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European institutions and human rights in Europe

Report¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Michael McNAMARA, Ireland, Socialist Group

Summary

The Committee on Legal Affairs and Human Rights notes that since the entry into force of the Lisbon Treaty, the European Union has expanded its work, which now encompasses certain traditional activities of the Council of Europe, such as in the field of justice and home affairs as well as initiatives with respect to democracy, human rights and the rule of law, both inside and outside the European Union. In March 2014, the European Commission issued a Communication on “A new EU Framework to strengthen Rule of Law”, in order to address systematic threats to the rule of law in European Union member States.

The Legal Committee stresses that the European Union should, in particular, make use of the Council of Europe’s expertise in implementing the European Commission’s proposal on the rule of law framework.

The report also notes that Opinion 2/13 of the Court of Justice of the European Union on the European Union’s accession to the European Convention on Human Rights, of December 2014, identified a number of legal obstacles to this process, and stresses the need for negotiations to be resumed as soon as possible.

The report also considers the “human rights” repercussions of austerity measures imposed on certain States in the eurozone – especially by the European Central Bank and the European Commission – and criticises lack of transparency in this area.

1. Reference to committee: Bureau decision, Reference 3886 of 29 June 2012.



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A. Draft resolution²

1. The Parliamentary Assembly recalls its previous resolutions and recommendations concerning co-operation between the European Union and the Council of Europe, in particular [Resolution 2029 \(2015\)](#) on the implementation of the Memorandum of Understanding between the Council of Europe and the European Union, [Recommendation 2027 \(2013\)](#) on European Union and Council of Europe human rights agendas: synergies not duplication, [Resolution 1836 \(2011\)](#) and [Recommendation 1982 \(2011\)](#) on the impact of the [Lisbon Treaty on the Council of Europe](#) and [Resolution 1756 \(2010\)](#) and [Recommendation 1935 \(2010\)](#) on the need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights.
2. The Assembly reaffirms that the European Convention on Human Rights (ETS No. 5) is the cornerstone of the human rights protection system in Europe and that any duplication of work in this area should be avoided.
3. The Assembly considers that the obstacles identified by the Court of Justice of the European Union in its Opinion 2/13 must be overcome as soon as possible, in line with the political commitments made by all sides, as also reflected in the Lisbon Treaty.
4. The Assembly notes that, since the entry into force of the Lisbon Treaty, the European Union has expanded its activities in areas traditionally covered by the Council of Europe, especially in the field of justice and home affairs, and it has taken various initiatives and action to promote and ensure respect for democracy, human rights and the rule of law, both inside and outside the European Union. This creates risks of overlap and unnecessary duplication of work, and even double standards, but also opportunities for co-operation and synergies.
5. The Assembly welcomes the synergies which have been developed recently between European Union and Council of Europe bodies, such as between the European Commission and the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) on the European Union Scoreboard for Justice. It also welcomes the good co-operation with the European Union Fundamental Rights Agency.
6. The Assembly welcomes the increased commitment of the European Union to the core values common to both organisations – democracy, human rights and rule of law – and its efforts to strengthen its capacity to protect these values in European Union member States, as summed up in the European Commission Communication on “A new EU Framework to strengthen the Rule of Law” of March 2014. It welcomes the European Union's willingness to make use of the Council of Europe's expertise in implementing this framework.
7. In view of the above, the Assembly invites the European Union to:
 - 7.1. resume, without delay, negotiations on the accession of the European Union to the European Convention on Human Rights in light of Opinion 2/13 of the Court of Justice of the European Union and give high political priority to this issue;
 - 7.2. continue to explore, in a regular and structured way, possible synergies with the Council of Europe and to make use of the expertise of the latter's institutions and bodies, including the European Commission for Democracy through Law (the Venice Commission), the Commissioner for Human Rights, the Parliamentary Assembly and relevant monitoring mechanisms;
 - 7.3. in following up the European Commission's proposal on “A new EU Framework to strengthen Rule of Law”, inform the Council of Europe's relevant bodies of any subsequent developments and/or of other similar initiatives in this area and make use of its expertise, in particular as regards defining criteria for the existence of “systematic threats” to the rule of law;
 - 7.4. continue to scrutinise its draft legislation with respect to its compatibility with the Charter of Fundamental Rights of the European Union and ensure that all European Union institutions involved in the legislative process are implicated in this scrutiny;
 - 7.5. continue to protect and promote human rights in its external policies and, when so doing, make use of the expertise of the relevant Council of Europe bodies.

2. Draft resolution adopted unanimously by the committee on 27 January 2015.

8. The Assembly also invites those member States of the Council of Europe which are also member States of the European Union to:

8.1. exercise their influence to re-open as rapidly as possible the negotiations on European Union accession to the European Convention on Human Rights and to give high political priority to this process;

8.2. exercise their influence in such a way as to avoid any unnecessary duplication of work in the field of democracy, human rights and the rule of law.

9. The Assembly is also concerned about the lack of transparency of the decisions and actions of the European Commission and the European Central Bank taken in the context of dealing with the consequences of the economic and financial crisis and imposing austerity measures on certain member States belonging to the eurozone benefiting from the European Union's financial aid. Referring to its [Resolution 1884 \(2012\)](#) "Austerity measures – a danger for democracy and social rights" and [Resolution 2032 \(2015\)](#) on equality and the crisis, the Assembly reiterates its concerns about the impact of such measures on social and economic rights and the principle of equality.

10. The Assembly therefore calls on the European Union and its member States to:

10.1. assess the social impact of the austerity measures imposed on member States belonging to the eurozone receiving financial assistance from European Union institutions (European Commission and European Central Bank) and/or the European Stability Mechanism;

10.2. ensure transparency and democratic and judicial control of decisions related to the conclusion of agreements on such financial assistance.

11. The Assembly also calls on member States to sign and/or ratify the revised European Social Charter (revised) (ETS No. 163), the Additional Protocol Providing for a System of Collective Complaints (ETS No. 158) and the Amending Protocol of 1991 to allow for the election of the 15 members of the European Committee of Social Rights by the Parliamentary Assembly (ETS No. 142, "Turin Protocol"), if this has not yet been done, and implement the decisions of the European Committee of Social Rights, where applicable.

B. Draft recommendation³

1. Referring to its Resolution ... (2015) on European institutions and human rights in Europe, the Parliamentary Assembly calls on the Committee of Ministers to:

1.1. take all necessary action to ensure that negotiations on European Union accession to the European Convention on Human Rights (ETS No. 5) are resumed as quickly as possible, and to report back to the Assembly on the state of play of this process;

1.2. streamline and structure co-operation and dialogue with European Union institutions and agencies, at all levels, so that such co-operation and dialogue be conducted on a regular basis by relevant bodies of the Council of Europe;

1.3. examine the possible impact of the European Commission's proposal on "A new EU Framework to strengthen Rule of Law" on European Union co-operation with the Council of Europe and follow any developments concerning the implementation of this proposal and/or any other similar initiatives taken by European Union institutions in this area.

2. Moreover, referring to its [Resolution 1884 \(2012\)](#) on Austerity measures – a danger for democracy and social rights and [Resolution 2032 \(2015\)](#) on equality and the crisis, the Assembly reiterates its concerns about the impact on social and economic rights of the austerity measures taken following the conclusion of financial assistance agreements by certain States belonging to the eurozone with the European Commission and/or the European Central Bank. It therefore calls on the Committee of Ministers to undertake, in co-operation with the Council of Europe's Commissioner for Human Rights, an expert study to prepare a catalogue of "criteria for the imposition of austerity measures", in compliance with requirements of the European Social Charter (revised) (ETS No. 163), as determined by the European Committee of Social Rights.

3. Draft recommendation adopted unanimously by the committee on 27 January 2015.

C. Explanatory report by Mr McNamara, rapporteur

1. Introduction

1.1. Procedure

1. During its June 2012 part-session, the Parliamentary Assembly agreed to a request for a current affairs debate entitled, “European institutions and human rights in Europe”. The request was prompted by the decision of the European Union to appoint a Special Representative for Human Rights and fears of overlap with, and duplication of, the Council of Europe’s activities. On 29 June, the Assembly referred the topic to the Committee on Legal Affairs and Human Rights for report.⁴ I was appointed rapporteur on 6 September 2012.

2. On 3 March 2014, the committee held a hearing with the participation of Mr Jean-Claude Trichet, Honorary Governor of the Bank of France (Paris) and former President of the European Central Bank (ECB), and Mr Morten Kjaerum, Director, European Union Agency for Fundamental Rights (FRA), Vienna. On 12 and 13 June 2014, I carried out a fact-finding visit to Brussels, where I met a number of officials from the European External Action Service, the Council of the European Union, the European Commission and the European Parliament, and representatives of Amnesty International and the think tank CEPS (Centre for European Policy Studies).

