System).

For each mechanism, the outcome is a text in the form of a report, communication, final opinion or issues paper, usually including recommendations for the state concerned. In many cases, for example with ECRI, the member states may make comments that will be included in the report before it is published. In the UPR, for example, member states have opportunity to indicate which recommendations they do/do not accept and this is noted in the outcome document. As regards the Special Procedures, states' comments on the country reports are included in those reports and states'

responses to communications are also included in reports. For the UN Treaty Bodies, in respect of consideration of state parties' reports, states can submit comments on the Committees' concluding observations.

Whether the reports are published depends on the mechanism. For example, the Venice Commission, Human Rights Commissioner, ECRI, PACE Monitoring Committee, EU FRA, UPR, Special Procedures and the Human Rights Treaty Bodies System generally make most of their reports public, and ECRI considers publication key to its work. In somewhat of a contrast, the CPT works according to a principle of confidentiality and is under no obligation to publish its reports. However, most states agree for them to be published. Similarly, country inquiries under the UN Treaty Body System are confidential, though some information might be published in consultation with, or with the agreement of, the state party.

### ***Procedure for Follow-up***

Most mechanisms cannot produce legally binding obligations, but instead focus on effecting best practice. In many cases, this results in state compliance and cooperation. The EU FRA, which adopts a thematic approach, has no specific system for follow-up, although it may revisit previously-examined themes and does engage in follow-up through the drafting and publication of its annual reports. Other European mechanisms, such as the CPT, ECRI and the PACE Monitoring Committee, issue a request for a state response. For example the CPT may request that a state respond to its findings in order to keep the CPT informed of any progress regarding national action; it may also conduct additional visits. If a state fails to cooperate or improve its situation, it might, as a last resort, vote in the Committee to make a public statement. ECRI and the PACE Monitoring Committee also allow authorities to comment no later than two years or one year after the closing of the procedure, respectively. ECRI will then issue conclusions regarding how the recommendations have been implemented, while the PACE Monitoring Committee engages in a post-monitoring dialogue in which every state is reported on once every three years, and which allows formal monitoring procedures to be (re)opened. Uniquely, the PACE Monitoring Committee can also penalise failure to adhere to recommendations through the adoption of a resolution and/or recommendation of non-ratification of the credentials of a national parliamentary delegation or the annulment of ratified credentials. If the violation of the member state continues, this may even lead to withdrawal from the CoE and the suspension of rights of representation according to Articles 7 and 8 of the Statute of the CoE. The Human Rights Commissioner and the Venice Commission cannot penalise failures, but instead focus on maintaining an open dialogue.

The UN bodies also do not have specific enforcement/follow-up mechanisms, but similarly encourage updates, encourage the involvement of other stakeholders in the implementation process, and/or provide assistance with implementation of recommendations. For example, for the UPR, the HRC decides if and when any specific follow-up is needed and has a Voluntary Fund for Financial and Technical Assistance to help countries implement recommendations. The UN Special Procedures follow-up via reporting, country visits and maintaining dialogue; they also rely on press and other public statements. In the UN Treaty Bodies System, as regards consideration of state parties' reports, some committees request states to report within one or two years on the implementation of particular priority recommendations. In the case of individual complaints, the case remains open until satisfactory measures have been taken.

In cases of non-cooperation, the UN Human Rights Treaty Bodies can undertake periodic reviews in absentia, or even without a report; and can decide individual complaints on the basis of information received only from the complainant. As an interesting case study on the UPR, in January 2013, in the case of non-cooperation with the UPR by Israel, the HRC adopted a decision in which it requested the HRC President to "take all appropriate steps and measures... to urge the state under review to resume

its cooperation".<sup>32</sup> In June 2013, the President reported that he had been in correspondence with Israel and that it had reaffirmed its intention to continue dialogue with a view to "positively resolve all outstanding issues in Israel's complex relationship with the Human Rights Council and its mechanisms".<sup>33</sup> The President encouraged Israel to participate in the scheduled review, which it did in October 2013.<sup>34</sup> Human Rights Council Resolution 5/1 provides that "After exhausting all efforts to encourage a state to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism".<sup>35</sup> In light of Israel's non-cooperation, there have been calls for the UPR to confirm what is meant by "persistent non-cooperation" in this context.<sup>36</sup>

## **B. Concluding Remarks**

All of the EU member states are subject to each of the mechanisms described above in Section A (except for the UN Treaty Bodies System, where there is not complete coverage as not all EU member states are party to all nine treaties and their optional protocols). Consequently, there is an abundance of available data regarding member state practice in relation to the rule of law, democracy and human rights. Therefore, any new EU-level monitoring mechanism should not engage purely in data collection; rather, added value could be better achieved in two ways. First, any new mechanism would clearly benefit from a synthesised summary of information, analysis and recommendations produced by existing CoE mechanisms, in order to avoid overlap and duplication. This would also be particularly useful for UN-level reports given their breadth of coverage. Second, it could capitalise on the major weakness of the bodies discussed above: enforcement/follow-up. Because of its unique nature, the EU is able to employ tools of enforcement that the CoE and the UN, for the most part, cannot use. First, the EU has a high level of political influence. It can put pressure on member states to change their laws and policies, as, for example, the Commission has done with regard to Hungary and its cooperation with the CoE mechanisms.<sup>37</sup> Second, EU legislation and case law penetrates national legal systems and can be enforced not only by the EU courts, but also by national courts without member state governments having to take action to implement it. In this way, EU law can effect a change in national practice towards the rule of law, democracy and human rights. This would be even more effective if the Court were to determine that Articles 2 or 3 TEU are directly applicable (see discussion in Section III below). Third and finally, the EU already has systems in place which it uses to sanction member states for failure to respect EU law, such as infringement proceedings, fines or withholding of EU funds (again, see discussion in Section III below).

Therefore, there seems to be scope remaining for a new mechanism to monitor compliance by the EU institutions and EU member states with the rule of law, democracy, and fundamental rights, and to provide an effective enforcement mechanism within the context of the EU. Moreover, this would also ensure that member state compliance on a wide range of issues is monitored beyond the point of their accession to the EU. The legal bases and possibilities for such a mechanism will be discussed below in Section III.

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<sup>32</sup> Report of the Human Rights Council on its seventh organizational meeting 14 and 29 January 2013 (4 April 2013) (A/HRC/OM/7/1).

<sup>33</sup> Report of the President of the Human Rights Council submitted in accordance with Council decision OM/7/1 of 29 January 2013 (5 June 2013) (A/HRC/23/CRP.1).

<sup>34</sup> See <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights29October2013pm.aspx>.

<sup>35</sup> HRC Resolution 5/1 'Institution-building of the UN Human Rights Council' (18 June 2007) at paragraph 38 of the Annex.

<sup>36</sup> See e.g., <http://www.upr-info.org/+HRC-President-presents-report-on+.html>.

<sup>37</sup> European Parliament report above n8 (in particular, the Preamble).

## **Section II: The Protection of the Rule of Law, Democracy and Fundamental Rights in the EU**

Section II examines the context in which discussions about a new EU mechanism are taking place, looking at some key mechanisms currently in existence for the protection of the rule of law, democracy and fundamental rights in the EU: the Charter; the relevance of the ECHR; the role of the CJEU; the sanctions mechanism in Article 7 TEU; the European Commission Strategy for the Effective Implementation of the Charter; the FRA; the European Commission Annual Report on the Application of the Charter; the European Parliament Annual Charter Report; the Copenhagen Criteria; the Cooperation and Verification Mechanism with Bulgaria and Romania; the EU Justice Scoreboard; and the European Semester.

### **A. Key Mechanisms for the Protection of the Rule of Law, Democracy and Fundamental Rights in the EU**

#### ***The Charter of Fundamental Rights of the European Union***

Article 6 TEU has been described as the “centrepiece of the EU’s human rights framework”.<sup>38</sup> It refers to three sources of EU human rights law: the Charter; the ECHR; and fundamental rights as derived from the member states. Article 6 does not expressly refer to other international human rights instruments.

The Charter was proclaimed in December 2000 and became legally binding with the entry into force of the Lisbon Treaty in December 2009. The Charter contains six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. The Preamble to the Charter makes clear that it “reaffirms” the rights as they result, in particular, from the member states, the ECHR, the Social Charters adopted by the EU and the CoE, and CJEU and ECtHR case-law, in order to make these “more visible in a Charter”. Indeed, it has been commented that “It was not the intention that these should be new rights, but rather that the Charter should draw together existing rights within the ambit of European Union law to make them more visible and to act as a guide to the institutions”.<sup>39</sup> The Charter entrenches all of the rights found in the ECHR but also “includes “third generation” fundamental rights, such as data protection, guarantees on bioethics and on good and transparent administration”.<sup>40</sup>

Crucially, the Charter has “the same legal value as the Treaties” (Article 6(1) TEU). The Explanations to the Charter provide guidance as to interpretation and must be considered by the CJEU and member state courts (Article 52(7) Charter).<sup>41</sup> The Charter provisions do not extend the competence of the EU as set out in the Treaties (Article 6(1) TEU), nor does the Charter create any new powers or tasks for the EU (Article 51(2) Charter).<sup>42</sup> The Charter provisions apply to EU bodies, taking into account the principles of subsidiarity, and to the member states when they implement EU law (Article 51(1) Charter). However, the Charter also mandates that the EU and member states “promote” the rights and principles in the Charter, which has been considered by some to suggest “something more

<sup>38</sup> Paul Craig and Gráinne de Búrca, ‘EU Law: Text, Cases, and Materials’ (OUP, 2011) at page 363.

<sup>39</sup> Margot Horspool and Matthew Humphreys, ‘European Union Law’ (OUP 7th edition, 2012) at page 146.

<sup>40</sup> See European Commission, ‘European Commission proposes negotiation directives for Union’s accession to the European Convention on Human Rights (ECHR) – frequently asked questions’ (17/03/2010) (Memo/10/84) available at: [http://europa.eu/rapid/press-release\\_MEMO-10-84\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_MEMO-10-84_en.htm?locale=FR).

<sup>41</sup> See Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:FULL:EN:PDF>.

<sup>42</sup> See also Article 52(2): “Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties”.

proactive”.<sup>43</sup> Indeed, it has been commented that the Charter has brought about a “transformation... in the culture and the practice of the institutions”, which, for example, systematically check the compatibility of legislative proposals with the Charter.<sup>44</sup>

### ***The Relevance of the European Convention on Human Rights***

First, in addition to identifying the ECHR as a source of EU human rights law, Article 6 TEU provides for the EU to accede to the Convention, though again it is specified that “Such accession shall not affect the Union’s competences as defined in the Treaties”. A draft accession agreement was finalised in April 2013.<sup>45</sup> The CoE and the EU are currently awaiting the opinion of the CJEU on the text of the agreement.<sup>46</sup> Once the agreement has been approved, it will need to be ratified by each of the parties to the ECHR, and the EU.<sup>47</sup> Accession will mean that individuals can bring complaints about EU acts before the ECtHR. However, it has been noted that the ECtHR “for some years has been prepared in certain circumstances to entertain indirect complaints against EU acts when they are brought against one or all member states”.<sup>48</sup> Also, in a recent memorandum on ECHR accession, the CJEU “made no comment on the question whether it will be formally bound by the case law of the ECtHR”, but “argued strongly for a mechanism to be established to ensure that... one of the EU courts must have the opportunity to give a prior ‘internal’ review”.<sup>49</sup>

Second, in so far as the Charter contains rights which correspond with rights in the ECHR, they are to be interpreted in line with the latter (Article 52(3) Charter). EU law may, however, provide a higher level of protection than that in the Convention (Article 52(3) Charter). Similarly, the Charter is not to be interpreted as restricting human rights recognised by EU law, international law, international agreements, or the constitutions of the member states (Article 53 Charter).<sup>50</sup>

While it is not yet clear how strictly the Court will follow the stipulation in Article 52(3),<sup>51</sup> the CJEU often refers to ECtHR rulings in its own case-law,<sup>52</sup> and strives to avoid conflict in the interpretation of fundamental rights.<sup>53</sup> However, it has been commented that since the Charter came into force, the CJEU has been less inclined to refer to ECtHR judgments.<sup>54</sup> The Court’s approach has been criticised as

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<sup>43</sup> Craig and de Búrca above n38 at page 397.

<sup>44</sup> Olivier De Schutter, ‘The EU Fundamental Rights Agency: Genesis and Potential’ (Working Paper Series: REFGOV-FR-23) (European FP6 – Integrated Project, Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain) at page 4.

<sup>45</sup> Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights (Strasbourg, 3-5 April 2013), ‘Final report to the CDDH’, (Strasbourg, 10 June 2013) (47+1(2013)008rev2) available at: [http://www.coe.int/t/dlapil/cahdi/Source/Docs2013/47\\_1\\_2013\\_008rev2\\_EN.pdf](http://www.coe.int/t/dlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf). See also Press release ‘Milestone reached in negotiations on accession of EU to the European Convention on Human Rights’ (Strasbourg, 05.04.2013) (DC041(2013)) available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR041%282013%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>.

<sup>46</sup> See <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>.

<sup>47</sup> Appendix 1: Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, in Final Report to the CDDH above n45.

<sup>48</sup> Craig and de Búrca above n38 at page 400.

<sup>49</sup> Craig and de Búrca above n38 at pages 405-406.

<sup>50</sup> Similarly, Article 52(4) of the Charter provides that “In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

<sup>51</sup> Craig and de Búrca above n38 at page 367.

<sup>52</sup> Craig and de Búrca above n38 at page 404.

<sup>53</sup> Craig and de Búrca above n38 at page 405.

<sup>54</sup> Gráinne de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’, NYU School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 13-51 (September 2013) at page 16. Craig and de Búrca similarly note that the CJEU has “only infrequently cited international human rights treaties other than the ECHR, and it seems likely to continue to do so when it sees fit” (Craig and de Búrca above n38 at page 366).

limiting “the potential influence of its rulings, despite their increasing impact and significance for many actors both within and outside the EU”.<sup>55</sup> This may be indicative of the CJEU coming into its own as a fundamental rights court with its own binding fundamental rights instrument.

### ***The Role of the Court of Justice of the European Union***

Some commentators have remarked that human rights litigation before the CJEU sharply increased after the entry into force of the Charter.<sup>56</sup> This, in addition to expanding EU competences, implies a greater role for the Court as a “human rights tribunal”.<sup>57</sup> Moreover, the Court’s conclusion that Charter rights are binding on member states when acting within the scope of application of EU law remains contentious because it is not always clear when they are acting within the scope of application of EU law, but also because some member states are clearly reluctant to have the CJEU adjudicate human rights standards to be applied to them.<sup>58</sup> This is underscored by some examples where, even in circumstances outside the scope of application of EU law, the CJEU has drawn attention to member states’ obligations under the ECHR.<sup>59</sup>

### ***The Sanctions Mechanism in Article 7 TEU***

Under Article 7 TEU, in certain circumstances, 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” and “may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”.

However, it has been commented that “despite the symbolism of Article 7 TEU, and a number of attempts which have been made by the European Parliament to instigate its application, it seems unlikely to have any significant application in practice”.<sup>60</sup> As noted above, Article 7 is regarded as the “nuclear option”.<sup>61</sup> Indeed, calls for a new EU monitoring mechanism have spoken of the shortcomings of Article 7 in this respect.

### ***European Commission Strategy for the Effective Implementation of the Charter***

In 2010, the European Commission adopted a ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’.<sup>62</sup>

This aims to (a) guarantee that the Charter is taken into account during the EU legislative process and the application of EU law domestically (including via impact assessments, discussed further below in Section III); (b) educate EU citizens about fundamental rights protection in the EU, including available remedies; and (c) monitor the Charter’s implementation via annual reports, discussed below.<sup>63</sup>

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<sup>55</sup> De Búrca above n54 at page 16.

<sup>56</sup> De Búrca above n54 at page 4.

<sup>57</sup> De Búrca above n54 at page 3. See also discussion of human rights-based challenges to EU legislation and to EU administrative acts in Craig and de Búrca above n38 at pages 372-381.

<sup>58</sup> Craig and de Búrca above n38 at page 381. For more information on human rights based challenges to member state action, see pages 381- 389.

<sup>59</sup> Craig and de Búrca above n38 at page 388.

<sup>60</sup> Craig and de Búrca above n38 at page 390.

<sup>61</sup> State of the Union Address 2012 above n2 at page 10.

<sup>62</sup> European Commission Communication ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ (Brussels, 19.10.2010) (COM(2010) 573 final) available at: [http://ec.europa.eu/justice/fundamental-rights/charter/implementation/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/implementation/index_en.htm).

