

## POLICY BRIEF

# A Fundamental Rights Strategy for the European Union

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## Introduction

### KEY POINTS

- ▶ The EU institutions should jointly adopt a fundamental rights strategy that highlights the benefits for citizens of rights conferred at EU level.
- ▶ A strategy would improve the EU's credibility when promoting human rights with third countries, and allow the Union to meet its overarching goal of improving the well-being of its peoples.
- ▶ The strategy should be structured around measures to respect, protect and promote fundamental rights to the fullest extent allowed by the Union's powers.
- ▶ To develop and implement the strategy, the institutions should engage in regular and structured dialogue with the United Nations, Council of Europe, Fundamental Rights Agency and civil society organisations.

The European Union has progressively given fundamental rights greater prominence in its law, policies and institutional framework. It has created standards binding on the member-states in areas of EU competence that relate to fundamental rights, which are of direct and immediate benefit to people living in the EU. These include rules on non-discrimination, data protection, human trafficking, treatment of suspects in criminal proceedings and victims of crime. The EU has also taken measures to ensure that its institutions respect fundamental rights standards when elaborating policy and legislation. Such measures include making the Charter of Fundamental Rights legally binding, creating the Fundamental Rights Agency, adopting a Commission strategy on the implementation of the Charter of Fundamental Rights,<sup>1</sup> acceding to the United Nations Convention on the Rights of Persons with Disabilities and negotiating accession to the European Convention on Human Rights.

However, these steps have been incremental and piecemeal. The Union lacks an overarching and coherent framework, and the benefits of what the EU has achieved for its citizens are not evident to the public. The institutions should commit jointly to a fundamental rights strategy. The tangible positive impact on individuals would increase public support for the

EU. A comprehensive fundamental rights strategy would be composed of measures to respect, protect and promote fundamental rights. To implement these measures properly, the institutions would need to ensure greater transparency in their decision-making, and increase participation by bodies with expertise on fundamental rights.

<sup>1</sup> European Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, 19 October 2010.

## A strategy would benefit the EU, its member-states and its peoples

The respect-protect-promote framework proposed here reflects the international human rights obligations that already bind the EU's member-states.<sup>2</sup> Human rights standards agreed to by the member-states under Council of Europe and United Nations treaties impose obligations to prevent authorities from interfering with fundamental rights (i.e. require them to respect rights). But these international commitments also impose positive obligations to protect and promote rights.

The EU does have measures in place to make sure that it respects fundamental rights. However, these measures require improvement. Furthermore, the EU has not recognised that it has a positive obligation to use its powers to protect and promote fundamental rights. This creates a gap in fundamental rights implementation in the EU, especially on those policy issues where the member-states have delegated their powers to take action to the EU.<sup>3</sup> After the EU has created harmonised rules, any deviation from these rules by member-states – even when this is designed to protect or promote fundamental rights – is strictly regulated. The Court of Justice (CJEU) rarely finds that measures taken by individual governments to protect and promote fundamental rights are acceptable when these measures deviate from uniform EU standards.

**This current gap in fundamental rights implementation can be illustrated with examples of cases decided by the CJEU.**

Governments trying to promote the rights of minorities or prevent a national language falling into disuse may wish to place language requirements on candidates for particular jobs. However, unless this policy is very limited, it will violate EU law on free movement of workers.<sup>4</sup>

National authorities may wish to protect freedom of expression by restricting the financial influence of businesses on the programming choices of national broadcasters. However, limitations on the amount of advertising allowed on national television violate rules on free movement of services.<sup>5</sup>

A government trying to protect the privacy and family life of those living near a trans-European motorway by reducing noise and air pollution may try to restrict the size of lorries using this road. However, this violates EU law on the free movement of goods.<sup>6</sup>

A member-state wanting to ensure that its nationals receive a fair trial during criminal prosecution may create a rule that suspects who are convicted in absentia must be able to appeal their convictions. However, if a court refuses to extradite one of its nationals because the requesting country's laws do not allow for appeals against *in absentia* convictions, this will violate EU extradition rules.<sup>7</sup>

Because it is difficult for member-states to take measures to promote and protect rights individually in areas covered by EU law, the Union itself needs to integrate protection and promotion of fundamental rights into its policies and legislation. Otherwise neither the Union, nor

<sup>2</sup> Butler, 'The European Union and International Human Rights Law', OHCHR, 2011, available on: [http://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf).