1.2. Issues at stake

3. During the debate in the Assembly in June 2012, many participants called for the need to broaden the discussion beyond the potential duplication that may arise from the appointment of a European Union Special Representative for Human Rights and the increasing duplication of roles and functions of the European Union (EU) and the Council of Europe.⁵ They stressed the need to look at the emerging trends in the development of the European Union and its compliance with core tenets of the Council of Europe, namely human rights, the rule of law and democracy in Europe. Moreover, the emerging discussion in Europe about co-decision and the so-called “democratic deficit” in the EU were raised in the current affairs debate. Following the political developments in Hungary and various initiatives taken by certain EU institutions and politicians to establish a mechanism to monitor the observance of the “Copenhagen criteria” in its member States, the Assembly, during its October 2013 part-session, decided to hold an urgent debate on “European Union and Council of Europe human rights agendas: synergies not duplication”. The Committee on Legal Affairs and Human Rights was seized for a report and I was appointed rapporteur. On 3 October 2013, the Assembly adopted [Recommendation 2027](#) (2013),⁶ in which it recalled that the setting up of parallel mechanisms could lead to double standards, “forum shopping” and create new dividing lines in Europe. In December 2013, the committee held an exchange of views – on this and related subjects – with the vice-chair of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), Ms Kinga Göncz.

4. Therefore, in view of these concerns expressed by the Assembly, I propose to examine the potential “dangers” of further duplication of work in the area of human rights that may arise between the institutions of the EU and the Council of Europe, despite the existence of the Memorandum of Understanding of 2007, concluded between both organisations (whose aim is, in part, to avoid such duplication). Although it would be interesting to explore how co-operation and co-ordination at all levels, and in particular between the European Parliament and our Assembly, can be enhanced, I do not intend to duplicate the work of our colleague Ms Kerstin Lundgren (Sweden, ALDE), whose report on “The implementation of the Memorandum of Understanding between the Council of Europe and the European Union” was debated by the Assembly at its January 2015 part-session.⁷ In my report, I will focus on the EU’s remit in the field of human (fundamental) rights and on the actions taken in this area by its institutions – the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union (CJEU) and the European Central Bank (ECB). Although the activities of some EU agencies – especially the Fundamental Rights Agency (FRA) and Frontex, co-ordinating member States’ actions relating to the management and control of the EU’s external borders would also deserve attention in this context, I will

4. Reference 3886 of 29 June 2012.

5. It is also interesting to note that the Euronest Parliamentary Assembly, which was constituted on 3 May 2011 in Brussels and consists of a European Parliament delegation and delegations from the Eastern European Partners, Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine, was cited as a further duplication of the Council of Europe’s activities. For more details, see: www.euronest.europarl.europa.eu/euronest.

6. See also [Doc. 13321](#).

7. [Doc. 13655](#), [Resolution 2029](#) (2015) and [Recommendation 2060](#) (2015).

only focus on the former (which has already been the subject of a couple of reports by our committee), as the role of the latter was recently examined by the Assembly following the presentation of a report by the Committee on Migration, Refugees and Displaced Persons (rapporteur: Mr Mikael Cederbratt).⁸ While examining the competences and actions of the EU institutions in the field of human rights, I will focus on those which aim to promote and protect human rights externally (outside the EU) and internally (within the 28 member States of the EU). A report on the “Accession of the European Union to the European Convention on Human Rights: Election of judges” is to be prepared, in due course, by our committee (rapporteur: Mr Jordi Xuclà, Spain, ALDE); I have therefore decided not to cover this issue in the present report.

5. Furthermore, I propose to look at the role of some EU institutions in promoting, and indeed imposing, austerity measures in certain member States belonging to the eurozone, at a time of economic and financial crisis. This concerns, in particular, some of the relatively newer institutions of the European Union, such as the European Central Bank (ECB), and the European Stability Mechanism (ESM). I propose to examine the extent to which decisions of such institutions are guided or influenced by the effect that they may have on human rights, including socio-economic rights.⁹ That is why I took part in the High-level Conference on the European Social Charter, which took place in Turin (Italy) on 17-18 October 2014, in the context of the Italian Presidency of the EU.

1.3. General co-operation between the European Union and the Council of Europe

6. On 23 May 2007, the European Union and the Council of Europe concluded the [Memorandum of Understanding between the Council of Europe and the European Union](#), which has until now governed their co-operation in the area of democracy, human rights and rule of law. This document highlights the role of the Council of Europe as “the benchmark for human rights, the rule of law and democracy in Europe”.

7. In [Resolution 1836 \(2011\)](#) on the impact of the Lisbon Treaty on the Council of Europe,¹⁰ the Assembly noted that the post-Lisbon partnership between both organisations should “ultimately lead to a common space for human rights protection” across the European continent, in particular through the European Union’s accession to the European Convention on Human Rights (ETS No. 3, “ECHR”) and other key Council of Europe conventions and monitoring mechanisms. Duplication and monitoring fatigue would thus be avoided, especially at a time of economic crisis, and the Council of Europe’s role as “the benchmark for human rights, rule of law and democracy in Europe” should further be enhanced. In its [Recommendation 2027 \(2013\)](#) “European Union and Council of Europe human rights agendas: synergies not duplication”, the Assembly called on the EU to continue to make use of its expertise, explore possible synergies and accelerate the EU’s accession to the European Convention on Human Rights.

2. The EU institutions and human rights: general legal framework

8. The Lisbon Treaty, which entered into force on 1 December 2009, introduced several changes in the areas of activity traditionally undertaken by the Council of Europe. Firstly, it pointed out the EU’s attachment to the main values of the Council of Europe in Article 2 of the Treaty on European Union (“TEU”), stipulating that the EU 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 ...”. Secondly, the Lisbon Treaty also granted the Charter of Fundamental Rights the same legal value as the EU Treaties (Article 6.2 of the TEU) and, thirdly, it contains a legal basis for the EU’s accession to the European Convention on Human Rights (Article 6.1 of the TEU). Fourthly, by merging the Community pillar with the two-intergovernmental pillars, the scope of the EU in the field of human rights has further expanded to areas such as justice, freedom and security, which are closely related to the issue of fundamental rights. This merger became fully applicable as of 1 December 2014; since then, in the field of police and judicial co-operation in criminal matters, the usual powers of the European Commission and the Court of Justice apply as well.

8. Frontex: human rights responsibilities, [Doc. 13161](#) and Assembly [Resolution 1932 \(2013\)](#) and [Recommendation 2016 \(2013\)](#). See also the opinion of our committee, [Doc. 13187](#) (rapporteur: Mr James Clappison, United Kingdom, ECG).

9. In its Judgment of 30 June 2009, the German Federal Constitutional Court dismissed a challenge to the compatibility of the Lisbon Treaty with the German Basic Law. In doing so, it reiterated that European unification on the basis of a treaty union of sovereign States may not be achieved in such a way that insufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. – [2 BvE 2/08](#), [2 BvE 5/08](#), [2 BvR 1010/08](#), [2 BvR 1022/08](#), [2 BvR 1259/08](#) and [2 BvR 182/09](#).

10. See also [Recommendation 1982 \(2011\)](#) and [Doc. 12713](#) (rapporteur: Ms Kerstin Lundgren, Sweden, ALDE).

9. Besides the above-mentioned changes, one should also mention two other provisions of the TEU, which existed beforehand: Article 6.3 and Article 7. Article 6.3 of the TEU stipulates that “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

10. Article 7 of the TEU contains the so-called “nuclear option”: it can be triggered in case of a “clear risk” of a “serious breach” of values enshrined in Article 2 of the TEU or in case of “serious and persistent breach” of them. If the European Council finds the existence of a “serious and persistent breach” of these values, the Council of the EU may decide to suspend certain of the rights deriving from the application of the Treaties, including voting rights of the member State in question. This mechanism, which remains mainly of a political nature, has so far never been used.

11. Following the entry into force of the Lisbon Treaty, the EU Council adopted the “Stockholm Programme – An open and secure Europe serving and protecting citizens” for 2010-2014, following which, *inter alia*, a number of directives on procedural rights in criminal proceedings were adopted. There is no new programme of that kind envisaged for the next five years. In its conclusions of 26-27 June 2014, the European Council adopted the new “Strategic Guidelines for Legislative and Operational Planning within the EU’s Area of Freedom, Security and Justice”¹¹ for the period 2015-2020, in which it pointed out that its priority now was to consistently implement and consolidate the adopted legal instruments and policies with respect to asylum, immigration, border control, police and judicial co-operation. It recalled the need to ensure full respect of fundamental rights in this area, but regrettably did not mention accession of the EU to the ECHR as a priority. Co-operation with the Council of Europe in the framework of the implementation of the Stockholm Programme has been positively assessed by Ms Lundgren in her report on “The impact of the Lisbon Treaty on the Council of Europe”. However, as noted by her, although the EU referred to the Council of Europe’s expertise, the way in which it consulted our Organisation was not consistent.¹²

12. The EU has expressed its interest in acceding to the Group of States against Corruption (GRECO)¹³ and the feasibility and modalities of such an accession are now being studied by the European Commission. EU accession to GRECO would mean that EU institutions would be subject to periodical and thematic assessment by GRECO.