<sup>63</sup> See [http://ec.europa.eu/justice/fundamental-rights/charter/implementation/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/implementation/index_en.htm).

## ***The European Union Agency for Fundamental Rights***

The FRA was established in 2007,<sup>64</sup> and built on the European Monitoring Centre on Racism and Xenophobia (EUMC).<sup>65</sup> The FRA was set up to assist the EU and the member states when implementing EU law to respect fundamental rights when exercising their respective competences to take measures or establish action plans.<sup>66</sup> The FRA does this by undertaking projects and activities which correspond to thematic areas covered by the Charter.<sup>67</sup> It is mandated to work in coordination with the CoE in order to avoid duplication.<sup>68</sup>

A recent evaluation of the FRA concluded that “the current quality procedures are working well in ensuring scientific quality of the FRA’s work”,<sup>69</sup> and that it is successfully coordinating and cooperating with the CoE and the UN.<sup>70</sup> However, the evaluation also highlighted a number of issues in need of attention. First, although the FRA is considered to provide added value regarding implementation of policy at the EU level,<sup>71</sup> it was questioned whether the FRA could provide the detailed and contextual information necessary in order to make an impact on national practice, although it has made recent moves to develop new methods of cooperation with national actors within the member states.<sup>72</sup> Second, there is evidence that its impact on local-level organisations is less substantial both because of their lack of awareness of the activities of the FRA, and because they benefit less from FRA cooperation activities as compared to those at the EU and national levels.<sup>73</sup> Third, it has been suggested that the FRA does not have a strong enough role in the EU legislative process,<sup>74</sup> for example, through contributions to the impact assessment process and in providing opinions on legislative proposals.<sup>75</sup> Fourth, it was noted that the main obstacles to optimal performance by the FRA are its limited mandate and the restrictive nature of the Multi-Annual Framework.<sup>76</sup> Fifth, although manageable at the moment, there is some concern that, as demand increases, its resources may become a problem.<sup>77</sup>

While the FRA’s findings are followed-up in its annual reports, what is not discussed in the evaluation report, but is of significance, is the lack of a systematic, state-by-state follow-up mechanism for the FRA’s findings, given its thematic approach.

## ***European Commission Annual Report on the Application of the Charter***

Since 2010, the Commission has published an Annual Report, which considers steps undertaken to implement the Charter.<sup>78</sup> Reports were published for 2010, 2011 and 2012.<sup>79</sup> The aim of the reports is

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<sup>64</sup> See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

<sup>65</sup> Council Regulation 168/2007 above n64 at para. 10.

<sup>66</sup> Council Regulation 168/2007 above n64 at Article 2.

<sup>67</sup> See <http://fra.europa.eu/en/about-fra/what-we-do/areas-of-work>.

<sup>68</sup> Council Regulation 168/2007 above n64 at Article 9.

<sup>69</sup> See Ramboll, ‘External Evaluation of the European Union Agency for Fundamental Rights’ (Final Report, November 2012) at page III.

<sup>70</sup> Ramboll Evaluation above n69 at page VI.

<sup>71</sup> Ramboll Evaluation above n69 at page VI.

<sup>72</sup> Ramboll Evaluation above n69 at page III.

<sup>73</sup> Ramboll Evaluation above n69 at page VI. In September 2013, the FRA launched a toolkit, ‘Joining up Fundamental Rights’, for local, regional and national public officials (see <http://fra.europa.eu/en/joinedup/home>). Its purpose is “to help reduce the gap between theory and practice in implementing fundamental rights through effective cooperation between public officials” (ibid). The FRA seems in this way to be seeking to reach more stakeholders at a national and local level.

<sup>74</sup> Ramboll Evaluation above n69 at page III.

<sup>75</sup> Ramboll Evaluation above n69 at page VII.

<sup>76</sup> Ramboll Evaluation above n69 at page VI.

<sup>77</sup> Ramboll Evaluation above n69 at page III.

<sup>78</sup> See [http://ec.europa.eu/justice/fundamental-rights/charter/application/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm).

<sup>79</sup> Ibid.

to review the application of the Charter in areas of EU competence and act as “a basis for dialogue between the EU institutions and Member States on effective implementation of the Charter”.<sup>80</sup> It also acts as an educational tool for the public on how they can use the Charter to assert their fundamental rights, and as to the role of the EU in this field.<sup>81</sup> By reviewing the application of all Charter provisions on an annual basis, the Commission hopes to monitor both progress and problems.<sup>82</sup>

The report considers implementation of the Charter at (a) the EU-level (by examining efforts to strengthen the protection of fundamental rights through EU legislation; the fundamental rights dimension of EU external actions; and the Court’s control of EU acts for compliance with the Charter);<sup>83</sup> and (b) in the member states (by looking at the actions taken by the Commission to ensure the respect of the Charter by the member states; and the development of national case-law on the application of the Charter by the member states).<sup>84</sup> On this last point, as national courts examine respect for the Charter when member states apply EU law, the 2012 report “provides an overview for the first time of the case-law of national courts on the Charter”.<sup>85</sup> An annex contains, for each of the six titles of the Charter, examples of the application of the Charter by the EU institutions and the member states; questions and petitions from the European Parliament; letters from the general public; relevant case-law of the CJEU and national courts; and data gathered by the FRA.<sup>86</sup> Letters received from the general public and communications received from the European Parliament in some cases result in the Commission requesting further details from the member states and/or providing information to the complainant.<sup>87</sup>

### ***European Parliament Annual Charter Report***

The European Parliament, via its LIBE Committee, published a ‘Report on the situation of fundamental rights in the European Union’ for 2010-2011,<sup>88</sup> and preceding that for 2009.<sup>89</sup> A draft report for 2012 has also been released.<sup>90</sup>

The draft report comments first on a number of “institutional questions”. For example, it highlights the need to (a) complete accession to the ECHR; (b) ensure that the drafting/transposing of European law which impacts fundamental rights is strengthened by implementing a thorough evaluation and monitoring policy with a view toward CJEU litigation where necessary; (c) put in place more systematic cooperation with the CoE and other relevant institutions to avoid overlap; and, significantly, (d) create a new mechanism to ensure the respect, protection and promotion of fundamental rights and other EU values.<sup>91</sup> The report also notes, as others have done, that recent events have demonstrated the lack of existing mechanisms to adequately respond to such crises, and in particular the difficulties of

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<sup>80</sup> See European Commission ‘2012 Report on the Application of the EU Charter of Fundamental Rights’ (2013) available at: [http://ec.europa.eu/justice/fundamental-rights/files/charter\\_report\\_2012\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf) (see foreword by Viviane Reding).

<sup>81</sup> Commission Charter Report 2012 above n80 at page 18.

<sup>82</sup> Commission Charter Report 2012 above n80 at page 18.

<sup>83</sup> Commission Charter Report 2012 above n80 at pages 6-11.

<sup>84</sup> Commission Charter Report 2012 above n80 at pages 12-15.

<sup>85</sup> Commission Charter Report 2012 above n80 at page 6.

<sup>86</sup> Commission Charter Report 2012 above n80 at page 24.

<sup>87</sup> Commission Charter Report 2012 above n80 at page 21.

<sup>88</sup> Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Monika Flašíková Beňová), ‘Report on the situation of fundamental rights in the European Union (2010 - 2011)’ (22.11.2012) (2011/2069(INI)).

<sup>89</sup> Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Kinga Gál), ‘Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon’ (1.12.2010) (2009/2161(INI)).

<sup>90</sup> Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Louis Michel), Draft Report on the situation of fundamental rights in the European Union (2012)’ (18.9.2013) (2013/2078(INI)) available at: <http://www.europarl.europa.eu/committees/en/libe/draft-reports.html#menuzone>.

<sup>91</sup> LIBE Committee Draft Report 2012 above n90 at para. 3.

invoking Article 7 TEU in this regard.<sup>92</sup> It then comments on positive achievements and causes for concern across a range of specific rights (such as dignity, liberty, equality, solidarity, citizenship and justice), closely mirroring each of the chapters of the Charter.<sup>93</sup>

### ***The Copenhagen Criteria***

Article 49 TEU provides that “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”. The criteria for accession were mainly outlined at the European Council in Copenhagen in 1993. The Copenhagen Criteria include that “the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>94</sup> Additional conditions have subsequently been set out. In particular, two “negotiating chapters” are aimed at assisting candidate countries to “establish a society based on the rule of law”.<sup>95</sup> These are Chapter 23 (Judiciary and Fundamental Rights) and Chapter 24 (Justice, Freedom and Security). The Commission is charged with monitoring progress.<sup>96</sup> However, it is important to emphasise that these are *entry* requirements for *new* member states only,<sup>97</sup> and there is no specific mechanism dedicated to ensuring that member states are still living up to these standards. In contrast, as discussed above in Section I in the context of the CoE, the PACE Monitoring Committee seeks to ensure that all member states fulfil the commitments entered into upon accession to the CoE and may penalise persistent failure to do so.

### ***Cooperation and Verification Mechanism with Bulgaria and Romania***

Bulgaria and Romania joined the EU on 1 January 2007.<sup>98</sup> The EU established a special “Cooperation and Verification Mechanism” (CVM) to aid the accession of both states to the EU and to “safeguard the workings of its policies and institutions”.<sup>99</sup> The Commission set criteria for monitoring progress in both countries,<sup>100</sup> and reports every six months on progress made in the fields of judicial reform, the fight against corruption and, in respect of Bulgaria, the fight against organised crime.<sup>101</sup> In exercising its responsibilities under this process, the Commission closely cooperates with the CoE, which has relevant expertise through the work of its Venice Commission.<sup>102</sup>

### ***The EU Justice Scoreboard***

In March 2013, the Commission launched the EU Justice Scoreboard,<sup>103</sup> a new comparative tool, which aims “to assist the EU and the Member States to achieve more effective justice by providing objective,

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<sup>92</sup> LIBE Committee Draft Report 2012 above n90 at para. C.

<sup>93</sup> LIBE Committee Draft Report 2012 above n90 at paras. 8–25.

<sup>94</sup> European Council in Copenhagen 21–22 June 1993, ‘Conclusions of the Presidency’ (European Council - DOC/93/3, 22/06/1993) at para. 7(A)(iii), available at: [http://europa.eu/rapid/press-release\\_DOC-93-3\\_en.htm?locale=en](http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en).

<sup>95</sup> See [http://ec.europa.eu/enlargement/policy/policy-highlights/rule-of-law/index\\_en.htm](http://ec.europa.eu/enlargement/policy/policy-highlights/rule-of-law/index_en.htm).

<sup>96</sup> See [http://ec.europa.eu/enlargement/policy/conditions-membership/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm).

<sup>97</sup> See Copenhagen Criteria above n94.

<sup>98</sup> See Treaty of Accession of the Republic of Bulgaria and Romania (2005) available at: [http://eur-lex.europa.eu/en/treaties/new\\_accession\\_treaties.htm#accession](http://eur-lex.europa.eu/en/treaties/new_accession_treaties.htm#accession).

<sup>99</sup> See [http://ec.europa.eu/cvm/index\\_en.htm](http://ec.europa.eu/cvm/index_en.htm). See also Commission Decision of 13/12/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (C (2006) 6570 final); and Commission Decision of 13/12/2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (C (2006) 6569 final) both available at: [http://ec.europa.eu/cvm/index\\_en.htm](http://ec.europa.eu/cvm/index_en.htm).

<sup>100</sup> See [http://ec.europa.eu/cvm/index\\_en.htm](http://ec.europa.eu/cvm/index_en.htm).

<sup>101</sup> See [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm).

<sup>102</sup> Rule of Law Discussion Paper above n19 at page 2.

<sup>103</sup> See [http://ec.europa.eu/justice/newsroom/effective-justice/news/130327\\_en.htm](http://ec.europa.eu/justice/newsroom/effective-justice/news/130327_en.htm).

reliable and comparable data on the functioning of the justice systems of all Member States”, in particular, information on the quality, independence and efficiency of justice.<sup>104</sup>

The scope of the 2013 Scoreboard focuses on those aspects of a justice system which impact business and investment,<sup>105</sup> by concentrating, for example, on “efficiency indicators for civil, commercial and administrative cases” and findings relating to public perceptions of the independence of the justice system.<sup>106</sup> The Scoreboard is seen as “an evolving tool” and the aspects covered will be expanded over time in order to identify “the essential parameters of an effective justice system”.<sup>107</sup> Importantly, the Scoreboard is non-binding and aimed at encouraging dialogue with the member states to improve their justice policies, as well as those of the EU institutions.<sup>108</sup> Providing such information is seen as contributing to the identification of shortcomings and best practice.<sup>109</sup>

### ***The European Semester***

Europe 2020 is the EU’s ten-year strategy for growth.<sup>110</sup> Member states have committed to achieving these targets and have developed national action plans; and the European Commission has set up the ‘European Semester’ to analyse national plans for economic and structural reforms on a yearly basis which will yield a series of recommendations for the following 12-18 months.<sup>111</sup> Key indicators have been developed for each of the main policy themes relevant for Europe 2020 to allow comparison between member states.<sup>112</sup> These areas include: fiscal policy, long-term sustainability and taxation; financial sector; promoting growth and competitiveness; labour market, education and social policies; and modernising public administration. In the area of assessing the quality of public administration in member states, for example, indicators include government effectiveness; the quality, independence and efficiency of justice systems; and corruption.<sup>113</sup>

## **B. Concluding Remarks**

The EU has been described as “a powerful and pervasive law-making entity with the capacity to impinge on fields of human freedom and welfare in many respects”.<sup>114</sup> From the discussion above, it can be seen that the protection of human rights has for some time held a significant place within EU law and policy. However, it also indicates that the EU has struggled during this time to identify the most effective method by which to monitor human rights practice within the EU institutions and the member states. The difficulty has arisen not least because of the lack of a clear legal basis on which to build a human rights mechanism at the EU level (which will be discussed further below in Section III), but also because of resistance from some member states over an enhanced role for the EU in this respect. It has been commented that “the debate over the appropriate scope of its human rights role remains contested even after the important changes introduced by the Lisbon Treaty”.<sup>115</sup> However, it

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<sup>104</sup> European Commission Communication, ‘The EU Justice Scoreboard: A tool to promote effective justice and growth’ (COM(2013) 160 final) at page 3, available at: [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_communication\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf).

<sup>105</sup> European Commission Communication on the EU Justice Scoreboard above n104 at page 3.

<sup>106</sup> See [http://ec.europa.eu/justice/newsroom/effective-justice/news/130327\\_en.htm](http://ec.europa.eu/justice/newsroom/effective-justice/news/130327_en.htm).

<sup>107</sup> European Commission Communication on the EU Justice Scoreboard above n104 at page 3.

<sup>108</sup> European Commission Communication on the EU Justice Scoreboard above n104 at page 3.

<sup>109</sup> European Commission Communication on the EU Justice Scoreboard above n104 at page 3.

<sup>110</sup> See [http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm).

<sup>111</sup> See [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm).

<sup>112</sup> See [http://ec.europa.eu/europe2020/making-it-happen/key-areas/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm).

<sup>113</sup> See [http://ec.europa.eu/europe2020/pdf/themes/34\\_quality\\_of\\_public\\_administration\\_final.pdf](http://ec.europa.eu/europe2020/pdf/themes/34_quality_of_public_administration_final.pdf) at page 1.

<sup>114</sup> De Búrca above n57 at page 3.