<sup>3</sup> Butler and Ahmed, 'The European Union and Human Rights: an International Law Perspective', 17 European Journal of International Law, (2006) p. 771, pp. 796-800.

<sup>4</sup> Case C-379/87 *Groener*, 28 November 1989; Case C-202/11 *Las*, 16 April 2013.

<sup>5</sup> Case C-353/89 *Commission v Netherlands*, 25 July 1991; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda et al v Commissariaat voor de Media*, 25 July 1991.

<sup>6</sup> Case C-28/09, *Commission v Austria*, 21 December 2011.

<sup>7</sup> Case C-399/11, *Melloni*, 26 February 2013.

national governments, will be able to implement these obligations. The EU will be directly subject to many of these obligations once it joins the European Convention on Human Rights.

A fundamental rights strategy is important not only to allow the EU to take up the international commitments of its member-states and comply with its future obligations under the European Convention. It will also help the Union achieve its overarching aim, which is to promote 'the well-being of its peoples'.<sup>8</sup> The EU's goals in specific policy areas, such as the internal market or agriculture, do not exist for their own sake. Rather, they are designed to fulfil the broader purpose of improving the quality of life for all those living within its borders.

**Example:**

The goal of competition policy is to benefit people in the EU as consumers: free competition encourages businesses to develop desirable and useful products at the lowest affordable price. But competition law could also benefit citizens as participants in the democratic process. Democracies rely on informed and free public debate. This is undermined when a small number of large owners come to dominate the media market. If certain media outlets have particularly large audiences they are able to influence the public, and consequently the government, with their own political and economic interests.

The Commission can take companies to court if they are abusing a dominant position in a particular market. The Commission may also withhold permission for companies to merge if this will make them too powerful. The objective is to prevent a business becoming so powerful that it is not affected by other companies trying to compete. This would lead to a situation where the company can charge higher prices, prevent new products entering the market, and does not need to innovate to attract and retain customers.<sup>9</sup> When the Commission is assessing whether a particular business is in breach of competition law, it looks at the share that this company has of the market. However, the Commission considers that print, online, radio and television are all distinct markets, with many separate sub-markets.<sup>10</sup> In addition the Commission is guided by economic considerations, rather than the impact of a business' market share on freedom of expression and democratic participation.<sup>11</sup> This means that a particular company could own print, online, radio and television channels without breaching competition rules. However, such a company could still have significant influence over politicians and public debate. If fundamental rights became a guiding principle of competition policy, along with consumer protection and economic development, this would help the EU reach its goal of improving the well-being of its peoples.

In addition to improving the lives of people inside the EU, a properly implemented fundamental rights strategy would allow the Union to promote human rights effectively in its relations with third countries. The EU has placed human rights at the centre of foreign policy through a strategic framework and action plan.<sup>12</sup> However, its ability to promote human rights abroad is undermined by problems with fundamental rights implementation inside the EU. A strategy would improve the credibility of the EU in the eyes of third countries, and serve as a model that the Union could promote abroad.

<sup>8</sup> Article 3, Treaty on European Union, Official Journal, C 83, 30 March 2010, p. 13.

<sup>9</sup> European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal, C 31, 5 February 2004, p. 5.

<sup>10</sup> Institute of European Media Law, 'Media Market Definitions – Comparative Legal Analysis', 2005, Chapter 1, available on: [http://ec.europa.eu/competition/sectors/media/documents/2005\\_media\\_market\\_definition\\_study\\_en.pdf](http://ec.europa.eu/competition/sectors/media/documents/2005_media_market_definition_study_en.pdf).

<sup>11</sup> Brogi and Gori, 'European Commission soft and hard law instruments for media pluralism and media freedom', in European University Institute, Centre for Media Pluralism and Media Freedom, 'European Union Competences in Respect of Media Pluralism and Media Freedom', Chapter 4, pp. 68-71, available on: <http://cmpf.eui.eu/Documents/CMPPFPolicyReport2013.pdf>.

<sup>12</sup> Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, 25 June 2012, available on: [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf).