3. The European Union and observing human rights within its member States

3.1. The application of the Charter of Fundamental Rights

13. The Charter of Fundamental Rights (“the Charter”) is divided into six chapters – Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights and Justice. It contains a series of individual rights and freedoms, including those enshrined in the ECHR, social and economic rights and a number of “third generation” rights such as data protection, guarantees on bioethics, and transparent administration. When a right is contained both in the Charter and in the ECHR, its meaning and scope is the same. Although introduced into the treaty law, the Charter is binding on EU institutions, bodies, offices and agencies of the Union and on the member States when they are implementing Union law.¹⁴

14. Since the entry into force of the Lisbon Treaty, the European Commission prepares annual reports on the application of the Charter of Fundamental Rights. It also screens the compatibility of legislative proposals with the Charter. The first report was issued in 2010.

15. According to the latest report of the European Commission,¹⁵ in 2013, there was an increase of cases in which national jurisdictions seized the EU Court of Justice asking for guidance about the applicability of the Charter when implementing EU law at national level (preliminary rulings)¹⁶ and the Court of Justice gave more precise indications on this subject in its judgment *Åkerberg Fransson*.¹⁷ National judges are more and more

11. Extract from the European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues, 2014/C 240/05, Official Journal of the EU, C 240/13 of 24 July 2014.

12. Doc. 12713, paragraphs 27-28.

13. See, for instance, the Council of the EU Conclusions on the EU anti-corruption report adopted on 5 and 6 June 2014.

14. Article 51.1 of the Charter.

15. COM(2014)224final: Report on the application of the Charter of Fundamental Rights in 2013, 14 April 2014.

16. In 2013, in 41 cases.

17. CJEU, case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26 February 2013.

aware of the Charter standards. The number of decisions in which EU courts (Court of Justice, General Court and Civil Service Tribunal) quoted the Charter in their reasoning has been on the rise in the last few years: 43 in 2011, 87 in 2012 and 114 in 2013.

16. The European Commission launched a number of infringement proceedings in which fundamental rights, enshrined in the EU Charter, played a role.¹⁸ It also proposed a number of legislative acts to defend the rights guaranteed by the Charter, such as the rights of suspects and accused in criminal proceedings or to strengthen access to asylum procedure.¹⁹ A few directives have been adopted in the framework of the Stockholm Programme: [Directive 2010/64/EU](#) on the right to interpretation and translation in criminal proceedings, [Directive 2012/13/EU](#) on the right to information in criminal proceedings, and [Directive 2013/48/EU](#) on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. A proposal for a directive on the presumption of innocence was approved by the Council on 4 December 2014 and should soon be examined by the European Parliament.

17. There is a scrutiny of draft legislation as to their compatibility with the Charter in the EU institutions: by the European Commission, the Council of the EU and the European Parliament. However, despite the fact that all European Commission departments are supposed to ensure such scrutiny with respect to their proposed policies and legislation, this control does not seem to be very thorough, as some departments work on issues which are not directly related to fundamental rights or are unaware of their policies' impact on the latter. Despite some efforts by DG Justice to "educate" other directorates, it seems that the European Commission does not possess sufficient staff to perform such checks of all proposals.²⁰

18. The Court of Justice has delivered a number of judgments in which it found that EU legislation and decisions addressed to individuals did not comply with the Charter. One good example is the *Kadi II* judgment, in which the CJEU found that the decision to freeze the assets of the applicant (implementing a decision of the United Nations Security Council's Sanctions Committee), who was suspected of terrorist acts, violated the right to an effective remedy and the right to a fair trial (Articles 41 and 47 of the Charter).²¹ Another one is the *Besselink* judgment, in which the General Court found a violation of the right of access to documents (Article 42 of the Charter), due to the Council of the EU decision refusing the applicant access to a document on EU accession to the ECHR.²²

3.2. EU mechanisms to monitor compliance with certain aspects of the rule of law within its member States

19. Although there is no internal mechanism within the EU to monitor on a regular basis compliance with the fundamental values enshrined in Article 2 of the TEU, some fragmented tools have been developed within its institutions to provide for an overview of certain aspects of the human rights and rule of law situation. These are: the EU Anti-Corruption Report; the EU Scoreboard for Justice; the Cooperation and Verification Mechanism; and certain annual reports prepared by EU institutions and agencies. As noted by some authors, these tools show "variable degrees of proximity to the EU legal framework established in the Lisbon Treaty".²³

20. The EU Anti-Corruption Report was prepared by the European Commission and it analyses EU member States' performance in the field of corruption and the steps taken to prevent and fight it. This is a new tool, as the first report on this subject was published on 3 February 2014.²⁴

18. For example, a legal action following which the Austrian data protection authority was separated from the Federal Chancellery and became independent with its own staff and budget. Case C-614/10, *Commission v Austria*, CJEU, judgment of 16 October 2012.

19. Directives 2013/32/EU and 2013/33/EU.

20. I. Butler, Open Society European Policy Institute, [European Commission's New Leadership Creates Momentum for Fundamental Rights](#), 6 October 2014.

21. Case C-584/10P, *Commission and Others v. Kadi (Kadi II)*, Appeal Case against T-85/09 *Kadi v. Commission (Kadi I)*, judgment of 18 July 2013.

22. General Court, T-331/11, *Besselink v. Council*, judgment of 12 September 2013.

23. See, for instance, a study commissioned by the European Parliament, Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs C, "[The Triangular relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism](#)", Study, (2013), or A. Szklanna, The Council of Europe vis-à-vis the proposal to establish a "rule of law mechanism" in the European Union, in: *European Yearbook on Human Rights 2014*, ed. W. Benedek and others, pp. 333-345.

24. [COM\(2014\)38final](#).

21. Another new information tool of the European Commission is the EU Scoreboard for Justice, which is aimed at providing data on civil and commercial justice in EU member States. Its first edition was published in March 2013²⁵ and the latest one was issued a year later.²⁶ Although the Scoreboard puts emphasis on the right of access to justice as a fundamental right and on the need to achieve more effective justice systems within the EU, it has been designed in the context of the so-called “European Semester”, an annual review of the co-ordination process of the member States’ economic policies and is hence aimed at contributing to “fostering economic growth in the EU”. That is why it does not examine the situation of criminal justice in EU member States. The Scoreboard is an example of good co-operation between the European Union and the Council of Europe, as most of the data on which it is based come from the Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ).

22. Since 2007, the European Commission has been using the Cooperation and Verification Mechanism to assess observance of the rule of law – justice systems and the fight against corruption – in Bulgaria and Romania. In the case of Bulgaria, it also examines the progress in the fight against organised crime. Within this framework, the European Commission reports every six months.²⁷

23. In addition, there are a number of various non-binding reports by EU institutions and agencies which include, *inter alia*, the European Commission’s Annual Report on the Application of the Charter of Fundamental Rights,²⁸ the European Parliament’s Annual Report on the Situation of Fundamental Rights in the EU,²⁹ the EU Fundamental Rights Agency’s Annual Report on the Situation of Fundamental Rights in Member States,³⁰ the European Ombudsman’s Annual Report,³¹ focusing on the complaints received by this institution, and the European Commission’s Anti-Fraud Office (OLAF) Annual Report.³²

3.3. The “Rule of Law Mechanism”

24. Over the last few years, several “crises” in EU member States (such as that in Austria in 2000, the problem of Roma eviction in France over the summer of 2010, the Romanian constitutional crisis in 2012 and the controversial constitutional and legal changes in Hungary begun in 2011) have shown that the EU still has difficulty in ensuring the continuing adherence of its member States to democracy, human rights or the rule of law, core tenets of the Council of Europe. The usual approach of political and diplomatic persuasion has not always been successful and the – last resort – “nuclear option” of Article 7 of the TEU has never been applied, due to the high threshold required for it to be triggered. Although the European Commission can start infringement proceedings against a member State which does not comply with the Treaties, it has – in effect – either acted only on some fragmentary aspects of rule of law problems³³ or omitted to launch such a procedure altogether.³⁴

25. In my previous report on “European Union and Council of Europe human rights agendas: synergies not duplication”, which was discussed by the Assembly in October 2013, I described the first initiatives taken by some EU institutions and politicians to introduce a mechanism to monitor the respect for the values mentioned in Article 2 of the TEU by EU member States, as well as the origin of this idea. One of these initiatives came from the European Parliament and its Committee on Civil Liberties, Justice and Home Affairs (LIBE), whose rapporteur, Mr Louis Michel, prepared a draft resolution on the situation of fundamental rights in the European Union in 2012. In this resolution, adopted by the European Parliament on 27 February 2014,³⁵ the European Parliament proposed to establish a “Copenhagen mechanism”, which would be triggered by a decision of the European Commission, in co-operation with FRA, whose remit should be widened. It also

25. The first one was published on 27 March 2013: “The EU Justice Scoreboard. A tool to promote effective justice and growth”, COM(2013)160final.