<sup>115</sup> Craig and de Búrca above n41 at page 364.

has also been cautioned that “the EU needs to rethink its human rights policies if it is not to continue losing influence in a changing international political environment”.<sup>116</sup>

In view of the EU mechanisms discussed above, several conclusions can be drawn. First, and perhaps most importantly, any new EU mechanism should fill the gap left by the sanctions mechanism in Article 7 TEU, which is regarded as an exceptional measure of last resort. Second, in respect of individual complaints of breaches of fundamental rights, an increasing number of human rights-based claims are being brought before the CJEU and the Charter applies both to EU institutions and to member states when they are implementing EU law. However, the CJEU is limited in its capacity to address violations of EU fundamental values as it can only consider practice as regards implementation of EU law, rather than human rights practice more broadly.<sup>117</sup> Third, accession by the EU to the ECHR will mean that individuals can bring complaints about EU acts directly before the ECtHR. Fourth, although the FRA conducts meaningful thematic examinations of human rights issues, and occasionally engages in evaluation of specific member state situations,<sup>118</sup> its lack of a systematic, country-by-country follow-up mechanism, given its thematic approach, greatly affects its ability to effect change in member state practice. Fifth, although the legislative impact assessments resulting from the European Commission’s Charter Strategy ensure that the Charter is considered during the EU legislative process and the application of EU law at national level, these assessments do not consider whether the member states are complying with human rights more generally.<sup>119</sup> In addition, while the Commission currently undertakes an annual evaluation of the application of EU law, its most recent report for 2012 contains only very limited reference to the Charter.<sup>120</sup> Sixth, the European Parliament’s annual report comments on positive achievements and causes for concern across a range of specific rights, which is helpful. However, these thematic comments are addressed to the EU and to the member states as a group, rather than to individual member states. Seventh, as noted above, the Copenhagen Criteria are entry requirements for new member states only,<sup>121</sup> and there is no specific mechanism dedicated to ensuring that the member states are still living up to these standards. Similarly, the CVM for Bulgaria and Romania is not a monitoring mechanism of general application for the EU institutions and wider member states. Finally, the EU Justice Scoreboard is a helpful comparative tool, which can be used to identify shortcomings and best practice, though it is non-binding. However, it is limited to examining the quality, independence and efficiency of justice rather than a wider range of fundamental rights and rule of law values. Indeed, it has been recognised that “It is not a mechanism for guaranteeing the rule of law across the EU”, though it is suggested that it could be used to develop a broader mechanism in the future.<sup>122</sup> Similarly, the European Semester, although providing concrete recommendations to member states, focuses very much on economic and structural reforms relevant for the Europe 2020 growth strategy.

Overall, it is clear from this discussion that existing EU mechanisms for the protection of fundamental rights, and in particular for monitoring the rule of law and democracy, are inadequate. This is also demonstrated, for example, by recent calls for a new mechanism, the European Commission’s current consultation, the limited mandate of the FRA and new initiatives such as the EU Justice Scoreboard.

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<sup>116</sup> Craig and de Búrca above n41 at page 363.

<sup>117</sup> See Articles 267-276 TFEU on jurisdiction of the Court generally.

<sup>118</sup> See <http://fra.europa.eu/en/about-fra/how-we-do-it/research-and-data-collection>.

<sup>119</sup> See wider discussion in Israel de Jesús Butler, “Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission,” *European Law Review*, Issue 4 (2012) (pages 397-418), available at: <http://www.opensocietyfoundations.org/publications/ensuring-compliance-charter-fundamental-rights-legislative-drafting-practice-european>.

<sup>120</sup> See, e.g., European Commission, ‘30th Annual Report on Monitoring the Application of EU Law (2012)’ (COM(2013) 726 final) (Brussels, 22.10.2013) available at: [http://ec.europa.eu/eu\\_law/infringements/infringements\\_annual\\_report\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm).

<sup>121</sup> See Copenhagen Criteria above n94.

<sup>122</sup> European Commission, ‘Questions & Answers: EU Justice Scoreboard’ (Memo/13/288) (Brussels, 27/03/2013) available at: [http://europa.eu/rapid/press-release\\_MEMO-13-288\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-288_en.htm).

Any new mechanism should have the potential to effect real change where necessary and to assess general state practice with regard to democracy, the rule of law and fundamental rights.

### **Section III: Possibilities for Creating a New Mechanism**

Section III discusses the possibility to create a new mechanism under existing powers and evaluates a range of possible options for a new EU monitoring mechanism, including a consideration of issues such as competence, possible legal bases and feasibility.

#### **A. The Possibility of Creating a New Mechanism Under Existing Powers**

There is no general competence for action in the field of human rights in the Treaty of Lisbon.<sup>123</sup> Consequently, there is no clear legal basis on which to base a general human rights monitoring mechanism. The EU does have competence to act within certain specific areas of human rights protection, such as non-discrimination (Article 19 Treaty on the Functioning of the European Union (TFEU)), and some have argued that five additional legal bases (for example, immigration and asylum, and social and workers' rights) could be relied on to support action within the area of human rights protection.<sup>124</sup> Although this may be true within those specific areas, it is doubtful that any of these specific competences could form the basis for a general EU human rights monitoring mechanism. According to the Network of Independent Experts on Fundamental Rights, discussed above, this lack of general competence "do[es] not in any way call into question the legitimacy of *monitoring* the policy followed by the Member States in the field of human rights. The primary reason for this is that such *monitoring* will only in exceptional circumstances result in imposing obligations as regards human rights on Member States which they have not already agree to" [original emphasis]. While this may be the case, because there is no general EU competence for human rights, it would be up to the member states, and not the EU, to take action to address any recommendations resulting from any such monitoring process. It is therefore necessary to explore which other Treaty provisions might provide a legal basis for general human rights action. We consider next, several potential Treaty bases for a new EU monitoring mechanism.

#### **Article 352 TFEU**

Article 352 functions as a "catch-all" provision, allowing the Union to take action "to attain one of the objectives set out in the Treaties" if it is deemed necessary and if unanimity is reached. It should only be used where other Treaty provisions alone are insufficient to adopt the measure in question. It is not meant as a means to bypass limitations on competence. The main drawback of this provision is clear: it requires all (now 28) EU member states to agree on a proposal from the Commission. However, it could arguably be used in combination with other Treaty articles to form the basis for a general human rights monitoring mechanism.

Prior to the entry into force of the Treaty of Lisbon, the then EC considered the legality of possibly acceding to the ECHR. The Court concluded not only that there was no Treaty basis to enact human rights rules or conclude international agreements relating to human rights, but also that, consequently, Article 352 TFEU (then Article 235 EEC) could not be used to expand the scope of Community powers. Such an expansion would be "of constitutional significance and would therefore...

<sup>123</sup> Craig and de Búrca above n38 at page 392.

<sup>124</sup> EU Network of Independent Experts in Fundamental Rights, 'Report of the situation of fundamental rights in the European Union and its member states in 2002', available at: [http://ec.europa.eu/justice/fundamental-rights/files/cfr\\_cdf\\_2002\\_report\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_2002_report_en.pdf) at pages 13-18.

go beyond the scope of Article 235". Since then, of course, the Treaty of Lisbon has provided an explicit legal basis for accession to the ECHR. However, as discussed above, there is still no general competence to act within the field of human rights. Perhaps now, 18 years after the Court's opinion, the lack of general competence to act may not be such a barrier given that the place of human rights within the EU legal order has taken on a more prominent position, especially following the entry into force of the Charter of Fundamental Rights as a binding legal instrument and the imminent accession by the EU to the ECHR. Indeed, significantly, the EU is now party to the UN Convention on the Rights of Persons with Disabilities,<sup>125</sup> which was the first instance of the EU becoming party to an international human rights treaty.<sup>126</sup> Various strategies have been put in place by the EU to monitor implementation of this Convention.<sup>127</sup>

Article 352 could be used alongside Article 3(1) TEU. Article 352 requires that the action must be necessary to attain one of the Treaty objectives within the framework of the policies defined by the Treaties. Moreover, the Treaties must not already provide the necessary powers. Article 3(1) states that one of the objectives of the EU is "to promote peace, its values and the well-being of its peoples." The phrase 'its values' is a reference to those stated in Article 2 TEU, which include "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". Article 352 would therefore function to fill this gap, as it has with respect to the FRA. As to whether such a mechanism is necessary for the purposes of Article 352, it could certainly be argued that the EU is best-placed to evaluate and determine whether its foundational values are being respected in the member states.

Article 352 TFEU could also be used in connection with Article 7 TEU (discussed below). This has been done on previous occasions in relation to human rights monitoring. The FRA's establishment was based on the perceived need to create a body that would assist the Council in making determinations under the Article 7 sanctions mechanism. However, because Article 7 does not explicitly provide for the creation of such a body, the Commission used Article 352 TFEU (ex 308 TEC) to establish the FRA.<sup>128</sup>

Article 352 TFEU may also be used to support legislation on its own. Several examples of this can be found in legislation currently in force. For example, Article 352 was used to establish a system of cooperation to facilitate access to compensation for victims of cross-border crime.<sup>129</sup> It has also been used to establish the EU Civil Protection Mechanism, which coordinates disaster response in the member states and assists with national response capabilities.<sup>130</sup> Article 352 was also used as a basis for establishing the fundamental rights and citizenship programme for the period covering 2007-2013. It seems that alone, Article 352 could be employed to establish a more general type of monitoring mechanism, such as a purely synthesising body, which will be discussed below in Section III.B.

There is also some evidence to suggest that the lack of an explicit basis to set up a monitoring mechanism is inconsequential so as to render recourse to Article 352 unnecessary. The Commission Decision establishing an EU anti-corruption reporting mechanism<sup>131</sup> relies only on Articles 67 and 83 TFEU. Article 67 TFEU pertains to the creation of an area of freedom, security and justice, and Article 83 covers the establishment of rules concerning definitions of crimes and sanctions in certain areas of

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<sup>125</sup> See <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> which notes 30 March 2007 (signature) and 23 December 2010 (formal confirmation).

<sup>126</sup> See European Commission Press Release, 'EU ratifies UN Convention on disability rights' (5 January 2011, Brussels, IP/11/4) available at: [http://europa.eu/rapid/press-release\\_IP-11-4\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_IP-11-4_en.htm?locale=FR).

<sup>127</sup> For example, see discussion in Commission Charter Report 2012 above n80 at pages 62-63.

<sup>128</sup> Council Regulation (EC) No 168/2007 establishing the FRA, above n64.

<sup>129</sup> Council Directive 2004/80/EC of 29.04.2004 relating to compensation to crime victims.

<sup>130</sup> Council Decision 2007/779/EC of 8.11.2007 establishing a Community Civil Protection Mechanism (recast).

<sup>131</sup> Commission Decision of 6.6.2011 Establishing an EU Anti-corruption reporting mechanism for periodic assessment, C(2011) 3673 final.

crime, such as corruption. Neither Treaty article provides an explicit legal basis for establishing a report/monitoring mechanism. The Commission seems to presume that the bases provided by Articles 67 and 83 suffice. Consequently, it may be enough to use Article 3(1) TEU or Article 7 TEU without resorting to Article 352.

Finally, despite its potential uses, it should be noted that since the entry into force of the Treaty of Lisbon, it has become much more difficult to use Article 352 due to national action by some member states. The German Constitutional Court has held,<sup>132</sup> for example, that Germany cannot support use of Article 352 without prior approval by the German Parliament. This is due, according to the Court, to the “non-specificity of possible cases of application of the flexibility clause”.<sup>133</sup> Similarly, the UK has adopted legislation which prevents a vote in favour of using Article 352 without approval by Parliament.<sup>134</sup> This means that Article 352 might not be the best legal basis for a monitoring mechanism. However, as it is largely a matter of political will, whether Article 352 could be successfully employed would depend a great deal on the type of mechanism that is chosen.

### **Article 7 TEU**

Article 7 TEU is a necessary part of promoting EU values in line with Articles 2 and 3(1), but as stated above, it does not provide an explicit legal basis for establishing a monitoring mechanism. Moreover, Article 7 does not specify how it should be implemented. However, it seems clear that the Commission believes that Article 7 TEU itself is a sufficient legal basis for action in the field of human rights. This was the basis upon which the Network of Independent Experts on Fundamental Rights was created.<sup>135</sup> The Commission could arguably, therefore, legitimately create a monitoring and analysis body. This kind of arrangement occurs frequently, not only in the field of human rights, but in other areas covered by the Treaties.

In addition to the Network of Independent Experts, the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) was set up within the Council to secure/monitor compliance with the Charter of Fundamental Rights and deal with EU accession to the ECHR.<sup>136</sup> The Committee on Civil Liberties, Justice and Home Affairs (LIBE) was created within Parliament, and is charged with legislative oversight in the development of the area of freedom, security and justice (AFSJ),<sup>137</sup> and the Subcommittee on Human Rights (DROI) organises hearings and discussions on various human rights issues, and produces an annual report, which catalogues the human rights situation globally.<sup>138</sup> The member states are aware that these sorts of bodies and groups are created regularly and are expected to engage with them. This is in no small part due to the duty of sincere cooperation imposed by Article 4(3) TEU. It should therefore be permissible to establish a similar body or working group tasked with monitoring and analysis, provided it does not go too far by giving the body the power to impose sanctions. That kind of power would increase the scope of competence set out in Article 7, which only provides for the Council to undertake such activity, and would therefore require Treaty amendment.

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<sup>132</sup> Judgment of 30 June 2009, BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), available (in German) at: [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html). See also, Philipp Kiiver, ‘The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU’, *European Law Journal*, Vol. 16, No. 5, September 2010, pages 578–588.

<sup>133</sup> Kiiver above n132 at page 583.

<sup>134</sup> European Union Act 2011 c. 12, Section 8.

<sup>135</sup> 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 final, 15/10/2003 at pages 3-4.

<sup>136</sup> For more details, see ‘List of Council preparatory bodies’, available at: <http://www.consilium.europa.eu/council/council-configurations/list-of-council-preparatory-bodies?lang=en>.

<sup>137</sup> See ‘LIBE’, available at: <http://www.europarl.europa.eu/committees/en/libe/home.html>.

<sup>138</sup> See ‘DROI’, available at: <http://www.europarl.europa.eu/committees/en/droi/home.html>.

### **Article 337 TFEU**

Article 337 TFEU may help to bolster legal support for a human rights monitoring mechanism. Article 337 provides that “The Commission may... collect any information and carry out any checks required for the performance of the tasks entrusted to it.” One of the Commission’s tasks is to assist the Council in determining whether, under Article 7 TEU, there has been or there is a clear risk of a serious breach of the Article 2 TEU values. According to Article 337 TFEU, it may collect information and carry out checks in order to make that determination. This is arguably a legal basis for a monitoring body in relation to Article 7. More generally, it may be possible to argue that Article 337 TFEU could be used as a legal basis for monitoring with respect to the EU’s general undertaking, in Article 3(1) TEU, to “promote peace, its values and the well-being of its peoples.” The duty of sincere cooperation in Article 4(3) could help to bolster member state engagement with any monitoring body created under Article 337 TFEU.

### **Article 70 TFEU**

It may also be possible to base a monitoring mechanism on Article 70 TFEU. This was suggested by the European Parliament in a resolution of July 2013.<sup>139</sup> Article 70 allows the Council, on a proposal from the Commission, to adopt measures for collaboration between the Commission and the member states with respect to conducting “objective and impartial evaluation of the implementation of the Union policies” referred to in Title V on AFSJ.

Since the entry into force of the Treaty of Lisbon, the Commission has adopted a Roadmap for strengthening the procedural rights of suspected or accused persons,<sup>140</sup> based on the specific mandate in Article 82(2) TFEU to facilitate mutual recognition and establish minimum rules within the sphere of judicial cooperation in criminal matters. The resulting legislation and proposals undoubtedly impact individuals’ fundamental rights.<sup>141</sup> Article 70 may, therefore, be a basis on which to establish a human rights monitoring mechanism, in order to assess how the policies enacted under Article 82(2) are being implemented. However, as Article 70 TFEU is limited by its terms to the evaluation of implementation of EU policies within Title V, a mechanism created on this basis would necessarily be limited in scope.

### **Article 121 TFEU**

The Commission may wish to draw on Article 121 TFEU in the context of infringement proceedings (discussed in Section III.B). Article 121 deals with the Union’s Economic policy,<sup>142</sup> and allows the Council and Commission to monitor member states’ economic policy development and consistency with EU policy, as well as carry out regular assessments in cooperation with the member states.<sup>143</sup> Moreover, it specifies what action may be taken where it is established that a member state’s policies

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<sup>139</sup> European Parliament resolution above n9 at para. 79.

<sup>140</sup> Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C-295/1, 4.12.2009.

<sup>141</sup> See, e.g., Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final; Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, COM(2011) 275 final; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

<sup>142</sup> Indeed, the European Parliament has suggested this in a recent draft report: Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Louis Michel), Draft Report on the situation of fundamental rights in the European Union (2012), (18.9.2013) (2013/2078(INI)), para. 7, available at: <http://www.europarl.europa.eu/committees/en/libe/draft-reports.html#menuzone>.

<sup>143</sup> Article 121(3) TFEU.

are inconsistent with EU economic policy, or where such policy risks jeopardising the proper functioning of the economic and monetary union. The Commission has the option of addressing a warning to the member state concerned, and may suggest that the Council issue recommendations as well, possibly public in nature.<sup>144</sup> Should the Council decide to take such action, it does so on the basis of a qualified majority vote which does not include the member state concerned. Article 121 does not specify what type of action might be possible. The Article 121 TFEU mechanism could perhaps be strengthened and modified for application in proceedings about violations of fundamental EU values.

### ***Concluding Remarks***

The choice of legal basis, therefore, will clearly impact both the feasibility and the ease of creation of a new monitoring mechanism; and will likely also influence whether the member states will cooperate with any new process.