# How the EU can improve the lives of its citizens

## Respect for fundamental rights by the EU

The duty to ‘respect’ fundamental rights requires the EU to refrain from adopting measures that interfere with rights. This obligation is negative, and requires the EU to refrain from crossing a line established by fundamental rights standards. The CJEU can review EU legislation and action, and the way EU rules are implemented by member-states, to check they respect fundamental rights. However, this has two limitations. First, it relies on a case actually reaching the court. Restrictive rules of legal standing severely limit the opportunities for bringing such cases. Second, the court only plays a role after the measure in question has been adopted and (usually) after it has been

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implemented, meaning that damage has already been done. For example, eight years passed between the adoption of the Data Retention Directive,<sup>13</sup> and a ruling from the CJEU finding that this legislation was in breach of the Charter.<sup>14</sup>

The EU institutions have taken some steps to ensure that laws and policies are checked before they are adopted. But these measures

require improvement if the EU is to make its commitment to respect fundamental rights effective. The Commission’s strategy on the implementation of the Charter is a significant step forward. If implemented correctly, it has the potential to prevent the Commission proposing legislation and policy that breaches the Charter. However, legislative proposals continue to emerge that fail to give proper consideration to fundamental rights.<sup>15</sup> The principal weakness of the Commission’s current approach is that officials are often unaware of the Charter’s relevance in policy areas outside the fields of justice and home affairs, where officials are more aware of rights implications.

For example, the Commission adopted legislation and guidance in 2012 that regulates the extent to which state aid for businesses providing services of general economic interest is permissible under EU law.<sup>16</sup> Because financial assistance to businesses from the state distorts competition, it is only allowed in limited circumstances, such as subsidies for businesses providing certain public services. Rules on services of general economic interest apply to provision of social services such as schools, hospitals, social housing, social security, measures to reintegrate workers into the labour market, social inclusion of vulnerable groups and long term care. Regulation of services of a general economic interest will inevitably have an impact on delivery of a range of social and economic fundamental rights, which are guaranteed by the Charter. These would probably include: the rights of the elderly (Article 25), the integration of persons with disabilities (Article 26), the right to health care (Article 35), the right to social security and social assistance (Article 34), and the rights

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<sup>13</sup> Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, 15 March 2006, Official Journal, L 105, 13 April 2006, p.54.

<sup>14</sup> Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, 8 April 2014.

<sup>15</sup> Butler, ‘Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission’, (2012) *European Law Review* 37 *European Law Review* p. 397, available on:

<http://www.opensocietyfoundations.org/sites/default/files/Ensuring%20Compliance%20with%20the%20Charter%20of%20Fundamental%20Rights%20in%20Legislative%20Drafting%20-%20The%20Practice%20of%20the%20European%20Commission.pdf>.

<sup>16</sup> European Commission, Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, Official Journal, C 8, 11 January 2012, p. 4; Commission Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, Official Journal, L 7, 11 January 2012, p. 3.

of the child (Article 24). Nevertheless, the term ‘fundamental rights’ does not appear in the measures recently adopted by the Commission, despite the fact that the Charter contains an express right of ‘access to services of general economic interest’ (Article 36). Nor were fundamental rights mentioned in the accompanying impact assessment.<sup>17</sup>

The Commission could improve awareness of the relevance of fundamental rights by:

- Offering tailored training for officials. This should not consist in general training on fundamental rights because it is impossible to master these rules within the relatively limited periods of time allocated to professional development in the EU institutions. Rather, training should focus on how fundamental rights apply to the specific policy areas in which an official works.<sup>18</sup>
- Facilitating secondments between the Council of Europe and the European Commission and increasing the capacity of the fundamental rights units of the Commission Legal Service and DG Justice.
- Requiring roadmaps to be shared with the fundamental rights unit of DG Justice and the Fundamental Rights Agency for screening.
- Increasing fundamental rights expertise on the Commission’s Inter-Service Group and Impact Assessment Board.

Despite the shortcomings, the Commission is the only institution that has a practice of systematically screening legislative proposals. The Council and the European Parliament do not habitually verify that their amendments to Commission proposals comply with the Charter. Although the Council’s Working Party on Fundamental Rights and Free Movement of Persons (FREMP) has adopted guidelines to this effect, these have not been put into practice.<sup>19</sup> Furthermore, other Council working parties do not have a practice of consulting FREMP on fundamental rights questions arising during negotiations. If a standing instruction were issued to all working parties to inform FREMP of fundamental rights questions arising during negotiations, FREMP would be able to offer guidance systematically. Analogous to the Horizontal Working Party on Drugs, FREMP should retain a general overview of all fundamental rights-related questions.<sup>20</sup> FREMP should also follow up, as a matter of course, with individual member-states on the implementation of recommendations made by the Fundamental Rights Agency in its reports, in conjunction with other relevant Council working parties.