26. COM(2014) 55, 17 March 2014.

27. For a complete list of its reports: http://ec.europa.eu/cvm/progress_reports_en.htm.

28. Supra note 15.

29. The latest report of this type will be referred to in the section below.

30. <http://fra.europa.eu/en/publications-and-resources/publications>.

31. The 2013 report was published on 23 September 2014. For a complete list of its reports, see: www.ombudsman.europa.eu/en/activities/annualreports.faces.

32. For a complete list of its reports produced since 1999, see: http://ec.europa.eu/anti_fraud/about-us/reports/olaf-report/index_en.htm.

33. For example, in March 2013, Hungary took measures to comply with the judgment of the Court of Justice on the forced early retirement of judges, notaries and prosecutors, which was found incompatible with Directive 200/78 on establishing a general framework for equal treatment in employment and occupation, Case C-286/12, *Commission v. Hungary*, judgment of 6 November 2012.

34. During my visit to Brussels, this point was raised by civil society representatives, who complained about lack of Commission action as regards the rights of Roma and asylum seekers.

called for a revision of Article 7 of the TEU and the creation of a “Copenhagen Commission” composed of independent high-level experts. More recently, on 12 March 2014, the European Parliament adopted another resolution on “Evaluation of justice in the field of criminal justice and the rule of law”,³⁶ which also calls on the European Commission to address the issue of a rule of law mechanism and stresses that the future tool “should seek complementarity with the work of other international institutions, such as the Council of Europe and its Venice Commission”.

26. Since the debate in the Assembly back in October 2013, there have been other developments³⁷ which eventually led to the adoption by the European Commission, in March 2014, its Communication “A new EU Framework to strengthen Rule of Law”.³⁸

27. In this document, the European Commission reiterated that the rule of law is the backbone of any modern constitutional democracy and a precondition for EU membership and stressed that various bodies had called upon it to develop a method to tackle situations where there was a systematic threat to the rule of law. The framework would address systematic threats to the rule of law within a member State that cannot be appropriately addressed by other enforcement mechanisms currently available.

28. The procedure is to contain three stages – assessment, recommendation and follow-up monitoring:

- a. Assessment: in order to assess whether a systematic threat to the rule of law exists. The framework is to make use of a number of sources, including the Council of Europe. If such a systematic threat exists, then the European Commission will send a “rule of law opinion” containing its concerns and provide the member State the opportunity to respond. This process will be kept confidential and the State’s compliance is expected as a result of the “duty of sincere co-operation” within Article 4.3 of the TEU.
- b. The European Commission will then, if the matter has not been satisfactorily resolved, issue a “rule of law recommendation” to the State concerned. The recommendation will indicate the reasons for the European Commission’s concerns and a fixed time limit for the member State to address these concerns. The recommendation may also include specific measures that should be taken in order to resolve shortcomings; the member State should reply indicating steps taken towards this goal. The recommendation and its main content will be made public.
- c. The European Commission will then follow up the recommendation by monitoring the steps taken by the member State to resolve the situation. If there is no satisfactory follow-up, the European Commission will consider the use of the mechanism envisaged in Article 7 of the TEU.

29. The Communication does not fully set out the legal basis for the creation of this framework³⁹ or specifically define the scope of such a mechanism due to the controversies concerning the definition of the “rule of law”.⁴⁰ The new mechanism will apply where the integrity and functioning of national institutions that aim to uphold the rule of law have allegedly been compromised. The Commission highlights that the framework will only apply to *systematic threats* to the rule of law and not individual breaches, which can be dealt with by national judicial systems and the ECHR procedure.

30. According to the European Commission, “the Framework will be complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law”.⁴¹ The European Commission emphasises the importance of co-operation between various institutions in the putting into effect of this framework. As a rule, it will seek the advice of, and co-ordinate with FRA, the Council of Europe and its Venice Commission in matters that are under their consideration and analysis. It is convinced that the proposed framework is based on its competences, as provided by the Treaties, and does not exclude any future amendment to them.

35. Report of 27 January 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), A7-0051/2014, P7_TA-PROV(2014)0173. See European Parliament Resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)).

36. 2014/2006(INI), see also draft report of 20 January 2014 by LIBE, rapporteur: Ms Kinga G6ncz, 2014/2006(INI), paragraphs 3 and 4.

37. For instance, *Assises de la Justice: Shaping Justice Policies in Europe for the Years to Come*, organised by the European Commission in Brussels, 21-22 November 2013.

38. Communication from the Commission to the European Parliament and the Council, COM(2014)158/2final, 19 March 2014.

39. Apart from stating that the Commission is required to take “an active role” in acting as “the guardian of the Treaties”.

40. The Communication lists, non-exhaustively, respect for the rule of law to include “legality ... legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law”.

41. Page 6.

31. During my visit to Brussels in June 2014, I discussed the proposed framework with civil servants from the European Commission, the Council of the EU and the European Parliament. I was informed that the Council of the EU was critical of the European Commission's proposal, claiming that it lacked a legal basis in the Treaties and that, due to the fact that it was issued relatively late in the term of both the Commission and Parliament, the European Parliament did not have enough time to examine it before the elections which took place in May 2014.

32. The European Commission's framework puts emphasis on "systematic threats" and co-operation with the Venice Commission. I agree with Ms Lundgren that "systemic rule of law problems in Europe are normally revealed by judgments of the European Court of Human Rights, by analytical country reports prepared by the Council of Europe, including reports by its monitoring bodies in the appropriate areas".⁴² Although the expertise of the Venice Commission, which has been assisting numerous States in drafting legislation compatible with international human rights standards, is of primordial importance in this context, other sources of information and expertise – such as the judgments of the Court, reports of Council of Europe monitoring bodies and the Commissioner for Human Rights – should not be neglected. In order to assess whether there is a "systematic threat", one should, first of all, refer to the judgments of the Court, and in particular its pilot judgments, and to the findings of the Committee of Ministers, which supervises the execution of the Court's judgments.

33. It is difficult to predict, at this stage, what follow-up will be given to the Commission's Communication of 19 March 2014. The new Commissioner for "Better Regulation, Inter-institutional Relations, the Rule of Law and the Charter of Fundamental Rights", Mr Frans Timmermans, who is also Vice-President of the European Commission, took up his duties on 1 November 2014. On 12 November 2014, Mr Timmermans met the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, with whom he discussed the state of human rights and democracy in Europe, the EU's rule of law framework and the European Union's accession to the European Convention on Human Rights. The fact that the President of the European Commission, Mr Jean-Claude Juncker, entrusted Commissioner Timmermans with a special responsibility for "rule of law" and the Charter of Fundamental Rights shows his and the Commission's commitment to solving the problem of the EU's apparent difficulty in monitoring its own member States from this perspective. In its conclusions of the General Affairs Council meeting of 16 December 2014, the Council of the EU and EU member States committed themselves to establishing an annual dialogue to "promote and safeguard the rule of law in the framework of the Treaties", which would be developed in a way "which is complementary with other EU Institutions and International Organisations, avoiding duplication and taking into account existing documents and expertise in this area".⁴³

34. For a long time, civil society has called on the EU to introduce a "Copenhagen mechanism" to monitor respect of the values enshrined in Article 2 of the TEU. For example, according to the Centre for European Policy Studies (CEPS), such a mechanism should be a monitoring one and should consist of a periodic evolution or scoreboard of member States' compliance with the said values, on the basis of expertise from academics, the United Nations, the Council of Europe and other non-EU bodies. It could be co-ordinated by the European Commission and would not require a treaty change in the short-term.⁴⁴

35. In this context, I would also like to refer to the recent Assembly's decision to revise its monitoring procedure, by inviting its Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) to "introduce a periodic overview of groups of countries in accordance with its internal working methods" and to "launch issue-based, cross-country monitoring in close co-operation with the relevant committees".⁴⁵ These two new procedures would allow the Monitoring Committee and the Assembly to conduct a more thorough monitoring of all member States of the Council of Europe, including member States of the EU, as, so far, the majority of States under *stricto sensu* monitoring of the Assembly (monitoring and post-monitoring dialogue) were non-EU States (with the exception of Bulgaria). Once these new mechanisms have been set up, there will be additional room for co-operation between the Assembly and the relevant EU institutions, including the European Commission.

42. *Supra* note 38, paragraph 60.

43. See "Conclusions of the Council of the European Union and the member States meeting within the Council on ensuring respect for the rule of law", items 1 and 5.

44. CEPS Policy Brief, Rule of law or rule of thumb? A New Copenhagen Mechanism for the EU, S. Carrera, E. Guild and N. Hernanz, No. 305, 20 November 2013.