## **B. Possible Models Under Existing Powers**

Section B discusses a range of possible options/models for a new EU monitoring mechanism, exploring what could be done under existing powers, as discussed above in Section A. Section C will then look at options for which Treaty reform would be required.

### ***Country Monitoring***

It is important to first note that either of the bodies discussed below could be purely synthesising. Such a body could be tasked with bringing together all regional and international reports on human rights practice in the member states with a view to making clear recommendations to states on ways to improve their human rights implementation and practice in relation to Article 2 TEU values. A synthesising role would also help avoid duplication with other bodies, including at CoE and UN levels.

#### *A New Network of Independent Experts*

A predecessor to the FRA, the EU Network of Independent Experts on Fundamental Rights was set up by the European Commission in September 2002,<sup>145</sup> on the recommendation of the European Parliament that “a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, to ensure a high level of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down notably in the Charter”.<sup>146</sup> This assessment should take account of “developments in national laws, the case law of the Court of Justice of the European Communities and the European Court of Human Rights and any notable case law of the Member States’ national and constitutional courts”.<sup>147</sup> The Network was set up on a contractual basis through an open call for tender,<sup>148</sup> rather than via the adoption of an EU regulation, perhaps as a way of bypassing the political negotiation process. However, soon after its inception, the Commission noted that the network was “operating on the basis of a contract of limited

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<sup>144</sup> Article 121(4) TFEU.

<sup>145</sup> See EU Network of Independent Experts on Fundamental Rights (CFR-CDF), ‘Report on the Situation of Fundamental Rights in the European Union and its Member States In 2002’ (submitted 31 March 2003) at page 11.

<sup>146</sup> See European Parliament resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI)) (5 July 2001) at para. 9.

<sup>147</sup> European Parliament resolution above n146 at para. 9.

<sup>148</sup> See DG Justice and Home Affairs, ‘Reseau D’Experts Faisant Autorite en Matiere de Droits Fondamentaux’, No. JAI/A5/2002/01, on file with authors (in French only).

duration” and that, in order to be sustainable, its work needed to be provided with “an appropriate legal basis”.<sup>149</sup> The Network was dissolved upon the creation of the FRA.<sup>150</sup>

The Network issued reports and opinions on fundamental rights practice in the member states and the EU.<sup>151</sup> The Network worked by reference to the Charter, and was given four main objectives.<sup>152</sup> First, it could make recommendations as to how to exercise EU competences so as to strengthen the protection of fundamental rights.<sup>153</sup> Second, it could have a monitoring role with regard to member state respect for EU values such as freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law, including those rights in the Charter.<sup>154</sup> Third, it could catalogue Charter rights as they correspond to international and European human rights instruments.<sup>155</sup> The Network suggested that reading Charter provisions in the light of other human rights standards safeguards against conflicts between EU law obligations and obligations the member states may have under other human rights instruments.<sup>156</sup> It also suggested that this approach paved the way for EU accession to these instruments,<sup>157</sup> and for the EU “to submit itself to the monitoring mechanisms which the Member States have themselves already accepted”.<sup>158</sup> Fourth, it could promote the exchange of information and the sharing of best practice between member states concerning implementation of the Charter,<sup>159</sup> described as “an open method of coordination”.<sup>160</sup>

It is important to highlight the Network’s role in relation to the Article 7 sanctions procedure. As noted above, part of its work included monitoring member states’ respect for the values in Article 2 TEU. The Network then informally began to monitor the member states’ compliance with the Charter for the purposes of Article 7,<sup>161</sup> noting the contribution it could make by way of supplying the requisite information to those EU institutions responsible for having recourse to the procedure.<sup>162</sup> The Commission too had noted that information from the Network might be useful in the context of the Article 7 TEU procedure;<sup>163</sup> the European Parliament disagreed.<sup>164</sup>

The Network was dissolved when the FRA was created. Perhaps it would be possible to re-establish a body similar to the Network which would focus purely on monitoring member state compliance with EU values. The main benefit of such an approach would be its comprehensiveness, but it would also be relatively easy to establish in a manner similar to that of the Network, which was set up on a

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<sup>149</sup> European Commission, ‘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’ (Brussels, 15.10.2003) (COM(2003) 606 final) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0606:FIN:EN:PDF> at page 10.

<sup>150</sup> The Network of Independent Experts on Fundamental Rights was replaced by FRALEX within the context of the FRA (above n43 at page 390). Subsequently, FRANET, a network of “National Focal Points” was launched in July 2011 and replaces both FRALEX and the former RAXEN network (for more information, see <http://fra.europa.eu/en/research/franet>), which was coordinated by the EUMC.

<sup>151</sup> Past reports are available at: <http://ec.europa.eu/justice/fundamental-rights/document/>. See also the website of the Interdisciplinary Research Cell in Human Rights, available at: [http://cridho.uclouvain.be/en/eu\\_experts\\_network/](http://cridho.uclouvain.be/en/eu_experts_network/).

<sup>152</sup> CFR-CDF above n145 at page 12; cf. the ‘Objet du Marche’ in the tender document for the Network, above n148 at pages 4-5.

<sup>153</sup> CFR-CDF above n145 at page 12.

<sup>154</sup> CFR-CDF above n145 at page 12.

<sup>155</sup> CFR-CDF above n145 at page 12.

<sup>156</sup> CFR-CDF above n145 at page 23.

<sup>157</sup> CFR-CDF above n145 at page 23.

<sup>158</sup> CFR-CDF above n145 at page 24.

<sup>159</sup> CFR-CDF above n145 at page 12.

<sup>160</sup> CFR-CDF above n145 at page 25.

<sup>161</sup> Craig and de Búrca above n38 at page 390.

<sup>162</sup> CFR-CDF above n145 at page 20.

<sup>163</sup> CFR-CDF above n145 at page 10.

<sup>164</sup> De Schutter above n44 at page 7.

contractual basis through an open call for tender,<sup>165</sup> rather than via the adoption of an EU regulation, perhaps as a way of bypassing the political negotiation process.

Creating a body such as this should not create a significant financial burden. By way of comparison, the European Network of legal experts in the non-discrimination field was established in 2004 by the Commission, and is tasked with providing information and advice on: (a) national implementation of the EU anti-discrimination directives; (b) national legislative initiatives; (c) compliance of national case law with EU law; (d) CJEU judgments in the field of non-discrimination; and (e) good practice regarding legal protection.<sup>166</sup> Rather than being in-house, this Network is comprised of 30 national experts and is managed by the Migration Policy Group. In order to run this Network for two years, the Migration Policy Group was awarded €3,300,000.<sup>167</sup> A small task force within the Commission would arguably require less financial support than a 30-person network.

### Expanding the Role of the FRA

Whether the role of the FRA should be expanded was one of Commissioner Reding's suggestions.<sup>168</sup> In consideration of that suggestion, several issues must be addressed. On the one hand, the Agency clearly has the experience and expertise to take on greater responsibilities for monitoring compliance with fundamental rights in the EU. Indeed, interviewees during the evaluation process commented on "the more general need for an EU agency working in the field of human rights"; with one commenting on the need to concentrate such activities in a "one stop shop in the area of human rights".<sup>169</sup> On the other hand, member states have so far resisted calls to confer greater powers on the FRA, as discussed above. In addition, as noted during the evaluation process, issues would first need to be resolved or clarified such as its lack of resources; limited mandate (in particular as regards legislative proposals and individual complaints); its thematic approach to monitoring the member states; restrictions in relation to the third pillar (such as the exclusion of judicial cooperation in criminal matters); and the Agency's reliance on the Commission under the Multi-Annual Framework. In particular, the recent evaluation report recommended that "it should be clarified to what extent the FRA should ... have a wider mandate to address particular pertinent issues occurring in Member States".<sup>170</sup> Some of these issues will now be discussed in more detail.

First, as noted in Section II, in terms of resources, the FRA is currently managing its workload. However, if the mandate of the FRA were to expand, a lack of resources could certainly become a problem. It is inarguable that any expanded role would have to be accompanied by an expansion in terms of resources. Perhaps one solution to this might be to establish a body within the FRA to focus on member states' compliance with Article 2 TEU. The remainder of the FRA could then continue to focus primarily on data collection and analysis on a thematic basis, which it has done successfully to date, while the new team could monitor on a state-by-state basis to target specific problems.

Second, it may be necessary to reassess whether the FRA has a role to play with regard to the Article 7 TEU sanctions mechanism. The Agency's limited role in relation to Article 7 has been explained by "the desire to preserve the purely political character of the sanctions' mechanism" and the CoE's fear that any such role would result in a duplication of its monitoring efforts and its own work being

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<sup>165</sup> See DG Justice and Home Affairs, 'Reseau D'Experts Faisant Autorite en Matiere de Droits Fondamentaux', No. JAI/A5/2002/01, on file with authors (in French only).

<sup>166</sup> See 'Networks of Experts – Justice', available at: [http://ec.europa.eu/justice/discrimination/experts/index\\_en.htm](http://ec.europa.eu/justice/discrimination/experts/index_en.htm).

<sup>167</sup> See Tenders Electronic Daily, 'Establishment and maintenance of a European network of academic experts in the non-discrimination field, Contract award notice', 2012/S 36-057080, available at: <http://ted.europa.eu/udl?uri=TED:NOTICE:57080-2012:TEXT:EN:HTML>.

<sup>168</sup> Reding above n10 at page 11.

<sup>169</sup> Ramboll above n69 at page 78.

<sup>170</sup> Ramboll above n69 at page VII.

marginalised.<sup>171</sup> However, a “compromise solution” was reached whereby a Declaration was appended to the Founding Regulation, while the Regulation itself did not reference Article 7 TEU.<sup>172</sup> The 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 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”.<sup>173</sup> Therefore, the question of the FRA’s role in relation to the Article 7 sanctions mechanism may arise again.

Third, is the issue of whether the FRA would monitor implementation of the Charter or look more broadly to other commitments. In terms of the future direction of the FRA, it has been commented that with the accession of the EU to the ECHR, the “compliance of Community acts with fundamental rights, and the subsequent role of the FRA under such a framework will be all the more important”.<sup>174</sup> There would be a need for continued coordination and cooperation between the FRA and CoE in order to avoid any unnecessary duplication in this respect.

A related issue is whether the FRA might also undertake evaluation of measures within the field of police and judicial cooperation.<sup>175</sup> This was rejected when the FRA was established, but declarations were attached to the Founding Regulation allowing the matter to be re-examined and also noting that EU institutions and member states may consult the expertise of the Agency on these matters as appropriate.<sup>176</sup> It remains to be seen whether this issue will be adequately considered in the institutions. However, the abolition of the three-pillar structure with the entry into force of the Treaty of Lisbon means that, by the end of November 2014, the CJEU will have jurisdiction over all third pillar measures. Therefore, it would be surprising perhaps for the FRA not to have competence to review practice in these areas once the CJEU is given full jurisdiction.

Regardless of the character of its expanded role, as the FRA was established by a legislative instrument, any change in its mandate would have to be effected through an amending or recast instrument, which would require member state consent. As there is no general Treaty basis for action in the field of fundamental rights, recourse would once again have to be made to Article 352 TFEU. This would require unanimous support from the member states. The unanimity requirement would apply to most of the changes discussed above, including altering the scope of the FRA’s mandate, giving it a role in the legislative process or a role with regard to the Article 7 TEU sanctions mechanism.

### **Enforcement**

At the outset, it may be useful to address the issue of voluntary participation by the member states in a monitoring mechanism. Indeed, one way to resolve the issue of legal basis surrounding the creation of a monitoring body might be to adopt a voluntary framework by which the member states ‘opt in’ to the monitoring framework and agree to the body monitoring their implementation of indexed EU legislation (as described below) or of Article 2 values generally. However, as discussed above in relation to Article 7 and existing powers, the EU would not necessarily have to create a voluntary

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<sup>171</sup> De Schutter above n44 at page 15.

<sup>172</sup> De Schutter above n44 at page 21. See wider discussion at pages 20-21.

<sup>173</sup> De Schutter above n44 at page 21.

<sup>174</sup> Ramboll above n69 at page 5.

<sup>175</sup> European Commission, ‘Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights’, COM(2005) 280 final, 30/06/2005 at page 3.

<sup>176</sup> De Schutter above n44 at pages 31-32.

mechanism in order to establish a monitoring body that engages the member states in a dialogue on human rights and that involves reporting requirements.

However, if the aim is to create a mechanism that not only monitors and analyses state practice with regard to fundamental EU values, but also includes an enforcement role, the member states' positive cooperation would be necessary, as there is no legal basis to do this under existing Treaty provisions.

The difficulties of a voluntary process are fairly clear. First, the effectiveness of a voluntary mechanism depends on the participation of a significant number of member states. It would be important to have the participation of the larger member states, but also those that have particular difficulties in the field of human rights. Second, a voluntary mechanism may not have the support which would allow it to impose sanctions or make binding recommendations. Finally, it risks creating different levels of protection between member states which could lead to uncertainty and unfairness. However, if the alternative is no mechanism at all, creating a voluntary mechanism until it is possible to garner adequate political support for a mandatory, binding mechanism, may be the most feasible option.

### *Fundamental Rights Index and Litigation Strategy*

Part of the role of the Commission is to act as guardian for the Treaties and secondary legislation, and, as discussed above, it may do this through the initiation of infringement proceedings under Article 258 TFEU. Creating a new body (or expanding the mandate of an existing body) that is tasked with monitoring implementation of EU legislation that impacts fundamental rights, would assist the Commission in targeting its litigation strategy to focus on breaches of fundamental rights.

This was proposed in a recent policy brief from the Open Society European Policy Institute. It suggested that "The Commission could develop a fundamental rights litigation strategy whereby it pursues infringement proceedings more aggressively on areas of EU law that could have a beneficial impact on the protection of its fundamental values. This would require it to develop a catalogue of existing legislation that indirectly protects the EU's fundamental values, and prioritise infringement proceedings where these rules are violated".<sup>177</sup> We will now consider how this might work in practice.

This mechanism could comprise a dual function: legislative monitoring and evaluation of implementation with a view to bringing litigation before the Commission or the CJEU wherever there is an infringement of EU values. First, it would be necessary to catalogue all EU provisions with a view to identifying those that have potential to protect fundamental rights. The impact of new EU legislation on fundamental rights would continue to be recorded through the Charter of Fundamental Rights impact assessment process, which is already required for legislative proposals from the Commission.<sup>178</sup> For existing legislation, a retrospective assessment of fundamental rights provisions could be carried out during this cataloguing process, if not already being undertaken.

Then, once the relevant legislation has been identified, a new dedicated task force could be created within the Commission's Legal Service that could monitor legislative implementation with a view to litigation where necessary. It could be comprised of fundamental rights specialists and lawyers who have established practice in that field, for example from the FRA. Moreover, it could include seconded CoE personnel to advise on any overlapping issues that might arise after EU accession to the ECHR.

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<sup>177</sup> See Israel Butler, Open Society European Policy Institute, 'Policy Brief: How to monitor the rule of law, democracy and fundamental rights in the EU' (August 2013) at page 4, available at: <http://www.opensocietyfoundations.org/briefing-papers/how-monitor-rule-law-democracy-and-fundamental-rights-eu>.

<sup>178</sup> 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments', SEC(2011) 567 final, 6 May 2011.

### Infringement Actions

It may be difficult to argue that Article 2 TEU entails any specific obligations for member states. The CJEU is likely to consider Article 2 as not having direct legal effect because of its declaratory nature. The Court tends to view provisions which merely set out general objectives as too vague to satisfy the requirements of direct effect as established in its prior case law.<sup>179</sup> The Court has stated that “programme” provisions relating only to the objectives sought by the EU as a whole are incapable of producing direct effect.<sup>180</sup> The Court is, therefore, unable to assess the compatibility of national measures against such provisions, although they may be used as interpretive aids for other Treaty provisions, or for secondary EU legislation. Article 2 TEU is a declaration of the EU’s founding principles. It is effectively a statement of the EU’s programme on fundamental rights and the objectives therein. It appears not to produce direct effect and, therefore, cannot be relied upon by individuals before national courts or before the CJEU. Before disposing of this possibility, it may be useful to consider the possible role for judicial intervention with respect to Article 2.

It should be recalled that the very case in which direct effect was developed was an example of the Court’s innovative standard setting. Without any explicit basis for doing so, the Court created the principle of direct effect by establishing the fact that the EU constitutes “a new legal order of international law” not only for the states themselves, but also their nationals. In a subsequent case,<sup>181</sup> the Court created the doctrine of supremacy of EU law, again without explicit legal basis. Both of these principles have become two of the most fundamental doctrines of EU law, against which nearly all national action is reviewed.