The European Parliament’s Committee on Civil Liberties Justice and Home Affairs (LIBE) does, on occasion, commission research or request the assistance of the Fundamental Rights Agency to check the fundamental rights implications of legislative proposals. Other EP committees may request LIBE to deal with legislative files that raise questions of compatibility with fundamental rights standards.<sup>21</sup> However, neither the Parliament nor LIBE have a procedure in place for systematically screening amendments for their compatibility with the Charter. Such a procedure should be put in place to ensure that legislation is compatible with the Charter when it is adopted in its final form.

<sup>17</sup> European Commission, Reform of the EU rules applicable to State aid in the form of public service compensation, Impact Assessment SEC(2011) 1581 final, 20 December 2011.

<sup>18</sup> See for example, ‘Human Rights in Health Care: a Framework for Local Action’ which is specifically tailored to those delivering health services at the local level, available on:

[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_o88972.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_o88972.pdf).

<sup>19</sup> FREMP, Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council’s preparatory bodies, 10140/11, 18 May 2011, available on:

<http://register.consilium.europa.eu/doc/srv?!=EN&t=PDF&gc=true&sc=false&f=ST%2010140%202011%20INIT>.

<sup>20</sup> General Secretariat of the Council, List of Council preparatory bodies, 14 January 2014, available on:

<http://register.consilium.europa.eu/doc/srv?!=EN&t=PDF&gc=true&sc=false&f=ST%205312%202014%20INIT>.

<sup>21</sup> Rules of Procedure of the European Parliament, 7<sup>th</sup> Parliamentary Term, Rule 36, available on:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20140310+0+DOC+PDF+Vo//EN&language=EN>.



## Protection of fundamental rights by the EU

The duty to protect fundamental rights requires the EU to take reasonable steps to prevent the member-states from violating rights. A comprehensive approach to protect fundamental rights would require four initiatives.

1. When introducing EU-wide fundamental rights standards. The EU has competence to introduce legislation that protects particular fundamental rights, such as data protection, asylum, non-discrimination and the rights of suspects of crime. Currently, when the EU creates standards covering particular fundamental rights, it may adopt a level of protection that is lower than what is required by the Charter of Fundamental Rights and the international commitments of its member-states. This has occurred, for example, in relation to rules on discrimination on grounds of sexual orientation, gender identity, religion, age and disability. EU law provides protection on these grounds in the area of employment only. In contrast, UN and Council of Europe standards that bind all the EU's member-states impose a general prohibition on discrimination.

This does not directly violate fundamental rights, because the EU is not obliging member-states to breach existing standards. Member-states remain free to apply the higher standards required by their international commitments. However, if they adopt lower standards in EU law, it amounts to a failure to protect rights for two reasons. It undermines member-states' international human rights obligations by condoning lower European standards. It may also cause national courts to apply lower levels of protection because EU law takes precedence over all other rules in national jurisdictions.<sup>22</sup>

2. The EU should include fundamental rights safeguards whenever it creates regimes based on mutual recognition or mutual trust. Such rules can open a gap in the protection of rights. For example, the European Arrest Warrant<sup>23</sup> and the Dublin II Regulation<sup>24</sup> allow member-states to transfer individuals to other member-states for detention, prosecution or processing. When the receiving state does not comply with fundamental rights standards, the sending state is placing individuals at risk of harm. Where an individual's rights are breached by the receiving state, for example because of poor conditions of detention, that person can take a case before the European Court of Human Rights.<sup>25</sup> They may also have a national case contesting the legality of their treatment referred to the CJEU.<sup>26</sup> As shown by cases brought by asylum seekers against Belgium, the UK, Ireland and Greece, both the sending state and the receiving state will be held responsible for violating that person's rights. However, this method of protecting individuals is ineffective: it requires an individual to bring a case, and then either exhaust domestic remedies (in the case of the ECHR) or hope that the national court decides to request a reference (in the case of the CJEU). This requires considerable time and resources, and will not necessarily prompt other countries with similar problems to change their practices.