45. [Resolution 18 \(2014\)](#) on the progress of the Assembly's monitoring procedure (October 2013–September 2014), adopted on 2 October 2014, paragraph 19. See also the report by the rapporteur of the Monitoring Committee, Mr Stefan Schennach (Austria, SOC), [Doc. 13595](#).

3.4. EU accession to the European Convention on Human Rights: a long way to go?

36. The impact of the accession of the EU to the European Convention on Human Rights was recalled in the current affairs debate in June 2012. The European Union's accession to the European Convention on Human Rights is required under Article 6 of the Lisbon Treaty and foreseen by Article 59 of the ECHR as amended by Protocol No. 14 (CETS No. 194). On 17 March 2010, the European Commission proposed negotiation Directives for the EU's accession to the Convention. On 4 June 2010, EU Justice Ministers gave the European Commission the mandate to conduct the negotiations on their behalf. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an ad-hoc mandate to its Steering Committee for Human Rights (CDDH) to prepare with the EU the necessary legal instrument for EU accession to the ECHR. This ad hoc group was subsequently replaced by the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the EU to the ECHR. On 5 April 2013, negotiations resulted in agreement on the draft accession instruments and on 4 July 2013 the European Commission asked the Court of Justice of the EU to give its opinion on the compatibility of the draft agreement with EU law, according to Article 218.11 of the Treaty on the Functioning of the EU (TFEU).⁴⁶ Twenty-four member States intervened in the procedure before the CJEU. In its opinion of 13 June 2014, Advocate General Kokott found that the draft agreement was compatible with EU law.

37. On 18 December 2014, the CJEU delivered its opinion on the draft agreement on EU accession to the ECHR. It found that it was incompatible with EU law and found many obstacles in the draft agreement, with the result that the EU accession to the ECHR has become very difficult, even, according to some commentators, impossible.⁴⁷ The Court of Justice referred to the autonomy of the EU law and its specific characteristics, pointing out that, in case of accession to the ECHR, its findings on EU law could not be called into question by the European Court of Human Rights. In this respect, firstly, it found that there was no provision in the draft agreement to ensure co-ordination between the ECHR and the Charter of Fundamental Rights in case the latter provided higher standards of protection. Secondly, the ECHR would require each member State to check that the other member States had observed fundamental rights, which would undermine the principle of mutual trust between member States under EU law (highly relevant in the area of freedom, security and justice, and especially in cases of European arrests warrants) and there was no provision to avoid that in the draft agreement. Thirdly, the mechanism established by Protocol No. 16 to the ECHR (CETS No. 214)⁴⁸ (allowing national courts to refer to the European Court of Human Rights for clarification about the interpretation and application of the rights and freedoms enshrined in the ECHR) could affect the autonomy and effectiveness of the preliminary ruling procedure under Article 267 of the TFEU and there was nothing on this in the draft agreement, either. The CJEU also argued that the draft agreement did not exclude the possibility for the European Court of Human Rights to settle disputes between EU member States, which would be contrary to EU law (Article 344 of the TFEU) and criticised the "co-respondent mechanism"⁴⁹ proposed in the draft agreement, as the granting of the status of co-respondent would require the Court to assess the rules of EU law governing the division of powers between the EU and its member States. Moreover, the CJEU elaborated on the procedure for its "prior involvement"⁵⁰ before a procedure before the European Court of Human Rights: it found that the draft agreement did not reserve to the CJEU only the power to rule on whether it has already dealt with an issue (i.e. it did not exclude the European Court of Human Rights from ruling on that) and did not permit the CJEU to rule on the interpretation, but only on the validity of the EU law. Lastly, the CJEU, which has only limited jurisdiction over acts taken within the common foreign and security policy (CFSP), held that the draft agreement failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts in this area. This was due to the fact that under the draft agreement the European Court of Human Rights would itself review EU law in the context of the CFSP.

46. Under the previous treaty regime, the European Court of Justice was already seized about the EU's legal competence to accede to ECHR and its opinion was negative; see its [Opinion 2/94](#) of 28 March 1996.

47. See article by S. Douglas-Scott, [Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice](#), [UK Constitutional Law Group Blog](#) of 24 December 2014.

48. Signed on 2 October 2013.

49. Where a large part of EU law is implemented by its member States, the co-respondent mechanism is aimed at ensuring that proceedings brought before the ECHR by non-EU member States and individuals are correctly addressed to EU member States and/or the EU as appropriate. A Contracting Party would become a co-respondent either by accepting an invitation from the European Court of Human Rights or by its decision upon request of that Contracting Party.

50. This procedure envisaged in the draft agreement is designed to enable the CJEU to be involved in cases brought before the Court in which EU law is at issue but has not yet been interpreted by the CJEU.

38. EU accession to the ECHR is a priority for most European institutions, and in particular for the European Commission, as announced by its new President, Mr Juncker, in his opening statement to the European Parliament⁵¹ and Commissioner Timmermans in his statement on the occasion of the 5th anniversary of the entry into force of the Charter of Fundamental Rights.⁵² However, regrettably, it was not mentioned in the European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues. The list of problems with the draft agreement pointed out by the CJEU is so long that it calls into question, in my view, the Luxembourg Court's willingness to accept the very idea of EU accession to the ECHR. It is particularly disappointing now, at a time when the EU's powers have been further expanded in the area of co-operation in criminal matters, where human rights are particularly relevant.

3.5. The Fundamental Rights Agency: an area of special concern?

39. The creation of the European Union Agency for Fundamental Rights (FRA) in 2007 gave rise to concern within the Council of Europe and the Assembly⁵³ about unnecessary duplication of Council of Europe work by the Agency. In 2008, an agreement was concluded between the European Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe.⁵⁴ Since then, FRA and the Council of Europe have established appropriate forms of co-operation and have consulted each other in their daily work. Although both institutions sometimes work on the same or similar issues, they use different tools in carrying out their respective activities. FRA's data collection and evidence-based analyses might complement the work undertaken by the Council of Europe's monitoring bodies.

40. This change of context was noted in Assembly [Resolution 1756 \(2010\)](#) and [Recommendation 1935 \(2010\)](#) on the need to avoid duplication of work of the Council of Europe by the European Union Agency for Fundamental Rights, on the basis of the report of our committee colleague, Mr Boriss Cilevičs (Latvia, SOC).⁵⁵ However, the Assembly recalled that FRA should retain – in its work – the Council of Europe's *acquis* in the human rights field as its main point of reference. It also called on the EU member States and institutions to reflect “once again on the allocation of financial and other resources to the different European human rights protection mechanisms in order to distribute them in a way which ensures their most effective use” and regretted that the funding of the Council of Europe's core human rights activities was far lower than that of FRA.⁵⁶

41. In its reply to Assembly [Recommendation 2027 \(2013\)](#) “European Union and Council of Europe human rights agendas: synergies not duplication”, the Committee of Ministers recalled the “very good co-operation” developed between the Council of Europe and FRA “in various areas on the basis of their respective mandates, strengths and skills” and that both parties agreed that “the 2008 Agreement between the European Community and the Council of Europe remains a valid basis for co-operation between the FRA and the Council of Europe”.⁵⁷ This good co-operation was also stressed by the Director of FRA, Mr Morten Kjaerum, at the hearing before our committee in March 2014. He stressed that FRA had interacted closely with Council of Europe staff and there was a complementarity between both institutions. The Council of Europe was represented by an independent member in FRA's Executive and Management Boards, and it was consulted on FRA's Annual Work Programme. Jointly, with the European Court of Human Rights, FRA had published handbooks on non-discrimination, asylum and data protection, and a publication on children's rights would come out soon. FRA also recently focused on hate crime, on which it organised a conference in 2013, and had elaborated – together with ECRI (European Commission against Racism and Intolerance) – its general policy recommendations, conducted surveys on discrimination of minorities and produced a report on anti-Semitism. FRA had also had an exchange of views with the ECB on human rights considerations, but its mandate is too narrow to examine in detail the impact of the decisions of the Troika (the European Commission, the ECB and the International Monetary Fund) on social and economic rights.

51. [A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission](#), Opening Statement in the European Parliament, Strasbourg, 15 July 2014.

52. See his [statement of 1 December 2014](#).

53. See its [Resolution 1427 \(2005\)](#) and [Recommendation 1744 \(2006\)](#).

54. OJ L186 of 15/07/2008, p. 6. See also [Agreement on the strengthening of co-operation between the PACE and the European Parliament \(28 November 2007\)](#).

55. [Doc. 12272](#).

56. Paragraphs 6.5 and 7 of [Resolution 1756 \(2010\)](#).

57. Item 2 of the reply, [Doc. 13432](#).

4. Human rights in EU external action

42. According to Article 21.1 of the TEU, the EU's "action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".

43. The Human Rights Working Group (COHOM) of the Council of the EU, which is comprised of experts from member States and the European Commission, examines human rights issues in the EU's external relations. It meets regularly and examines human rights issues of urgent concern and promotes the inclusion of human rights problems on the agenda of other expert meetings with third countries.