Given the great importance of fundamental rights and their veneration within the EU order, particularly since the entry into force of the Treaty of Lisbon which makes the Charter of Fundamental Rights legally binding, perhaps it is time for the Court once again to take the initiative and assign direct effect to Article 2 TEU so that individuals could assert their fundamental rights before national courts and before the CJEU. The Court might also wish to assign direct effect to Article 3(1), which, although also a declaratory provision, includes a positive obligation to promote the values of the EU. This obligation is not only for the EU institutions, but also the member states.

Commissioner Reding also suggested expanding “the role of the Court of Justice... by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU against Member States by means of an infringement procedure brought by the Commission or another Member State”.<sup>182</sup>

Articles 258 TFEU and 259 TFEU can be employed by the Commission or the member states against a member state that “has failed to fulfil an obligation under the Treaties”. Used in conjunction with Article 2 TEU, the Commission could initiate infringement proceedings against any member state that breached the Union’s values as expressed therein. Moreover, Article 258 allows the Commission to refer the matter to the CJEU where the member state does not comply with the Commission’s opinion. This would also correspond with Commissioner Reding’s suggestion to expand the role of the CJEU. The advantages of using this method of enforcing human rights at the EU level are that it would not necessitate Treaty amendment, nor would it require recourse to the highly political Article 7 sanctions mechanism. Alternatively, as discussed in Section III.A, the Commission could strengthen and expand on the procedure in Article 121 TFEU.

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<sup>179</sup> Case 26/62 Van Gend en Loos [1963] ECR 13.

<sup>180</sup> Joined cases C-72/91 and C-73/91 Sloman [1993] ECR 887, paras 25-27. See also Case 126/86 Zaera [1987] ECR 3697, para. 13 and Case 149/77 Defrenne [1987] ECR 1365, para. 19.

<sup>181</sup> Case C-6/64 Costa v ENEL [1996] ECR 585.

<sup>182</sup> Reding above n10 at page 10.

## C. Possible Models Requiring Treaty Reform

Section C discusses a range of possible options/models for a new EU monitoring mechanism, looking at options for which Treaty reform would be required.

### ***Mechanism for Cooperation and Verification of EU Values***

As discussed above in Section II, the EU put in place the CVM for Bulgaria and Romania to monitor their accession commitments. The CVM is established, for each member state, by a Commission Decision which sets out specific benchmarks that each member state must meet regarding judicial reform and the fight against corruption.<sup>183</sup> Each Decision refers to a legal basis in the joint Accession Act for Bulgaria and Romania, which allows the Commission to “take appropriate measures” if there is an imminent risk that either state would “cause a breach in the functioning of the internal market” because of a failure to implement its accession commitments.<sup>184</sup> The Accession Act also allows the Commission to take measures where there is a risk of “serious shortcomings” in the transposition or implementation of commitments relating to police and judicial cooperation, or the policy relating to what is now the AFSJ.<sup>185</sup> The Accession Act goes on to provide that measures taken with regard to risks to the functioning of the internal market must be proportionate and not arbitrarily or discriminately invoked.<sup>186</sup> Measures relating to breaches of commitments on police and judicial cooperation or the AFSJ may include the temporary suspension of provisions relating to relations with the other member states, and should last no longer than necessary.<sup>187</sup>

Provisions such as those in the Act of Accession are the norm for new member states. Just as with Bulgaria and Romania, the Act of Accession concerning the ten new member states in 2003 includes a provision for Commission action in relation to the same sort of behaviour.<sup>188</sup> There have been instances where the Commission has used these provisions to suspend EU funding in response to imminent or actual breaches. A recent example of this was in October 2012 when the Commission issued a letter of warning to Romania stating that it was pre-suspending nearly €500 million in EU funding because of problems regarding corruption in the field of transport, regional development and competition.<sup>189</sup> Romania was given two months to react with a firm plan for change, or the funds would be suspended.

Efforts such as this are often limited to new or candidate member states.<sup>190</sup> There is no specific, formal system in place for monitoring commitments to EU values post-accession. Perhaps something along these lines could be conducted by the Commission with regard to current member states’ commitments to fundamental EU values. It could be run similar to the infringement proceedings, described above, and it could be based on the commitment under Article 3(1) TEU to promote the values of Article 2 TEU. A mechanism such as this would be similar to the Article 7 sanctions

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<sup>183</sup> Commission Decision of 13/XII/2006, C(2006) 6569 final (on Romania); Commission Decision of 13/XII/2006, C(2006) 6570 final (on Bulgaria).

<sup>184</sup> See *ibid.* In both Commission Decisions, paragraph 5 of the Preamble refers to Article 37 of the Accession Act: Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union: Act of Accession and its Annexes, signed in Luxembourg on 25 April 2005, OJ L 157, 21/06/2005, page 203 (hereinafter “2005 Accession Act”).

<sup>185</sup> 2005 Accession Act, Article 37.

<sup>186</sup> 2005 Accession Act, Article 37.

<sup>187</sup> 2005 Accession Act, Article 38.

<sup>188</sup> Articles 37 and 38, Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236, 23/09/2003, page 33.

<sup>189</sup> See ‘Clock is ticking for Romania suspended funds’, available at: <http://www.euractiv.com/regional-policy/clock-ticking-romania-suspended-news-515710>.

<sup>190</sup> See also the discussion above in Section II regarding the Copenhagen Criteria.

mechanism, but has the potential to be less stringent, as it could focus on suspension of EU funding, rather than more political rights.

A CVM for fundamental EU values could operate similarly to the UN's UPR, which is a mechanism based on cooperation and dialogue. It could work not only with states, but also with other relevant stakeholders through a broad consultation process that might include FREMP, LIBE, DG Justice and relevant NGOs. Again, similarly to the UPR, the CVM assessment could operate in the following manner: first, the CVM could collect questions and issues relating to the state under review for the purposes of a lengthy interactive dialogue with the state. The dialogue could result in an outcome document including recommendations and conclusions, and any voluntary pledges made by the state. Unlike the UPR, which allows the state to either accept or reject specific recommendations, the CVM would expect the state to implement all of the recommendations. Second, the CVM and other relevant stakeholders could participate in the implementation process and there could be, for example, a voluntary fund specifically to aid in implementation. It would also be helpful to make provision for an interim update procedure which could occur, for example, every two years. Finally, where a member state has not complied with the CVM recommendations, or has engaged in persistent violations of fundamental EU values, it should be open to the CVM to refer the matter to the European Commission to initiate infringement proceedings, as described above. This would go beyond what is envisaged within the context of the UPR, which, as seen above in relation to Israel's non-cooperation, has no specific enforcement mechanism.

#### **D. Concluding Remarks**

The main points to emphasise from this discussion are that, there must be a sufficient legal basis for any EU monitoring mechanism; the chosen legal basis will inform the role and function of whatever mechanism is chosen; and finally, if the ultimate objective is to create a new mechanism that will have enforcement powers outside of the context of Article 7 TEU, Treaty amendment will likely be required.

It is also important to consider the potential effectiveness of the chosen mechanism. Some of the bodies suggested above would have greater impact on fundamental rights practice than others. For example, a purely synthesising body with an advisory role may have less impact than an infringement procedure or a strong enforcement procedure that could issue sanctions for breaches of fundamental values. How much this matters depends on the ultimate objective for creating an EU-level monitoring mechanism. If the objective is to encourage dialogue on human rights in the member states and assist them to improve their human rights framework, it may matter less that sanctions are not an option. However, if the objective is to demonstrate *politically* that respect for fundamental rights is a key component of EU membership, a mechanism allowing for sanctions might be preferred.

Regardless of which mechanism is chosen, it is important to avoid duplication. Therefore, the mechanism should be created while bearing in mind the roles of each of the CoE, EU and UN mechanisms discussed in this Report, as well as other mechanisms, such as the UN Human Rights Council Complaints Procedure, that were not included. It is important to determine which kind of mechanism would provide added value, as well as querying which type of mechanism would best serve the EU's objective of promoting democracy, equality, the rule of law and respect for human rights. Ideally, the EU mechanism would synthesise the findings of the bodies examined above in Section I of this Report. Its added value would lie in the EU's proven influence in the member states. Such influence would allow the mechanism to have a structured dialogue that includes a procedure for follow-up and enforcement that may include a fundamental rights litigation strategy or even proceedings before the CJEU or national courts, if Article 2 TEU is made to have direct effect.

The characteristics of this ideal-type mechanism will be discussed next in Section IV.

## Section IV: An Ideal-Type Monitoring Mechanism

Section IV considers some of the specific characteristics of an ideal monitoring body, at each stage of the monitoring process, providing illustrative examples from the CoE, EU and UN levels.

### A. Introduction

Several points of reference can be consulted concerning both the need for a new EU monitoring mechanism and the characteristics which might be considered ideal.

For example, in her speech of 4 September 2013, Commissioner Reding highlighted “the need for a better developed set of instruments that would fill the space that exists at present between the Commission’s infringement role as guardian of the Treaties, and the Article 7 procedure, which is very heavy to handle... in practice almost impossible to use”.<sup>191</sup> She referred to the “emerging consensus on the need for a future rule of law mechanism”,<sup>192</sup> and set out four guiding principles for such a mechanism. First, the “legitimacy basis” for any new mechanism would need recognising and possibly reinforcing if the Commission were to have an enhanced monitoring, supervision and enforcement role.<sup>193</sup> She suggested that, at a minimum, any new mechanism must have official endorsement from the Council and Parliament.<sup>194</sup> Second, she emphasised the need for the Commission to draw upon the necessary expertise,<sup>195</sup> for example, through recourse to the Justice Scoreboard, which might serve as a starting point for a more comprehensive tool in the future, as well as the FRA, and national judicial and European networks.<sup>196</sup> Third, she highlighted the importance of the equal application of any new tool among the member states.<sup>197</sup> Finally, she stated that any new mechanism must take into account the complementary work of the CoE.<sup>198</sup>

As noted above, the European Parliament Annual Charter draft report for 2012 also makes suggestions for a new EU monitoring mechanism. It suggests that the mechanism could be based on a Commission Decision and set up relatively quickly, in a manner similar to that of the framework for monitoring corruption in the EU.<sup>199</sup> In particular the draft report recommends that the mechanism should (a) establish benchmarks; (b) monitor both the EU and the member states; (c) make objective and comparative assessments for each member state of all instruments on fundamental rights, including the CoE, the UN and even NGO documents; (d) create an annual and multi-annual framework surrounding Article 2 TEU that would include an inter-institutional forum on these values; (e) develop recommendations and penalties for violations of Articles 2 and 7 TEU; and (f) establish an “early-warning system” with provision for dialogue, a “formal notice” procedure and a “freezing procedure”.<sup>200</sup> In this respect, the report recommends “the opening of a dialogue between the European institutions and a member state where there is a risk of a serious breach of the values of the Union” and “the possibility for the European institutions to make recommendations as provided for in Article 7(1)”; and “fully supports the Commission’s proposal to use letters of formal notice in this context”.<sup>201</sup> The draft report also calls for the substance and procedure under Article 7 TEU to be

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<sup>191</sup> Reding above n10 at page 7.

<sup>192</sup> Reding above n10 at page 7.

<sup>193</sup> Reding above n10 at page 8.

<sup>194</sup> Reding above n10 at page 8.

<sup>195</sup> Reding above n10 at page 9.

<sup>196</sup> Reding above n10 at page 9.

<sup>197</sup> Reding above n10 at page 9.

<sup>198</sup> Reding above n10 at page 10.

<sup>199</sup> Draft European Parliament Report 2012 above n90 at para. 5.

<sup>200</sup> Draft European Parliament Report 2012 above n90 at para. 4.

<sup>201</sup> Draft European Parliament Report 2012 above n90 at para. 6.

“substantially revised”, including that the FRA be given a formal supportive role.<sup>202</sup> The report also calls for “the deletion of Article 51 of the Charter” and “the extension of the possibilities for redress and the powers of the Commission and the Court”.<sup>203</sup> It calls on the Commission “to propose the announced amendments to the treaties”.<sup>204</sup>

In its July 2013 Resolution regarding the standards and practices in fundamental rights in Hungary, the European Parliament indicated several characteristics that it believed should be included in an EU-level mechanism directed at ensuring compliance with Article 2 TEU. Broadly, it suggested that the mechanism should cooperate with existing mechanisms, such as those within the CoE, and indicated that the FRA’s mandate “should be enhanced to include regular monitoring of Member States’ compliance with Article 2 TEU”.<sup>205</sup> More specifically, the Resolution suggested that the mechanism should (a) be independent, efficient and effective; (b) fully cooperate with other international bodies acting within the sphere of fundamental rights and the rule of law; (c) monitor fundamental rights, democracy and the rule of law on a country basis; (d) conduct its monitoring in a uniform manner in all of the member states; (e) advise the EU of any risk of a breach/deterioration of the values in Article 2 TEU; and (f) make recommendations to the EU and the member states regarding appropriate responses to and remedies for any breach/deterioration of Article 2 TEU.<sup>206</sup>

Finally, in his academic review of monitoring mechanisms in the CoE, De Beco suggests that in order to be “satisfactory”, a human rights monitoring mechanism must fulfil five main criteria.<sup>207</sup> First, it should collect information at various stages throughout the monitoring process, and from various actors, including not just the states, but also civil society, NGOs and other monitoring mechanisms. Second, the monitoring mechanism must be inclusive in the sense that non-state actors should be involved. Third, the mechanism should be independent in order to bolster its credibility. Fourth, it must have access to accurate information from a multitude of credible sources. Finally, the mechanism should have a procedure by which the confidentiality of the sources of its information can be protected.

Next, the Report considers which characteristics might be considered ideal for a new EU Monitoring mechanism. It takes into account the characteristics of the bodies considered in this Report in Sections I and II, as well as the discussion immediately above.

## **B. Composition of the Monitoring Body**

In order to provide the monitoring mechanism with a high level of credibility, its members should preferably consist of independent experts. They should be selected on the basis of merit via an open call for applications. Alternatively, a system of nomination by a wide range of stakeholders (as done, for example, for the UN Special Procedures), would allow for external verification of expertise and suitability for the role, though could be potentially vulnerable to (the appearance of) politicisation. Staff should be remunerated and considered in-house staff (as with the FRA), rather than being consultants drafted in on short-term contracts, in order to ensure their independence from external influences. Provision should be made to ensure that the body is adequately resourced in order to address problems facing existing mechanisms, which have limited their activities (such as the FRA and CPT) or resulted in significant delays (such as the UN Treaty Bodies). Staff might be split into areas of

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<sup>202</sup> Draft European Parliament Report 2012 above n90 at para. 7.

<sup>203</sup> Draft European Parliament Report 2012 above n90 at para. 7.

<sup>204</sup> Draft European Parliament Report 2012 above n90 at para. 7.

<sup>205</sup> European Parliament resolution above n9 at para. 80.

<sup>206</sup> European Parliament resolution above n9 at para. 81.

<sup>207</sup> Gauthier de Beco (ed.), *Human Rights Monitoring Mechanism of the Council of Europe* (Routledge, 2013), at pages 10 and 192.

expertise, with country experts as well as thematic experts who might provide guidance and support on cross-cutting issues to colleagues.

In order to ensure coordination and collaboration with existing mechanisms, provision should be made to ensure representatives from the CoE, UN and existing EU bodies can participate within any mechanism (similar to arrangements at the FRA whereby the Management Board includes one independent person appointed by the CoE; and similar to coordination meetings at the UN level).

### **C. Triggering the Monitoring Process**

As noted above, we consider that scope remains for a new mechanism to monitor compliance by the EU institutions and EU member states, with the rule of law, democracy, and fundamental rights, and to provide an effective enforcement mechanism within the context of the EU. Ideally, therefore, any new mechanism should engage in automatic and periodic monitoring (as, for example, in many of the UN and CoE mechanisms) to enable the body to gather expertise and obtain an accurate picture of the situation regarding fundamental rights, democracy and the rule of law in the member states. However, as will be discussed below in Section IV.D, this should involve synthesising the findings of the bodies examined above in Section I, given their breadth of coverage.

It is important that the mechanism be able to respond to requests and information from individuals, member states and credible third parties (as, for example, in the UN Special Procedures and the UN Treaty Bodies System, to differing degrees). This would enable the mechanism to draw the attention of the Commission to systemic or structural violations as well as to those situations which require urgent action. In addition, requests for assistance or expert opinions can serve a preventive function, for example, by allowing the monitoring body to comment on proposed legislation or policy in advance of its implementation. We have not considered here that a new mechanism might accept complaints from individuals of violations by member states because this function is performed by the CJEU in relation to fundamental rights violations occurring within the scope of application of EU law; and, for those violations which occur outside of the scope of EU law, many of these will be justiciable before the ECtHR.

### **D. Collecting Information**

In order to publish effective and accurate research and recommendations, it is vital that the monitoring body have several credible sources of information.<sup>208</sup> As noted above, in order to avoid overlap and duplication, any new mechanism would clearly benefit from a synthesised summary of information, analysis and recommendations produced by existing CoE, EU and UN mechanisms, given the abundance of available data gathered at those levels regarding member state practice in relation to the rule of law, democracy and fundamental rights.

In addition, however, it should be open to the new mechanism to take into consideration additional sources of information, for the reasons outlined in Section IV.C above. For example, this might include staff engaging in 'on-the-ground' analysis through country visits (as is done by, for example, the Venice Commission, CPT, ECRI and the Special Procedures). This is one of the most effective ways of engaging with relevant stakeholders and obtaining an accurate picture of law, policy and practice in individual states. There might also be benefit in the mechanism making unannounced visits in order to prevent states from temporarily 'repairing' problematic situations in light of scheduled visits. Consent might be presumed by participation in the new monitoring mechanism itself.

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<sup>208</sup> De Beco above n207.

During discussions that preceded the establishment of the FRA, a CoE report expressed strong concerns about possible overlap with existing CoE mechanisms, noting that human rights bodies “actively monitor respect for common European standards on a country-by-country basis” and that other bodies conduct “political monitoring, both thematic and country-specific, in which issues relating to human rights, democracy and the rule of law play a predominant role”.<sup>209</sup> Therefore, it suggested extensive cooperation and exchange of information between the FRA and the CoE.<sup>210</sup> The CoE Parliamentary Assembly adopted a similarly narrow view as to the mandate of the FRA.<sup>211</sup> In fact, most contributors to the broader consultation highlighted the need to avoid overlap with work undertaken at the national and international levels.<sup>212</sup> Similar considerations clearly apply to any new EU monitoring mechanism and it is for this reason that a synthesised summary of information produced by existing mechanisms is suggested here, as well as other methods of coordination.

## **E. Applicable Standards**

The precise standards upon which the mechanism would base its assessment depend to some extent on the remit of the body.

As noted above, we suggest that scope remains for a new mechanism to monitor compliance by the EU institutions and EU member states with the values set out in Article 2 TEU, and to provide an effective enforcement mechanism within the context of the EU. Article 2 TEU refers broadly to the “the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. Therefore, any new mechanism should primarily refer to the Charter, as the EU’s fundamental rights instrument, as well as to any relevant case-law of the CJEU. However, many of the rights contained in the Charter are also contained in other international and regional instruments to which the EU member states are party. And, all of the EU member states are subject to each of the mechanisms described above in Section I (except for the UN Treaty Bodies System where there is not complete coverage among EU member states). Therefore, we suggested above in Section IV.D that the primary source of information for the new mechanism might be a synthesised summary of information produced by these existing mechanisms. Similarly, the applicable standards against which the EU member states would be assessed under the new mechanism should encompass those rights and values which feature in the relevant underlying instruments to which the EU member states are party at CoE, EU and UN levels. (Similarly, for example, the basis for review under the UPR includes human rights instruments to which a state is party.) In particular, the Charter provides that in so far as the Charter contains rights which correspond with rights in the ECHR, they are to be interpreted in line with the latter (Article 52(3) Charter). Therefore, the new mechanism should refer to the ECHR and to ECtHR jurisprudence in order to avoid conflicts between EU and CoE standards. This will be all the more important when the EU accedes to the ECHR.

The mechanism should also be able to consult other regional and international instruments to which the EU member states are party; as well as related soft law, such as the Venice Commission’s checklist on the rule of law,<sup>213</sup> perhaps with a view toward encouraging states to set standards beyond the minimum provided for in the Charter.

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<sup>209</sup> CoE Information Documents, ‘The Fundamental Rights Agency of the European Union - A Council of Europe Perspective’ (SG/Inf(2004)34) (16 December 2004) at page 4.

<sup>210</sup> CoE Information Documents above n209 at page 10.

<sup>211</sup> See discussion in De Schutter above n44 at pages 16-19.

<sup>212</sup> European Commission, ‘Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights {SEC(2005)849}’ (Brussels, 30.06.2005) (COM/2005/0280 final - CNS 2005/0124) at page 2.

<sup>213</sup> Venice Commission, ‘Report on the Rule of Law’ (Adopted 86th Plenary Session 25-26 March 2011) available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29003rev-e>.

## **F. Procedure for Assessment**

A country specialist within the new mechanism, with input from the thematic experts, should prepare a synthesis report summarising information produced by existing CoE, EU and UN mechanisms. Member states should be requested to respond to this synthesis report, which could contain both a summary of relevant information from existing mechanisms, as well as findings and analysis by the new EU mechanism. This would significantly reduce overlap with other processes and the reporting burden on states. Each member state should be reviewed on a periodic basis every four or five years with an intermediate procedure to allow for follow-up on specific “priority” recommendations (as is done, for example, by some of the UN Treaty Bodies and ECRI).

The synthesis report and the state’s written response should then be used as a basis for dialogue with the member state under review. Other member states and relevant stakeholders should also be able to contribute to this dialogue. Alternatively, engagement could take place solely via written contributions, however, an oral exchange of information would allow for more direct accountability and exchange of views. An outcome document containing recommendations should then be produced on which the state under review should be able to provide comments. It is important that the monitoring body should provide the member state with an opportunity to respond to any conclusions or opinions it draws with respect to a particular national situation and before the documents are finalised and published. This procedure for assessment is similar, for example, to the UPR’s working methods.

All documents produced by and submitted to the mechanism (including any responses from the state under review) should be publicly available in order to ensure accountability, and to allow for lesson learning and sharing of best practice amongst the wider EU membership. Therefore, it should be made clear to external contributors that any submissions will be published and so should not contain sensitive or confidential information.

## **G. Procedure for Follow-up**

The member state under review should be responsible for implementing the recommendations set out in the final outcome document. External stakeholders, in particular civil society and NGOs, could have a role to play in this regard by raising public awareness, conducting campaigns and advocacy initiatives around particular issues, and maintaining pressure on the government to comply with the mechanism’s recommendations.

As noted above, an intermediate procedure should be put in place in order to provide an opportunity for follow-up on specific recommendations identified in the outcome document. For example, the body might initiate a procedure similar to that of certain UN Treaty Bodies or ECRI in which certain recommendations to states are considered a “priority” for these purposes. For all other recommendations, the next periodic report should provide an opportunity to assess implementation.

### ***Focus on the Article 7 Sanctions Mechanism***

As suggested above, it is important that the new mechanism be able to draw the attention of the European Commission to systemic or structural violations as well as those situations requiring urgent action. The Commission could then take further action via infringement proceedings or through the application of the Article 7 TEU sanctions mechanism.

In this regard, the CoE report (issued during the discussions that preceded the establishment of the FRA) emphasised that existing CoE mechanisms “are sufficient to ensure that situations such as those

contemplated in Article 7 TEU are identified at an early stage” and that, as an exceptional measure, Article 7 TEU “could not serve as a basis for the Agency to monitor regularly and routinely respect for human rights by EU Member States acting within their own domestic legal orders”.<sup>214</sup> However, the issue of Article 7 TEU was not so clear cut in the broader consultation; while the member states were generally “very prudent” on this issue, NGOs favoured a strong role for the Agency in this respect.<sup>215</sup> In fact, the Commission’s June 2005 proposals did suggest that the Council might make use of the Agency’s expertise in relation to Article 7 TEU; however, it emphasised that the FRA is not a “complaint resolution mechanism” and “will not, however, carry out systematic and permanent monitoring of the Member States for the purposes of Article 7”.<sup>216</sup> Therefore, our suggestion, whereby the new mechanism could play a contributory and supporting role to the Commission in relation to Article 7, might be amenable.

We would endorse the suggestion from Commissioner Reding that a formal warning procedure be introduced in relation to Article 7 TEU. For example, she suggested taking a similar approach to Article 7 situations as is already done for Commission infringement proceedings whereby “formal notice” is given to member states where a systemic rule of law crisis may be developing.<sup>217</sup> She suggests this new approach could be laid down in “a new policy Communication of the Commission... politically endorsed by the European Council and the European Parliament”.<sup>218</sup>

## H. Concluding Remarks

In light of our review of existing mechanisms at CoE, EU and UN levels, we have suggested in Section IV some of the specific characteristics of an ideal monitoring body at each stage of the monitoring process. Clearly, the options chosen in this regard will have an impact on choice of legal basis and on whether or not existing powers are sufficient to establish the new body. This in turn will impact on both the feasibility and the ease of creation of a new mechanism; and may also foretell the willingness of states to cooperate with any new process.

## Conclusion

In this Report, we have suggested that scope remains for a new mechanism to monitor compliance by the EU institutions and member states with the rule of law, democracy, and fundamental rights, and to provide an effective enforcement mechanism within the context of the EU.

All of the EU member states are subject to each of the mechanisms described in **Section I** (except for the UN Treaty Bodies System, where there is not complete coverage). Therefore, we have suggested that any new mechanism should not engage purely in data collection but, instead that added value could be better achieved by drawing on a synthesised summary of information produced by these existing mechanisms at CoE, EU and UN level; and by providing an effective enforcement mechanism at EU level. We have seen in **Section II** that the EU has struggled to identify the most effective method by which to monitor human rights practice within the EU institutions and the member states; and that existing EU mechanisms for the protection of fundamental rights, and in particular for monitoring the rule of law and democracy, are not adequate.

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<sup>214</sup> CoE Information Documents above n209 at page 7.

<sup>215</sup> European Commission Proposal above n212 at page 2.

<sup>216</sup> European Commission Proposal above n212 at pages 3-4.

<sup>217</sup> Reding speech above n10 at pages 2 and 10.

<sup>218</sup> Reding speech above n10 at page 10.

As discussed in **Section III**, there must be a sufficient legal basis for any new EU monitoring mechanism and the chosen legal basis will inform the role and function of whatever mechanism is chosen. For example, if the ultimate objective is to create a new mechanism, which will have enforcement powers outside of the context of Article 7 TEU, Treaty amendment will likely be required. Finally, in **Section IV**, in light of our review of existing mechanisms at CoE, EU and UN levels, we have suggested some of the specific characteristics of an ideal monitoring body at each stage of the monitoring process. It is our view that the mechanism should be created while bearing in mind the roles of each of the CoE, EU and UN mechanisms discussed in this Report, as well as other mechanisms that were not included. We have suggested that ideally, the new mechanism should synthesise information and findings from existing mechanisms; and that its added value would lie in the EU's proven influence in the member states. Clearly, the options chosen for the new mechanism will have an impact on choice of legal basis and on whether or not existing powers are sufficient to establish the new body. This in turn will impact on both the feasibility and the ease of creation of a new mechanism; and may also foretell the willingness of states to cooperate with any new process.

It is a time of increased debate about a possible model for a new mechanism to monitor implementation of the EU's fundamental values of the rule of law, democracy and fundamental rights. Any new mechanism should have the potential to effect real change where necessary and to assess general state practice with regard to democracy, the rule of law and fundamental rights. We hope that this Report is a helpful contribution to that discussion.

## Annex: Overview of Existing Monitoring Mechanisms<sup>219</sup>

### A. Introduction

Council of Europe	
European Commission for Democracy through Law (the Venice Commission)	<ul style="list-style-type: none"> <li>• Established in 1990 by 18 Council of Europe (CoE) states.</li> <li>• Independent.</li> <li>• Request-driven.</li> <li>• Provides states with legal advice on draft of existing legislation and produces thematic reports and studies.</li> <li>• Fosters the understanding of participating states' legal systems (i.e. of the 47 CoE states and 12 non-member states).</li> <li>• Promotes the rule of law and democracy.</li> <li>• Examines the work of democratic institutions.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>• Created in 1999 by a resolution of the CoE's Committee of Ministers.</li> <li>• Independent, non-judicial body.</li> <li>• Raises awareness and encourages respect for human rights within CoE states.</li> <li>• Promotes education and provides information and advice on human rights.</li> <li>• Identifies deficiencies in law and practice regarding human rights.</li> <li>• Several inter-governmental partners, including the United Nations (UN), European Union (EU) and Organization for Security and Cooperation in Europe (OSCE).</li> <li>• Works with human rights NGOs, universities and think-tanks as well as with national ombudsman and human rights institutions.</li> <li>• Function reinforced with protection of human rights defenders.</li> <li>• Specifically cannot take up individual complaints.</li> </ul>
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)	<ul style="list-style-type: none"> <li>• Created in 1989 under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the Convention).</li> <li>• Monitors implementation of the Convention, which entered into force in 1989.</li> <li>• Non-judicial preventive function.</li> </ul>
European Commission against Racism and Intolerance (ECRI)	<ul style="list-style-type: none"> <li>• Created in 1993 by the Vienna Summit of the CoE Heads of states and government in its Plan of Action on Combating Racism, Xenophobia, Anti-Semitism and Intolerance.</li> <li>• Reviews national legislation and policy.</li> <li>• Proposes relevant action.</li> <li>• Makes general policy recommendations.</li> <li>• Examines relevant international legal instruments to strengthen their application.</li> </ul>

<sup>219</sup> Note that each Treaty Body's and each Special Procedure's specific procedures and working methods may differ from the general approach described here.

Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (PACE Monitoring Committee)	<ul style="list-style-type: none"> <li>• Created in 1997 by CoE Resolution 1115 (1997).</li> <li>• Monitors CoE states' fulfilment of obligations under the Statute of the CoE, the European Convention on Human Rights (ECHR) and all other CoE Conventions to which they are parties.</li> <li>• Monitors state commitments following accession to the CoE.</li> </ul>
EU Agency for Fundamental Rights (FRA)	<ul style="list-style-type: none"> <li>• Created in 2007 on the basis of Article 352 Treaty on the Functioning of the European Union (TFEU) (ex 308 TEC); preceded by the EUMC.</li> <li>• Mandated to permanently study racism, xenophobia and other intolerance; other work set by Commission through a Multi-Annual Framework, which presently includes, e.g., access to justice, victims' rights, immigration.</li> <li>• Coordinates its annual work programme with that of the CoE.</li> <li>• Provides independent, evidentiary-based advice on fundamental rights in the EU to EU institutions and the member states when they implement EU law and policy.</li> <li>• Specialised agency of the EU.</li> <li>• Collects and analyses information and data on fundamental rights protection.</li> <li>• Can draft opinions on fundamental rights issues upon request.</li> <li>• Provides assistance and expertise.</li> <li>• Engages in communication and awareness-raising.</li> </ul>
<b>United Nations</b>	
Universal Periodic Review (Human Rights Council) (UPR)	<ul style="list-style-type: none"> <li>• UPR established when the Human Rights Council (HRC) was created in 2006.</li> <li>• It is a universal periodic review of "the fulfilment by each state of its human rights obligations and commitments".<sup>220</sup></li> <li>• Cooperative mechanism based on "interactive dialogue".</li> <li>• <u>EU coverage</u> – All EU member states (and the current five candidate countries) are UN member states and therefore covered by the UPR mechanism.</li> </ul>
Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li>• The Commission on Human Rights (replaced by the HRC), first established an ad hoc working group of experts in 1967 (in respect of South Africa).</li> <li>• The Special Procedures are "independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective".<sup>221</sup></li> <li>• Described as "most directly accessible mechanism of the international human rights machinery".<sup>222</sup></li> <li>• As at 1 October 2013, there are 14 country mandates and 37 thematic mandates.</li> <li>• <u>EU coverage</u> – As of 3 September 2013, all EU member states (and the five current candidate countries) have</li> </ul>

<sup>220</sup> GA Resolution 60/251 'Human Rights Council' (UN Doc A/RES/60/251) (3 April 2006), para. 5(e).

<sup>221</sup> See 'Special Procedures of the Human Rights Council', available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>.

<sup>222</sup> See 'UN Special Procedures Facts and Figures 2012' (February 2013), p. 1 available at: [http://www.ohchr.org/Documents/HRBodies/SP/Facts\\_Figures2012.pdf](http://www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2012.pdf).