44. In 2012, the EU adopted the "Strategic Framework and Action Plan on Human Rights and Democracy", which focuses on a coherent promotion of human rights in its external relations, including policy areas such as trade, investment, and development, as well as the Common Security and Defence Policy (CSDP) and the external dimensions of justice and home affairs and employment and social policy.⁵⁸ To implement this framework, it also adopted an Action Plan, which expired on 31 December 2014. In 2013, it adopted nearly 150 human rights country strategies in this framework and held human rights consultations with 30 partner countries and regional groupings. Every year the Council of the EU adopts its Annual Report on Human Rights and Democracy in the World.⁵⁹

45. In July 2012, the Council of the EU appointed Mr Stavros Lambrinidis as the European Union Special Representative for Human Rights. Council Decision 2012/440/CFSP of 25 July 2012, appointing the Special Representative, established a budget of €712 500 for activities up to the end of the first half of 2013 and a mandate to:

- a. contribute to the implementation of the Union's human rights policy, in particular the EU Strategic Framework on Human Rights and Democracy and the EU Action Plan on Human Rights and Democracy, including by formulating recommendations in this regard;
- b. contribute to the implementation of Union guidelines, toolkits and action plans on human rights and international humanitarian law;
- c. enhance dialogue with governments in third countries and international and regional organisations on human rights as well as with civil society organisations and other relevant actors in order to ensure the effectiveness and the visibility of the Union's human rights policy;
- d. contribute to better coherence and consistency of the Union policies and actions in the area of protection and promotion of human rights, notably by providing input to the formulation of relevant policies of the Union.

46. As indicated in the 2013 Annual Report on Human Rights and Democracy,⁶⁰ Mr Lambrinidis focused "on strengthening the EU's human rights engagement with EU strategic partner countries; on addressing human rights challenges with countries in transition in pivotal world regions; on elevating the EU's visibility and engagement with multilateral and regional human rights mechanisms (United Nations, Council of Europe, Organization for Security and Co-operation in Europe (OSCE), Association of Southeast Asian Nations (ASEAN), African Union, Organisation of Islamic Cooperation); and on heightening EU co-operation with and empowering civil society throughout the world". Thematically, he continued to work on "protecting NGOs and human rights defenders and expanding the space in which they operate; advancing the universality of human rights; raising the effectiveness of EU human rights dialogues; and promoting key EU thematic priorities, including those reflected in recently adopted human rights guidelines". He works under the authority of the EU High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission and the guidance of the Political and Security Ambassadors, and in co-ordination with the European External Action Service (EEAS), the European Commission and the European Parliament.

58. In its [Resolution 1901 \(2012\)](#) on human rights and foreign policy, the Assembly welcomed the adoption of the EU Strategic Framework and Action Plan on Human Rights and Democracy and saw it as an opportunity to improve synergies between the Council of Europe and the EU and to enhance the effectiveness of international efforts to promote and protect human rights worldwide.

59. For the latest report of 23 June 2014, see: http://eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf.

60. *Ibid.*, p. 14.

47. During my visit to Brussels, the President of the COHOM, Mr Bert Theuermann, explained to me that the main added value of the Special Representative was his visibility, as Mr Lambrinidis was seen as a key face on EU human rights policy. Moreover, he often mobilises other EU institutions to have a closer look at human rights issues, for example in the area of migration, energy, business activities, and has identified a number of third countries as strategic actors. He assured me that there was no risk of duplication of work of the Council of Europe, as the Special Representative's work was aimed at the external relations of the EU and that he often referred to the expertise of the Council of Europe and, in particular, that of the Venice Commission.

48. Moreover, the EU has adopted a number of guidelines to promote in its external human rights policy,⁶¹ such as, more recently – in 2013 “EU Guidelines on the promotion and protection of freedom of religion and belief”, “EU Guidelines on the Death Penalty”, “Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons” and in 2014 “EU Human Rights Guidelines on Freedom of Expression Online and Offline”. These guidelines have been adopted at ministerial level and, although they are not legally binding, they show the EU's strong political commitment to promote the rights in question.

49. Through the European Instrument for Democracy and Human Rights (EIDHR), the EU supports, *inter alia*, NGOs promoting human rights, democracy and the rule of law. Between 2014 and 2020, the financial support will amount to €1.3 billion.

50. As far as Council of Europe member States which are candidates for EU membership are concerned, the European Commission has regular consultations with the Council of Europe relevant instances and bodies. As regards the human rights dimension in EU trade agreements, the European Commission carries out an “impact assessment” which takes into account this problematic before the opening of the negotiation process.⁶² In its agreements with third countries, the EU regularly includes “human rights, democracy and rule of law clauses” to promote its values and political principles. The non-respect of such clauses, which are considered as essential element clauses, allows it to take restrictive measures, including the suspension of all or part of an agreement as a measure of last resort.⁶³

51. Moreover, sanctions – also referred to as restrictive measures – against third countries, individuals or entities, are an essential EU foreign policy tool and are applied in accordance with the principles of the Common Foreign and Security Policy. They are adopted as “common positions” of the Council of the EU. Their implementation is carried out by the European Commission and member States. They are open to very limited, if any, judicial review.⁶⁴

52. The European Parliament regularly follows the human rights situation in third countries through the work of its Subcommittee on Human Rights (DROI), which drafts the European Parliament's Annual Report on Human Rights and often invites civil society representatives and human rights defenders to its sessions.⁶⁵ Following the entry into force of the Lisbon Treaty and the increase of the European Parliament's powers in concluding international agreements, its Committee on Foreign Affairs (AFET) and Committee on International Trade (INTA) have also important roles in this area. The European Parliament also annually awards its Sakharov Prize for Freedom of Thought.

5. The European Union, the economic crisis and fundamental rights

53. Within the Council of Europe, the impact of the crisis on human rights has already been examined by the Assembly,⁶⁶ in particular in its [Resolution 1884 \(2012\)](#) “Austerity measures – a danger for democracy and social rights”,⁶⁷ and by other instances of the Council of Europe.⁶⁸ During the January 2015 part-session, the Assembly debated, *inter alia*, the report of the Committee on Equality and Non-Discrimination on “Equality and the crisis”.⁶⁹ I do not intend to duplicate the work of my colleagues.

61. For a complete list: http://eeas.europa.eu/human_rights/guidelines/index_en.htm.

62. *Ibid.*, p. 27.

63. *Ibid.*, p. 106.

64. For more information: http://eeas.europa.eu/cfsp/sanctions/index_en.htm.

65. *Supra* note 59, p. 120. See also pp. 124-125 and 128 concerning the role of other EP committees and their achievements in 2013.

66. See, for example, [Resolution 2024 \(2014\)](#) and [Recommendation 2058 \(2014\)](#) “Social exclusion – a danger for Europe's democracies”, [Resolution 1719 \(2010\)](#) and [Recommendation 1911 \(2010\)](#) on women and the economic and financial crisis and [Resolution 1651 \(2009\)](#) on the consequences of the global financial crisis.

67. See also the report of the Committee on Social Affairs, Health and Sustainable Development (rapporteur: Mr Andrej Hunko, Germany, UEL), [Doc. 12948](#).

54. Although the European Court of Human Rights has remained rather silent on this issue (as, in principle, the ECHR does not guarantee social and economic rights), the European Committee of Social Rights (ECSR) – following several collective complaints – has found a number of violations of the European Social Charter (revised) with regard to austerity measures in some countries.⁷⁰ For example, in the case of Greece, the legislation allowing dismissal without notice or compensation of employees with contracts of indefinite duration during a probationary period of twelve months was considered as being in breach of Article 4.4 of the European Social Charter (which grants the right of all workers to a reasonable period of notice for termination of employment) despite being a condition of Greece's loan arrangement with the EU institutions and the International Monetary Fund (IMF).⁷¹ Moreover, cuts in old-age pensions, also undertaken to honour an agreement with the Troika, were considered as contrary to its Article 12.3, which provides for an obligation to raise progressively the system of social security to a higher level.⁷² A comparison of the case law of the European Court of Human Rights and of the ECSR in connection with the economic crisis shows that their approaches are different: while the Court allows a certain margin of appreciation to member States when they take austerity measures, the ECSR has taken a clear stance on the protection of core rights protected by the European Social Charter.⁷³

55. I would also like to reflect on whether the decisions taken by some EU institutions in relation to the economic and financial crisis in the eurozone were taken in accordance with the principles of democracy and respect for human rights. First of all, the Troika, which, in its agreements on financial assistance with Cyprus, Greece, Ireland and Portugal, imposed a number of conditions such as fiscal increases and expenditures cuts, structural measures aimed at liberalising the labour market and certain protected sectors appears to be subject to very little, if any, accountability. Similarly, in its judgment in the *Pringle* case,⁷⁴ the Court of Justice of the EU found that when member States established the European Stability Mechanism (in which, as indicated, the European Commission and the ECB play a major role) as a separate international organisation acting as a permanent crisis resolution mechanism for the eurozone, they were not implementing EU law, as there was nothing in the Treaties conferring the EU any specific competence to this effect. Therefore, the Charter of Fundamental Rights does not apply to the establishment of the ESM by member States within the meaning of Article 51 of the Charter. The European Stability Mechanism was established by European Council Decision 2011/199 amending Article 136 of the TFEU.