	<p>extended standing invitations to all thematic Special Procedures.</p> <ul style="list-style-type: none"> <li>As of 1 October 2013, no EU member states (and none of the five current candidate countries) are subject to a country mandate.</li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li>The Human Rights Treaty Bodies monitor implementation of the nine core international human rights treaties.</li> <li>Committee on the Elimination of Racial Discrimination (<u>CERD</u>).</li> <li>Committee on Economic, Social and Cultural Rights (<u>CESCR</u>).</li> <li>Human Rights Committee (<u>CCPR</u>).</li> <li>Committee on the Elimination of Discrimination against Women (<u>CEDAW</u>).</li> <li>Committee against Torture (<u>CAT</u>).</li> <li>Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (<u>SPT</u>).</li> <li>Committee on the Rights of the Child (<u>CRC</u>).</li> <li>Committee on Migrant Workers (<u>CMW</u>).</li> <li>Committee on the Rights of Persons with Disabilities (<u>CRPD</u>).</li> <li>Committee on Enforced Disappearances (<u>CED</u>).</li> </ul> <p><u>EU coverage</u> – Not all EU member states are parties to all nine treaties and their optional protocols.</p>

## B. Composition of the Monitoring Body

Council of Europe	
Venice Commission	<ul style="list-style-type: none"> <li>Experts serving in individual capacities.</li> <li>One member and one substitute per member state, elected for renewable four-year term by his/her state.</li> <li>Groups of members draft the opinions and studies, with assistance of the secretariat.</li> <li>Assisted by specialist consultants.</li> <li>Elected Bureau of members including a President, three Vice-Presidents and four other members.</li> <li>Sub-committees may be created.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>Commissioner elected by Parliamentary Assembly.</li> <li>Candidates submitted by member states.</li> <li>Commissioner must be a national of a CoE state.</li> <li>Elected for non-renewable term of six years.</li> </ul>
CPT	<ul style="list-style-type: none"> <li>Independent experts from varied backgrounds.</li> <li>Elected by CoE Committee of Ministers from a list drafted by the CoE Bureau of the Consultative Assembly.</li> <li>Three candidates per national delegation, two of which must be nationals of that delegation.</li> <li>Elected for a term of four years that may be renewable twice.</li> </ul>
ECRI	<ul style="list-style-type: none"> <li>47 members (one per CoE state) appointed by the state's government.</li> <li>Elected for renewable term of five years.</li> <li>Small contingent of non-voting observers, such as the Holy See.</li> </ul>

	<ul style="list-style-type: none"> <li>• Bureau composed of Chair and two Vice-Chairs and four other elected members.</li> </ul>
PACE Monitoring Committee	<ul style="list-style-type: none"> <li>• 84 nominated members from the CoE's Parliamentary Assembly.</li> <li>• Includes chairpersons from Political Affairs Committee and the Committee on Legal Affairs and Human Rights.</li> <li>• Two co-rapporteurs per each CoE state for maximum of five years.</li> <li>• Sub-committees may be created to deal with specific issues.</li> </ul>
<b>European Union</b>	
FRA	<ul style="list-style-type: none"> <li>• Approximately 90 staff members with Management Board, Executive Board, Scientific Committee and a Director.</li> <li>• The Management Board guides the work of the FRA and sets its priorities. It is composed of independent experts, one appointed by each Member states, two European Commission representatives and an independent expert appointed by the CoE.</li> <li>• The Executive Board advises the Director and includes a Chairperson and Vice-Chairperson, two members of the Management Board and one European Commission representative.</li> <li>• The Scientific Committee has 11 independent members appointed by the Management Board (based on European Parliament recommendations) according to an open call for applications and selection process.</li> <li>• The Director leads the FRA and is supported by a Directorate and is charged with ensuring the objectives of the FRA are met efficiently and effectively.</li> <li>• Includes specialist departments as the Freedom and Justice Department and the Equality and Citizens' Rights Department.</li> <li>• Includes a multi-disciplinary research network, FRANET, which is composed of National Focal Points in each EU member state and which provides the FRA with fundamental rights data to facilitate the work of the FRA.</li> <li>• Fundamental Rights Platform: this is the FRA's network of civil society organisations that play an active role in the work of the FRA.</li> <li>• Staff are experts from a variety of backgrounds, legal and non-legal.</li> <li>• Each EU member state appoints a National Liaison Officer for information exchange.</li> </ul>
<b>United Nations</b>	
UPR	<ul style="list-style-type: none"> <li>• Reviews are conducted by the UPR Working Group which is chaired by the HRC President and composed of the 47 member states of the Council.</li> <li>• A "troika" of three rapporteurs assists each review and are selected by drawing lots among members of the Council and from different UN Regional Groups.</li> <li>• There are opportunities for other countries and stakeholders to participate during the Working Group's review and during the HRC's plenary session.</li> </ul>

Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li>• Special Procedures are either an individual (“Special Rapporteur” or “Independent Expert”) or a working group of five members (one from each of the UN Regional Groups).</li> <li>• General criteria as well as technical and objective requirements are set out.</li> <li>• Mandate-holders serve in their personal capacities and are not UN staff. Receive no remuneration, except expenses.</li> <li>• <u>Length of mandate</u>: Three years (thematic) and one year (country). These mandates can be extended.</li> <li>• <u>Tenure of mandate-holders</u>: No more than six years (two terms of three years for thematic mandate-holders).</li> <li>• <u>Appointment</u>: Candidates can be nominated by a wide range of stakeholders; OHCHR prepares a public list of applicants; a Consultative Group (appointed by the HRC) considers the applications and interviews shortlisted candidates; the President chooses a candidate for each post on the basis of the Group’s recommendations and following broad consultations, and presents a list to states; appointments are completed on HRC approval.</li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li>• The treaty bodies are committees of independent experts who are nominated and elected by state parties for fixed, renewable terms of four years.</li> <li>• Elections for half of the members are held every two years, (except for SPT, CRPD and CED whose membership is renewable only once). Treaties do not otherwise impose a limit on number of times a member’s term can be renewed.</li> <li>• CERD – 18 members.</li> <li>• CESCO – 18 members.</li> <li>• CCPR – 18 members.</li> <li>• CEDAW – 23 members.</li> <li>• CAT – 10 members.</li> <li>• SPT – 25 members.</li> <li>• CRC – 18 members.</li> <li>• CMW – 14 members.</li> <li>• CRPD – 18 members.</li> <li>• CED – 10 members.</li> </ul>

### C. Triggering the Monitoring Process

<b>Council of Europe</b>	
Venice Commission	<ul style="list-style-type: none"> <li>• Requests for legal opinions from CoE member states, CoE institutions, or international organisations such as the EU.</li> <li>• Requests for amicus curie opinions from national courts or the European Court of Human Rights (ECtHR).</li> <li>• Requests for amicus ombud opinions from national ombudspersons.</li> <li>• Thematic research on own-initiative.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>• Engages in on-going evaluations of human rights practice in CoE states.</li> <li>• Not a complaint body, but may be alerted to specific issues by a variety of bodies, e.g. government or national human rights organisations.</li> </ul>

	<ul style="list-style-type: none"> <li>• Focuses on systemic problems where general measures at national level are needed.</li> <li>• May use relevant information given to it by national bodies, individuals and relevant organisations.</li> <li>• Can act as third party intervener before the ECtHR.</li> </ul>
CPT	<ul style="list-style-type: none"> <li>• On-going monitoring process, no trigger per se; has preventive function.</li> <li>• Engages in scheduled (regular) and ad hoc state visits.</li> </ul>
ECRI	<ul style="list-style-type: none"> <li>• Country-by-country and thematic monitoring.</li> <li>• Not a complaints body; engages in continuous monitoring.</li> <li>• Relations with civil society, e.g., national roundtables, expert seminars.</li> </ul>
PACE Monitoring Committee	<ul style="list-style-type: none"> <li>• Monitoring procedure begins six months after state's accession to the CoE.</li> <li>• Application to initiate monitoring procedure may come from: <ul style="list-style-type: none"> <li>– General committees of the Assembly.</li> <li>– The PACE Monitoring Committee.</li> <li>– At least 20 Assembly members representing at least six national delegations and two political groups.</li> <li>– Bureau of the Parliamentary Assembly.</li> </ul> </li> <li>• Applications from outside (of) the PACE Monitoring Committee will be investigated by two co-rapporteurs.</li> <li>• Decision by the PACE Monitoring Committee and the Bureau to (re)open monitoring procedure is transformed into draft resolution for discussion and adoption by the Parliamentary Assembly. Any decision not to (re)open monitoring must be recorded and confirmed by the Parliamentary Assembly.</li> </ul>
<b>European Union</b>	
FRA	<ul style="list-style-type: none"> <li>• Not complaint-based.</li> <li>• Continually engages in awareness-raising and provision of advice.</li> <li>• Can react and report on urgent fundamental rights situations in specific EU member states within the Agency's remit, e.g. by consulting its stakeholders.</li> <li>• Advice and assistance may result from: <ul style="list-style-type: none"> <li>– Drafting of thematic reports.</li> <li>– Formal request by EU institution for legal opinions or analysis on thematic issues or proposed legislation.</li> <li>– Request by EU member state for assistance on specific fundamental rights issue.</li> </ul> </li> <li>• Development of training materials and programmes.</li> <li>• Collection and dissemination of 'promising practices'.</li> </ul>
<b>United Nations</b>	
UPR	<ul style="list-style-type: none"> <li>• Periodic monitoring of all UN member states.</li> <li>• First cycle 2008-2011 reviewed all UN member states.</li> <li>• Second cycle scheduled for 2012-2016 – the order of review will remain the same for this and subsequent cycles.</li> <li>• For second and subsequent cycles, the periodicity of review will be four and half years – implying the consideration of 42 states per year during three UPR Working Group sessions.</li> </ul>

Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li>• Special procedures “can be activated even where a state has not ratified the relevant instrument or treaty, and it is not necessary to have exhausted domestic remedies to access the special procedures”; and “Special procedures can therefore be used for any country or human rights issue, within the parameters of existing mandates”.<sup>223</sup></li> <li>• <u>Communications</u>: Decision whether/not to intervene is at discretion of mandate-holder in light of mandate and criteria in Code of Conduct. Criteria generally relate to reliability of source; credibility of information received; details provided; and scope of mandate.</li> <li>• <u>Country visits</u>: Governments may issue an invitation; mandate-holders may seek an invitation; UN General Assembly (UNGA), HRC or High Commissioner for Human Rights may suggest/request a visit. As at 3 September 2013, 95 states had extended standing invitations.</li> <li>• <u>Additional activities</u>: Mandate-holders may also prepare thematic studies; convene expert consultations; and participate in seminars and conferences.</li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li>• <u>Consideration of state parties’ reports</u>: All treaty bodies (except SPT) periodically consider reports submitted by state parties on implementation of the treaty provisions. In general, states must submit an initial report within one or two years of the treaty entering into force for the country in question; and subsequently, states must report periodically (usually every four or five years).</li> <li>• <u>Consideration of individual complaints</u>: All treaty bodies (except SPT) may, under certain circumstances, consider complaints from individuals alleging human rights violations</li> <li>• <u>Consideration of inter-state complaints</u>: (1) Some treaty bodies allow state parties to submit complaints about alleged violations by other state parties. These procedures have never been used. (2) Some treaty bodies provide for the resolution of inter-state disputes concerning the interpretation/application of a convention.</li> <li>• <u>Conduct country inquiries</u>: Some treaty bodies may conduct inquiries “if they receive reliable information containing well-founded indications of serious, grave or systematic violations of the conventions in a state party”.<sup>224</sup></li> <li>• <u>General comments</u>: Each of the treaty bodies publishes general comments on its interpretation of treaty provisions. The SPT has published similar documents.</li> <li>• <u>General discussions/thematic debates</u>: Some treaty bodies hold general discussions on particular themes which are usually open to external stakeholders.</li> </ul>

<sup>223</sup> OHCHR Handbook for Civil Society (2008), p. 120 available at:

[http://www.ohchr.org/en/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](http://www.ohchr.org/en/AboutUs/CivilSociety/Documents/Handbook_en.pdf).

<sup>224</sup> OHCHR, ‘The United Nations Human Rights Treaty System: Fact Sheet No. 30/Rev. 1 (2012), p. 32 available at:

<http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>.

## D. Collecting Information

<b>Council of Europe</b>	
Venice Commission	<ul style="list-style-type: none"> <li>• Desk-based research and country visits.</li> <li>• Members work in working groups/sub-committees and with relevant experts/ consultants.</li> <li>• State visits for discussion with national authorities, civil society and other interested stakeholders.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>• Country visits with assessment reports and recommendations to national authorities.</li> <li>• Desk-based thematic research leading to opinions, issue papers and reports.</li> <li>• Information exchange with governments, civil society and educational institutes, as well as national ombudsman and human rights structures.</li> </ul>
CPT	<ul style="list-style-type: none"> <li>• Periodic country visits once every four years to monitor compliance, plus ad hoc visits for which CPT delegations must be given unlimited access to places of detention, e.g. they must be allowed private interviews with persons deprived of their liberty.</li> </ul>
ECRI	<ul style="list-style-type: none"> <li>• Reviews state legislation, policy and relevant international legal instruments and conducts country visits and confidential dialogues with states to produce analytic reports with recommendations.</li> <li>• Country visits.</li> <li>• Engages with civil society via information sessions in the states, e.g. meetings and hearings for information exchange.</li> <li>• Consults relevant studies, research and press articles.</li> </ul>
PACE Monitoring Committee	<ul style="list-style-type: none"> <li>• Predominantly engages in analysis of national measures/commitments often including state visits</li> </ul>
<b>European Union</b>	
FRA	<ul style="list-style-type: none"> <li>• Consults a variety of resources to gather information according to theme, rather than by member state, including legislative instruments, court judgments and academic commentary.</li> <li>• Engages in desk-based legal analysis.</li> <li>• Engages in fieldwork, including surveys and interviews.</li> <li>• FRA sets themes and methodology yet data collection is typically conducted by national experts outside the Agency via its network of national focal points, FRANET.</li> </ul>
<b>United Nations</b>	
UPR	<ul style="list-style-type: none"> <li>• Review based on three key documents:</li> <li>• National report – Information prepared by the state concerned and any other relevant information, presented orally or in writing; encouraged to prepare through a broad consultation process at the national level with all relevant stakeholders.</li> <li>• Compilation prepared by OHCHR of information contained in UN documents e.g., treaty bodies, special procedures etc.</li> <li>• Summary prepared by OHCHR of information from other relevant stakeholders.</li> </ul>

	<ul style="list-style-type: none"> <li>Note that second and subsequent cycles should focus on the implementation of accepted recommendations and development of human rights situations.</li> </ul>
Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li>Mandate-holders are “called upon to take account of all available sources of information that they consider to be credible and relevant” received from range of stakeholders.<sup>225</sup></li> <li>Dialogue – Opportunities for governments to comment on allegations against them and for those making the allegations to comment on these responses.</li> <li>Country visits – These allow mandate-holders to obtain first-hand information; for dialogue with governments and other stakeholders; and are aimed at assessing the actual human rights situation in a country. OHCHR provides a “country assessment” in advance of a visit.</li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li>The treaty bodies receive information from state parties, individuals and other relevant stakeholders. Some conduct country visits in the performance of some of their duties.</li> </ul>

## E. Applicable Standards

Council of Europe	
Venice Commission	<ul style="list-style-type: none"> <li>ECHR and case law of the ECtHR.</li> <li>Previous opinions and guidelines of Venice Commission.</li> <li>Applicable principles of international and regional law.</li> <li>Details vary according to topic at issue.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>ECHR.</li> <li>Case law of the ECtHR.</li> <li>Its own previous opinions and reports.</li> <li>Documents from other CoE bodies and from international organisations, details vary according to topic at issue.</li> </ul>
CPT	<ul style="list-style-type: none"> <li>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its protocols.</li> <li>CPT Standards.</li> <li>ECHR Article 3.</li> <li>ECtHR Article 3 case law.</li> </ul>
ECRI	<ul style="list-style-type: none"> <li>ECHR and other applicable CoE documents, depending on the subject matter, e.g., the European Charter for Regional or Minority Languages, its own General Policy Recommendations, European Convention on the Legal Status of Migrant Workers.</li> <li>Documents produced by other intergovernmental organisations, national authorities and local, national or international NGOs.</li> </ul>
PACE Monitoring Committee	<ul style="list-style-type: none"> <li>Statute of the CoE.</li> <li>ECHR and ECtHR judgments.</li> <li>All other CoE conventions.</li> </ul>

<sup>225</sup> Manual of Operations of the Special Procedures of the Human Rights Council (August 2008) ('Manual'), para. 23 available at: [http://www.ohchr.org/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf).

European Union	
FRA	<ul style="list-style-type: none"> <li>• Charter of Fundamental Rights of the EU.</li> <li>• CoE treaties and other documents, including the ECHR and the ECtHR case law.</li> <li>• UN documents.</li> <li>• OSCE documents.</li> </ul>
United Nations	
UPR	<ul style="list-style-type: none"> <li>• Basis for review: Charter of the UN; Universal Declaration of Human Rights; Human Rights instruments to which a state is party; Voluntary pledges and commitments made by states.</li> <li>• The review also takes into account applicable international humanitarian law.</li> </ul>
Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li>• Mandate-holders shall "Evaluate all information in the light of internationally recognized human rights standards relevant to their mandate, and of international conventions to which the state concerned is a party".<sup>226</sup></li> <li>• <u>Thematic mandates</u>: Mandated to "investigate the situation of human rights in all parts of the world, irrespective of whether a particular government is a party to any of the relevant human rights treaties".<sup>227</sup></li> <li>• <u>Country mandates</u>: Mandate-holders are "called upon to take full account of all human rights (civil, cultural, economic, political and social) unless directed otherwise".<sup>228</sup></li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li>• The Human Rights Treaty Bodies monitor implementation of the nine core international human rights treaties.</li> <li>• <u>ICERD</u> International Convention on the Elimination of All Forms of Racial Discrimination 7 March 1966.</li> <li>• <u>ICESCR</u> International Covenant on Economic, Social and Cultural Rights 16 Dec 1966 (and its optional protocol 2008).</li> <li>• <u>ICCPR</u> International Covenant on Civil and Political Rights 16 Dec 1966 (and its optional protocols 1966 and 1989).</li> <li>• <u>CEDAW</u> Convention on the Elimination of All Forms of Discrimination against Women 18 Dec 1979 (and its optional protocol 1999).</li> <li>• <u>CAT</u> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 Dec 1984 (and its optional protocol 2002).</li> <li>• <u>CRC</u> Convention on the Rights of the Child 20 Nov 1989 (and its optional protocols 2000, 2000 and 2011 (latter not yet in force)).</li> <li>• <u>ICRMW</u> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 18 Dec 1990.</li> <li>• <u>CRPD</u> Convention on the Rights of Persons with Disabilities 13 Dec 2006 (and its optional protocol 2006).</li> <li>• <u>CPED</u> International Convention for the Protection of All Persons from Enforced Disappearance 20 Dec 2006.</li> </ul>

<sup>226</sup> HRC Resolution 5/2, 'Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council', Article 6(c) of the Annex, available at: [http://www.ohchr.org/Documents/HRBodies/SP/CodeofConduct\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/SP/CodeofConduct_EN.pdf)

<sup>227</sup> Manual, para. 4.

<sup>228</sup> Manual, para. 4.

## F. Procedure for Assessment

Council of Europe	
Venice Commission	<ul style="list-style-type: none"> <li>• Focuses on exchange of information rather than imposing solutions.</li> <li>• Working groups of rapporteurs and experts draft opinion on compliance with relevant standards and issue proposals for improvement after a request for examination is made or a draft of legislative text given and then engage in state visits prior to drafting final opinion.</li> <li>• If necessary, draft opinions are discussed in sub-commission with national authorities first, and ultimately put forward for adoption at plenary session.</li> <li>• Final opinions submitted to requesting party and made public.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>• Country visits, dialogue with relevant partners and desk-based research by the Commissioner leads to production of advice and information in the form of opinions, issue papers and reports, whether or not with recommendations.</li> </ul>
CPT	<ul style="list-style-type: none"> <li>• In order to execute its preventative function, based on its country visits, the CPT provides states with recommendations to strengthen protection of persons deprived of liberty in detailed reports.</li> <li>• No obligation to publish these reports, seeing the principle of confidentiality applies, but states often allow reports to be made public.</li> </ul>
ECRI	<ul style="list-style-type: none"> <li>• Gathers all information into draft texts to initiate a confidential dialogue with states and other relevant bodies and individuals, during which these texts are reviewed and revised.</li> <li>• Works with countries individually, rather than engaging in comparisons.</li> <li>• Invites comments from national authorities and civil society on follow-up to previous recommendations and collects new background information.</li> <li>• Working Group prepares monitoring visit.</li> <li>• Country visits with stakeholder meetings.</li> <li>• Adopts and sends draft report to states for comment.</li> <li>• Review of report in light of comments.</li> <li>• Opportunity for national authorities to provide oral remarks to ECRI (Bureau and rapporteurs).</li> <li>• Adoption of final report.</li> <li>• Opportunity for national authorities to amend in appendix.</li> <li>• Final report sent to national authorities and published.</li> </ul>
PACE Monitoring Committee	<ul style="list-style-type: none"> <li>• Drafts reports which examine compliance of national law and policy with CoE obligations.</li> <li>• Reports include draft resolution with proposals for improvement.</li> <li>• Committee submits reports to Parliamentary Assembly for public debate.</li> </ul>

European Union	
FRA	<ul style="list-style-type: none"> <li>• According to its Multi Annual Framework, it examines national data against applicable standards.</li> <li>• Methodology depends on nature of issues to be examined, e.g., qualitative or quantitative surveys may be employed.</li> <li>• Quality assurance is provided by internal peer review and the Scientific Committee.</li> <li>• After data is collected, FRA drafts opinions and conclusions, particularly on development and implementation of legislation and policy.</li> <li>• The opinions are addressed to the EU institutions or member states and published.</li> </ul>
United Nations	
UPR	<ul style="list-style-type: none"> <li>• <u>Stage One</u>: Troika collates questions/issues from states. UPR Working Group holds a three and half hour “interactive dialogue” with the country under review. There is opportunity for other states to contribute. Working Group then adopts outcome document which contains summary of proceedings, recommendations/conclusions and voluntary pledges. Country under review indicates which recommendations it does/does not accept.</li> <li>• <u>Stage Two</u>: The report is sent to the HRC. One hour is allocated per country. There is opportunity for the country under review to present its views before the outcome document is adopted. Other states and stakeholders can also contribute. A report of the HRC session is prepared.</li> </ul>
Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li>• Generally, special procedures should foster a constructive dialogue with states. In addition, mandate-holders report regularly on their activities to the relevant UN bodies, in particular the HRC and GA. States are given opportunity to respond and to engage in dialogue.</li> <li>• <u>Country visits</u>: The agenda is determined by the mandate-holder; and they normally meet with the government at the start and end of the visit. A press conference is usually organised to share preliminary conclusions and responses from country. Mission report is prepared with the itinerary, analysis of the situation, conclusions and recommendations. Comments from the country on substance should be annexed to the report and may be issued as an official document if government so requests.</li> <li>• <u>Communications</u>: <ul style="list-style-type: none"> <li>– Most Special Procedures act on information received by sending a communication to relevant government via diplomatic channels. Aim is to obtain clarification and promote measures designed to protect human rights. Not intended as a substitute for judicial or other proceedings at national level.</li> <li>– Urgent appeals: Used where “alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or on-going damage of a very grave nature to victims that cannot be addressed in a timely manner” by letters of</li> </ul> </li> </ul>

	<p>allegation.<sup>229</sup></p> <ul style="list-style-type: none"> <li>- Letters of allegations: Used to “communicate information about violations that are alleged to have already occurred and in situations where urgent appeals do not apply”.<sup>230</sup></li> <li>- Other Letters: Used since 2011 to request information without any allegation of violations.</li> <li>- A summary of the exchange of information (communications sent and responses received) is provided in reports submitted periodically.</li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li>• <u>Consideration of state parties’ reports</u>: Submission of the initial report by the state party; list of issues/themes drawn up by the committee and submitted to the state party; written response to the list of issues from the state party; other stakeholders may provide information; state parties are invited to attend the session at which the committee formally considers the report to engage in “constructive dialogue”; examination of the report ends with the adoption of “concluding observations” and recommendations.</li> <li>• <u>Consideration of individual complaints</u>: There are several admissibility requirements. Once it receives a complaint, the committee decides whether to formally list the case for consideration. If so, the case is usually transmitted to the state concerned and it is requested to submit its observations. The complainant is given opportunity to comment on the state party’s response. Committee then considers each case in closed session and generally considers admissibility and merits together. It takes a decision and this is sent to the state party and the complainant simultaneously. There is no appeal.</li> <li>• <u>Conduct country inquiries</u>: On receipt of information, the committee invites the state party to submit observations; committee may then designate one or more members to conduct a confidential inquiry and report to the committee. This may include a country visit. Findings are then examined by the committee and sent to the state party with comments and recommendations.</li> <li>• <u>Consideration of inter-state complaints</u>: Several treaties set out procedures for the resolution of inter-state disputes.</li> </ul>

## G. Procedure for Follow-Up

Council of Europe	
Venice Commission	<ul style="list-style-type: none"> <li>• No specific procedure for follow-up, as it does not produce binding obligations.</li> <li>• Assessment is based on a continuing and open dialogue, which allows the state to contribute and comment while information is gathered and the draft opinions are written.</li> </ul>

<sup>229</sup> Manual, para. 43.

<sup>230</sup> Manual, para. 46.

	<ul style="list-style-type: none"> <li>• Generally Venice Commission opinions are respected and put into practice nationally.</li> </ul>
Human Rights Commissioner	<ul style="list-style-type: none"> <li>• No specific procedure for follow-up.</li> <li>• No power to penalise failure to adhere to recommendations.</li> <li>• Engages in on-going dialogue and public awareness-raising activities with states during and after assessment.</li> </ul>
CPT	<ul style="list-style-type: none"> <li>• Committee reports will include a request for a state response.</li> <li>• Reports may also suggest that further action be taken at national level.</li> <li>• Failure of a state to cooperate may result in a CPT public statement.</li> <li>• Additional visits may be arranged.</li> </ul>
ECRI	<ul style="list-style-type: none"> <li>• First engagement for assessment with state is aimed at allowing comment regarding previous recommendations, the Interim follow-up process created in 2007 emphasises certain recommendations a priority.</li> <li>• Request for progress update issued to governments at least two years following publication of report.</li> <li>• ECRI then drafts conclusions on implementation of its recommendations.</li> </ul>
PACE Monitoring Committee	<ul style="list-style-type: none"> <li>• Carries out post-monitoring dialogue with relevant state commencing one year after closure of monitoring procedure.</li> <li>• Each state reported on once every three years.</li> <li>• Possibility to re-open the formal monitoring procedure if necessary.</li> <li>• Can penalise persistent failure to honour obligations and commitments, or for lack of cooperation through adoption of resolution and/or recommendations (of non-ratification of the credentials of a national parliamentary delegation).</li> <li>• Continued violations may be dealt with under the CoE Statute's provisions for withdrawal from CoE or suspension of rights of representation.</li> </ul>
<b>European Union</b>	
FRA	<ul style="list-style-type: none"> <li>• No specific procedure for follow-up on a state-by-state basis, although it may revisit certain themes and engage in follow-up in its annual reporting process.</li> <li>• Primary task is to promote awareness of fundamental rights and gather expertise according to thematic research.</li> </ul>
<b>United Nations</b>	
UPR	<ul style="list-style-type: none"> <li>• Country under review expected to follow-up on accepted recommendations, voluntary commitments and pledges.</li> <li>• Other stakeholders have role to play and states are encouraged to conduct broad consultations. Wider international community also assists.</li> <li>• Voluntary Fund for Financial and Technical Assistance – should support national needs and priorities.</li> <li>• Encouraged to provide mid-term updates. Some provide updates during general debate on UPR at regular sessions.</li> <li>• As noted above, second and subsequent cycles should focus on implementation of accepted recommendations and</li> </ul>

	<ul style="list-style-type: none"> <li>developments in the human rights situation.</li> <li>Council will decide if/when any specific follow-up is needed.</li> </ul>
	<ul style="list-style-type: none"> <li><u>Additional Note</u> –</li> <li>“After exhausting all efforts to encourage a state to cooperate... the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism”.<sup>231</sup></li> <li>E.g., In January 2013, the HRC adopted a decision re: Israel’s non-cooperation with the UPR, which it was decided should be considered a precedent for similar situations in future. It regretted Israel’s non-participation on the scheduled date and called upon it to resume its cooperation. It requested the HRC President to “take all appropriate steps and measures... to urge the state under review to resume its cooperation”. It decided to consider “any steps that may be deemed appropriate” at a future date when the President’s report is considered. It decided to reschedule the UPR of Israel.<sup>232</sup> (See discussion in Section I of the main Report for further information on this point.)</li> </ul>
Special Procedures (Human Rights Council)	<ul style="list-style-type: none"> <li><u>Follow-up to communications</u>: Via reporting; analysis of general trends and developments; and maintaining dialogue with the country concerned and others.</li> <li><u>Follow-up to country visits</u>: Via issuing recommendations; carrying out follow-up initiatives through communications and further visits; and cooperating with relevant partners.</li> <li><u>Follow-up to thematic studies</u>: Via wide dissemination of the reports and information gathered in preparation of reports.</li> </ul>
	<ul style="list-style-type: none"> <li><u>Additional Note</u> –</li> <li>Where a state does not respond to a request for a country visit, the mandate-holder may “remind the government concerned... draw the attention of the Council to the outstanding request, and... take other appropriate measures designed to promote respect for human rights”.<sup>233</sup></li> <li>In “appropriate situations, including those of grave concern or in which a government has repeatedly failed to provide a substantive response to communications” mandate-holders may “issue a press statement, other public statement or hold a press conference”.<sup>234</sup> Generally, they “should engage in a dialogue with the government through the communications procedure before resorting to a press release or other public statement” and should “indicate fairly the responses provided by concerned states”.<sup>235</sup></li> <li>Generally, special procedures can make comments via the media and other public statements.</li> </ul>
Human Rights Treaty Bodies System	<ul style="list-style-type: none"> <li><u>Consideration of state parties’ reports</u>: States are required to submit periodic reports, which include reporting on</li> </ul>

<sup>231</sup> HRC Resolution 5/1 ‘Institution-building of the UN Human Rights Council’ (18 June 2007) at paragraph 38 of the Annex.

<sup>232</sup> Report of the Human Rights Council on its seventh organizational meeting 14 and 29 January 2013 (4 April 2013) (A/HRC/OM/7/1).

<sup>233</sup> Manual, para. 56.

<sup>234</sup> Manual, para. 49.

<sup>235</sup> Manual, para. 50.

	<p>measures taken to implement the recommendations in the previous report. Some committees request states to report within one or two years on implementation of specific / priority recommendations. Some members of treaty bodies have visited state parties to follow-up on implementation.</p> <ul style="list-style-type: none"> <li>• <u>Consideration of individual complaints</u>: Where a committee decides that there has been a violation, it invites the state party to submit information on steps taken to give effect to the committee’s findings and recommendations. This is then sent to the complainant for comments. The case remains open until satisfactory measures have been taken.</li> <li>• <u>Conduct country inquiries</u>: Committee requests the state to submit its observations and information on measures taken in response.</li> <li>• <u>Consideration of inter-state complaints</u>: Several treaties set out procedures for the resolution of inter-state disputes.</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• <u>Additional Note</u> –</li> <li>• <u>Consideration of state parties’ reports</u>: No means of enforcement but “most states take the reporting process seriously”.<sup>236</sup> A committee can consider a report in absentia. Also the “review procedure” allows a committee to consider the country situation without a report, and in absentia.</li> <li>• <u>Consideration of individual complaints</u>: Decisions represent “an authoritative interpretation of the treaty”<sup>237</sup> but recommendations are not legally binding. Committees monitor implementation but cannot directly enforce the decisions. In “many cases, however, state parties have implemented the committees’ recommendations and granted a remedy to the complainants”.<sup>238</sup> If the state does not respond to a complaint, the Committee decides the case on the basis of information from the complainant.</li> <li>• <u>Conduct country inquiries</u>: Inquiry procedure is confidential, though a committee may decide in consultation with the state party to produce a summary and a full inquiry report if the state party agrees.</li> <li>• <u>Consideration of inter-state complaints</u>: As regards the resolution of inter-state disputes regarding the interpretation/application of a convention, if the parties fail to reach agreement on terms of arbitration within six months, one of the states may refer the dispute to the ICJ (this procedure has been used twice).</li> </ul>
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<sup>236</sup> OHCHR, ‘The United Nations Human Rights Treaty System: Fact Sheet No. 30/Rev. 1 (2012), p. 29.

<sup>237</sup> See ‘Human Rights Treaty Bodies - Individual Communications’, available at:

<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#proceduregenerale>.

<sup>238</sup> OHCHR, ‘The United Nations Human Rights Treaty System: Fact Sheet No. 30/Rev. 1 (2012), p.31.