56. Since I wished to examine whether the decisions of the ECB were taken in accordance with the principles of democracy and respect for human rights, I invited Mr Jean-Claude Trichet, former President of the ECB, to a hearing before our Legal Affairs Committee on 3 March 2014. I am very grateful to Mr Trichet for having accepted the invitation to appear before the committee. In his very interesting presentation, the former President of the ECB gave us his views on the measures taken by the EU, and in particular the ECB, to combat the economic and financial crisis.

57. Mr Trichet stressed that all ECB decisions had been taken in accordance with the European treaties. According to the legal services of the European Commission, the Council of the EU and the ECB, it was up to the Court of Justice of the EU to assess their compatibility with EU law. The financial and economic crisis had been going on since 2007 and it had been the greatest crisis in advanced countries since the Second World War. EU States finding themselves in a situation of economic and financial imbalance would not have been in such a state had they observed the Maastricht Treaty and the Stability and Growth Pact and they should have paid more attention to their competitiveness. Mr Trichet also acknowledged that some States, notably Ireland which had adhered to the Maastricht criteria but had failed to heed warnings about a property price bubble, also found themselves in a similar crisis. Investors and finance houses had lost confidence in them, as could be seen from the prices of credit default swaps. In the last phase of the crisis, only two solutions were conceivable, he explained: either the help of a generous philanthropist prepared to continue financing ongoing deficits, to replace investors scared off by the size of the deficits; or adjustments by the States concerned

68. See, for example, the report by the Commissioner for Human Rights, *Safeguarding human rights in times of economic crisis*, November 2014.

69. [Doc. 13661](#) (rapporteur: Mr Nikolaj Villumsen, Denmark, UEL).

70. Annual conclusions of the European Committee of Social Rights, 29 January 2014, www.coe.int/t/dghl/monitoring/socialcharter/conclusions/conclusionsindex_EN.asp.

71. *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece* (No. 65/2011), decision on the merits of 23 May 2012.

72. *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece* (No. 76/2012) and a number of similar decisions delivered on 7 December 2012.

73. Steering Committee for Human Rights (CDDH), *The impact of the economic crisis and austerity measures on human rights in Europe*. Draft feasibility study, CDDH(2014)017 of 4 November 2014, p. 9. See also at p. 7 concerning the inadmissibility decisions of the European Court of Human Rights on applications contesting austerity measures.

74. *Thomas Pringle*, Case C-370/12, judgment of 27 November 2012.

limiting deficits to a level considered sustainable by investors. In the absence of such a philanthropist, the International Monetary Fund and/or other European institutions and governments stood ready to assist the countries concerned in achieving the inevitable adjustment. He stressed that no States were forced into an assistance programme; they could also refuse the aid and make the necessary adjustments autonomously. He went on to state that the speed of the economic adjustment should not now be questioned, but rather its fairness or unfairness and that it should be held accountable in this regard through the democratic processes in the States in question. People's incomes should be decreased in a proportionate way, because that was the only way to protect employment, he maintained. However, he acknowledged that the "bargaining power" of people holding jobs or generally stronger positions in society was stronger than that of jobless or otherwise disadvantaged people whose benefits not only could be, but would have to be, reduced considerably. Whilst acknowledging that this could lead to the democratic processes in the countries concerned producing imbalanced or unfair results as regards the sharing of the burden of the adjustment, he did not accept that the ECB should have regard to the Charter of Fundamental Rights when making proposals. Knowing that excessive budgetary deficits always catch up with the countries concerned and lead to a catastrophe, they should insist on proper management, implement procedures for supervising macroeconomic balance, finalise the work on the banking union and have instruments like the European Stability Fund. Damage to economic and social rights was not the fault of the IMF or the Troika: deficits needed to be reduced, when a "world philanthropist" could not be found.

58. Mr Trichet was of opinion that the European Parliament should have more power to control EU institutions' decisions concerning the functioning of the eurozone. The decision-taking process in solving the crisis was indeed long, but this was due to the fact that States were operating within the EU and they had to follow democratic procedures.

59. Despite the ECB having been established as an institution of the European Union in the TEU, Mr Trichet saw little relevance of the Charter of Fundamental Rights or the Fundamental Rights Agency to its work or any benefit in having the FRA review the effects of its policy. He also dismissed the suggestion that the right to engage in work, set out in the Charter, had to be considered when determining the monetary policy of the ECB, the primary objective which, as mandated in Article 2 of the Statute of the ECB, is to maintain price stability within the eurozone.

60. Mr Trichet's presentation obviously reflected the opinions of an economist and a former president of a central bank. As regards the responsibility of the Troika for the austerity measures, he clearly stressed that the primary political responsibility for the acceptance of such measures lay with the States which had accepted the financial help of the European Union and the IMF. Similar views were heard by the rapporteur of the Committee on Equality and Non-discrimination, Mr Villumsen, when he met Troika representatives in Lisbon and he subsequently spoke about "shared responsibility".⁷⁵ Within the EU, the lack of the accountability of the Troika, the lack of transparency of the agreements concluded with it and the overall lack of democratic control in this respect was criticised by the European Parliament in two resolutions adopted on 13 March 2014.⁷⁶ The European Parliament has raised doubts as to whether the European Commission had not abused its competences as the "guardian of the Treaty" and contested the role of the ECB. The European Parliament rapporteur, Mr Alejandro Cercas, even considered that the measures proposed by the Troika were contrary to Article 9 of the TEU, which stipulates that the EU "shall observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies" in all EU activities.

61. Mr Trichet declined to comment specifically on the legality of the outright monetary transactions. In this context, I would also like to note that a case concerning the legality of the ECB's decision of 6 September 2012 outlining a programme for the purchase of government bonds issued by States of the eurozone – transactions known as Outright Monetary Transactions (OMTs) – is pending before the Court of Justice of the EU, following a request for a preliminary ruling from the German Federal Constitutional Court (*Bundesverfassungsgericht*).⁷⁷ The *Bundesverfassungsgericht* has doubts whether the said decision of the ECB is compatible with Article 119 and Articles 127.1 and 127.2 of the TFEU (whether the OMT was an economic policy, and not monetary policy, measure) and Article 123.1 of the TFEU (on the prohibition of monetary financing). In its very recent opinion of 14 January 2015, Advocate General Cruz Villalón proposes that the Court of Justice reply that an OMT, if it is being implemented, is compatible with the Treaties only under some conditions. It is compatible with Article 119 and Articles 127.1 and 127.2 of the TFEU provided

75. Supra note 69, paragraph 6.

76. Employment and social aspects of the role and operations of the Troika and Troika with regard to the euro area programme countries.

77. Lodged on 10 February 2014. Case C-62/14, *Peter Gauweiler and Others*.

that, “the ECB refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked ...” and with Article 123.1 of the TFEU, provided that, “the timing of its implementation is such as to permit the actual formation of a market price in respect of government bonds”⁷⁸.

62. During my visit to Brussels, I had a discussion with officials from the European Commission about the social consequences of the decisions it had taken in relation to the economic crisis. My interlocutors from the European Commission (DG Employment) indicated to me that more social impact assessment was indeed needed. However, the European Commission had taken some action to strengthen the social and employment dimension of the economic and monetary union. In its “Communication on Strengthening the Social Dimension of the Economic and Monetary Union”,⁷⁹ the Commission included some key social and employment indicators (such as unemployment or risk of poverty) to better identify, and at an earlier stage, major employment and social problems.⁸⁰ It also called for better co-ordination and monitoring of employment and social policies as part of the European Semester process and for boosting the role of social dialogue. Moreover, employment and social considerations were part of the two Regulations, of 21 May 2013, on budgetary surveillance: 472/2013 (EU)⁸¹ and 473/2013 (EU).⁸² The first one stipulates that member States, when preparing their draft macroeconomic adjustment programmes, shall seek the views of social partners and relevant civil society organisations. The second one obliges them to provide general information on expenditure on education, health care and employment.

63. My interlocutors from the European Commission also claimed that there existed no risk of duplication of work in the area of social and economic rights in the EU and the Council of Europe, as the latter’s standards (the European Social Charter) were adopted a long time ago. There is obviously a role for the Court of Justice of the EU which has the power to interpret these rights as enshrined in the Charter. However, there is a risk of divergences between the EU (CJEU) standards and those of the Council of Europe (mainly the European Committee of Social Rights), as shown by the case *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, concerning the right to bargain collectively and the right to strike.⁸³

64. On the occasion of the High-level conference in Turin on 17 and 18 October 2014, in which I took part, the Sub-Committee on the European Social Charter of the Committee on Social Affairs, Health and Sustainable Development adopted a declaration in which it deplored the fact that “many austerity and fiscal consolidation programmes were implemented without prior consultation with social partners and are not in conformity with the European Social Charter, or the Charter of Fundamental Rights of the European Union”. The sub-committee called on European governments and parliaments to strengthen the protection of social rights and related mechanisms, by “assessing the impact of past austerity measures on social and democratic rights, and encouraging the adoption of programmes for the restoration of rights and of institutions for social dialogue where necessary” and “ensuring that fiscal objectives and structural reforms do not hamper decent work and employment for all, and promote fair income distribution”. It also called for the reinforcement of the pivotal role of the European Social Charter and the ensurance of coherence between the EU and the Council of Europe’s standards, statements to which I fully subscribe.

6. Conclusions

65. All EU member States are members of the Council of Europe and are Parties to the European Convention on Human Rights. The EU itself is based on the same values core – democracy, rule of law and human rights. In certain areas, it even strives to ensure higher protection, which is well illustrated by the material scope of its Charter of Fundamental Rights, a modern human rights instrument. In its external relations with third countries, the EU promotes human rights by inserting “human rights clauses” in trade agreements or applying targeted sanctions. However, two primordial problems remain unresolved: the EU, which is a powerful organisation with an enormous bureaucracy, has not yet acceded to the ECHR (although all its member States had to do so before they joined it) and it has difficulties in disciplining its own member

78. Paragraph 263.

79. COM(2013)690, 2 October 2013.

80. See Annex to the Communication.

81. Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

82. Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area.

83. Case No. 85/2012, decision on admissibility and the merits of 3 July 2013.

States, when there is a risk of serious and systemic breaches of the values enshrined in Article 2 of the TEU. Moreover, the EU institutions' response to the economic crisis is highly controversial, due to the lack of transparency – and accountability – of the decision-makers.

66. During my visit to Brussels, civil society representatives also complained of the following: lack of access to some procedures and documents; lack of a formalised procedure for third party interventions before the CJEU; the inactivity of the European Commission in case of serious human rights violations (such as the lack of infringement proceedings in the case of violations of the rights of Roma or asylum seekers); the decoupling of migration issues from human rights, the weak role of the FREMP (Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons) of the Council of the EU; and the fact that the European Parliament did not seize the FRA for opinions on all legislative drafts and proposed amendments to proposals on which the FRA has provided guidance. Although these remarks should be addressed directly to the EU leaders and institutions, they are also pertinent to fellow parliamentarians from EU member States.

67. The European Convention on Human Rights remains the cornerstone of the human rights protection system in Europe and the EU should accede to the ECHR. EU accession to the ECHR would resolve many problems stemming from the co-existence of the legal orders of the EU and Council of Europe and it should be a political priority for EU decision-makers. [Opinion 2/13](#) of the CJEU puts on hold, for a long time, the whole process and apparently shows the Luxembourg Court's deeply rooted reluctance towards any external control of the EU's actions. Renegotiating the draft agreement in such a way that it would take into account the concerns expressed by the CJEU will require many months, if not years, and the goodwill of EU institutions, EU member States and the 19 Council of Europe member States which are not member States of the EU. EU accession to the ECHR is – as stipulated in Article 6 of the TEU – a legal obligation placed upon the EU and its member States. I call on governments of all member States of the EU, and the EU itself (Council, Commission and European Parliament) to take appropriate measures to accelerate the process of EU accession to the ECHR. This process should also be more transparent than it has been to date (see also the above-mentioned *Besselink* judgment of the CJEU).⁸⁴

68. Although the "Copenhagen criteria" are strictly verified before a candidate joins the EU, the existing tools do not allow a full and coherent monitoring of their continued observance by EU member States. Despite the existence of high EU standards in this field – those stemming from Article 2 of the TEU, its Charter of Fundamental Rights and the fact that all member States are States Parties to the ECHR –, the situation is far from perfect. Some member States still face serious risks of breaches of the rule of law principle due to interferences with "checks and balances" in their constitutional systems (for example in Hungary and Romania), systemic problems with the functioning of their judiciary (for example, due to corruption scandals, in Bulgaria or Romania or, due to excessively lengthy proceedings in Italy) and many serious and/or widespread human rights violations have not been properly investigated (such as the CIA retention centres, the use of member States' airspace or airports for rendition flights or involvement of some western States in mass surveillance carried out by the United States National Security Agency (NSA)).

69. As pointed out by Amnesty International, within the EU, violence against women, migrants, Roma and LGBTI people remains pervasive, and border control measures put at risk refugees and asylum seekers, who often lose their life in their attempts to reach the EU. Amnesty International stressed the EU's "responsibility to develop protective migration policies and practices that respect the human rights of migrants, refugees and asylum-seekers, and prevent further loss of life at sea".⁸⁵ It also called upon the leaders of the EU to "ensure that human rights form the bedrock of EU internal (and external) policies and practices".⁸⁶

70. Human rights problems persist within EU member States and one should welcome any action aimed at improving EU internal monitoring in this respect. However, any initiative in this direction, such as the European Commission's proposal on "the rule of law framework", should be examined with caution and the Council of Europe should remain vigilant in order to avoid any unnecessary duplication of tasks by both organisations and the waste of scarce resources. Regrettably, despite the Assembly's criticism, other Council of Europe bodies remain rather silent on the issue, which might be explained by the fact that the major part (almost 86%) of the technical assistance and co-operation activities to promote respect for human rights and rule of law of this institution are financed by the EU via the so-called "joint programmes".⁸⁷

84. *Supra* note 22.

85. See [press release of 27 June 2014](#), New EU leadership must work together to prioritise human rights.

86. See [press release of 26 June 2014](#), EU leader's actions must speak louder than any words at this week's Summit to protect human rights and their own credibility.

71. In its reply to Assembly [Recommendation 2027 \(2013\)](#) of February 2014, the Committee of Ministers fully supported the Secretary General, who indicated to his EU interlocutors that “a possible future European Union framework should take into account the instruments and expertise of the Council of Europe and co-operate closely with it”.⁸⁸ The Committee of Ministers also considered that it was premature to perceive this initiative as “undermining the role of the Council of Europe or of the Convention system”, due to the absence of detailed information⁸⁹ (at that time, i.e. before the European Commission issued its Communication in March 2014). It seemed to be less concerned about the risk of duplication of work and unnecessary waste of resources and failed to reflect on how the Council of Europe could be involved in the process of elaboration of the said initiative and ensure that the EU takes into account its expertise. I am fully convinced that the Committee of Ministers should reconsider its position, draw more attention to the recent initiatives within the EU concerning the “rule of law framework” and take more steps to promote the expertise of our Organisation and establish/pursue co-operation between the two organisations, as specified in the 2007 Memorandum of Understanding.

72. During my visit to Brussels, many of my interlocutors within the EU institutions called for more structured co-operation with the Council of Europe and I fully agree with them. There are many colleagues in our Organisation who have more or less regular working relations with their EU counterparts; however, this co-operation is often fragmentary, thematic and scattered. This also concerns our Assembly, which should try to establish more regular and structured working contacts with the relevant committees of the European Parliament (in the case of our committee – primarily with the LIBE Committee).

73. As regards the EU’s role in imposing austerity measures on some States threatened by the economic and financial crisis in the eurozone, much remains to be elucidated. Such measures often undermine social rights and target the most vulnerable groups (young people, the elderly, migrants, women and people with disabilities) and can lead to the upsurge of extremism, racism, hate crime and intolerance. The interventions of the Troika or of the European Commission alone are often presented as the only way out of the crisis; that is, in particular, the opinion of Mr Trichet, former President of the ECB. Without necessarily “judging” the appropriateness or otherwise of political decisions taken by governments in accepting international and/or EU financial assistance, I would like to stress that the circumstances in which such decisions were taken often lacked transparency and that they were not subjected to any judicial scrutiny. EU decision-makers should reflect on how best to make such processes more transparent and democratic. Perhaps the EU and/or the Council of Europe could draw up a catalogue of “compliance criteria for the imposition of austerity measures”, following the example of the United Nations Office of the High Commissioner for Human Rights?⁹⁰

87. The EU remains the most important contributor to the Council of Europe’s Joint Programmes, focused on co-operation and technical assistance for EU candidate States, countries of the EU Eastern Partnership, Southern Mediterranean and Central Asia. In 2013, the EU’s contribution to the 55 Joint Programmes amounted to €81.9 million, i.e. 86% of the overall contribution.

88. [Doc. 13432](#), paragraph 4.

89. *Ibid.*, paragraph 5.

90. “Austerity measures and economic, social and cultural rights”, p. 12.