Where EU rules create a gap in protection, the EU must step in to close that gap. If the EU wishes to allow member-states to transfer custody over individuals between them, this should be accompanied by measures to ensure that member-states respect their rights. The EU has made some progress. After member-states recognised that the European Arrest Warrant was

<sup>22</sup> Case C-399/11, *Melloni*, 26 February 2013.

<sup>23</sup> Council Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States, Official Journal, L 190, 18 July 2002, p. 1.

<sup>24</sup> Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal, L 50, 25 February 2003, p. 1.

<sup>25</sup> e.g. ECHR, Application No. 30696/09, *M.S.S. v Belgium and Greece*, 21 January 2011.

<sup>26</sup> e.g. Cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

allowing individuals to be transferred to jurisdictions that did not respect their rights,<sup>27</sup> the EU began adopting standards to protect suspects.<sup>28</sup> But it has not taken similar action in its revision of the Dublin II Regulation.<sup>29</sup> Member-states refused to include in the Dublin III Regulation a mechanism to suspend transfers where countries failed to meet fundamental rights standards.<sup>30</sup>

3. The EU should ensure that member-states implement fundamental rights standards in areas of EU competence. The Commission should enforce EU rules covering fundamental rights issues, which is not always the case. Mass deportation, eviction and segregation of Roma are clear breaches of the Racial Equality Directive and Free Movement Directive.<sup>31</sup> But these violations of EU law have not resulted in infringement proceedings.

Furthermore, the Commission should perform an audit of existing EU legislation governing the internal market to identify where this can be used to support implementation of fundamental rights. For example, EU procurement rules can be used to prevent corruption and excessively close business-government relations, which can threaten democracy.

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The EU should respond to calls by a number of member-states, the European Parliament and civil society organisations, to create a mechanism to ensure that member-states implement the EU's fundamental values in areas outside EU competence.

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Similarly, state aid rules can be used to prevent governments supporting friendly voices in the media through discriminatory advertising policies. The Commission could maximise its ability to protect fundamental rights if it catalogued these fundamental

rights-friendly rules and prioritised infringement proceedings on these issues.

4. The EU should respond to calls by a number of member-states,<sup>32</sup> the European Parliament<sup>33</sup> and civil society organisations,<sup>34</sup> to create a mechanism to ensure that member-states implement the EU's fundamental values in areas outside EU competence. Currently, the EU's only tool for this is Article 7 of the Treaty on European Union. Article 7 has never been activated because it requires a clear risk of a serious breach of the EU's fundamental values. It also requires significant political will from the European Parliament, Commission or Council to activate. The Commission's new framework on the rule of law does not provide the EU with a

<sup>27</sup> European Commission, Report on the implementation of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, 11 April 2011.

<sup>28</sup> European Commission, Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice, COM(2013) 820 final, 27 November 2013.

<sup>29</sup> Proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2008) 820 final, 3 December 2008, Article 31.

<sup>30</sup> Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Article 33, Official Journal L 180, 29 June 2013, p. 31.

<sup>31</sup> Ligue des Droits de l'Homme and European Roma Rights Centre, 'Census: Forced evictions of migrant Roma in France' (2014), available on: <http://www.errc.org/cms/upload/file/france-detailed-report-14-january-2014.pdf>; Dinmore, 'Italy faces pressure over Roma 'ghetto' camps', Financial Times, 20 May 2013, available on: <http://www.ft.com/intl/cms/s/0/edo6ba3a-c162-11e2-b93b-00144feab7de.html?siteedition=uk#axzz3itSzZUp5>.

<sup>32</sup> Hayden, 'EU Is Urged to Set Up Mechanism to Protect Basic Values', Bloomberg News, 8 March 2013, available on: <http://www.bloomberg.com/news/2013-03-08/eu-is-urged-to-set-up-mechanism-to-protect-basic-values.html>.

<sup>33</sup> European Parliament, Report on the situation of fundamental rights in the European Union (2012), 2013/2078(INI), 27 January 2014, available on: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0051+0+DOC+PDF+Vo//EN>.

<sup>34</sup> Butler, 'How to monitor the rule of law, democracy and fundamental rights in the EU', Open Society European Policy Institute, (2013), available on: <http://www.opensocietyfoundations.org/sites/default/files/how-monitor-rule-law-democracy-and-fundamental-rights-eu.pdf>; Amnesty International, 'The future of EU policies in the area of freedom, security and justice: a human rights perspective', (2014), available on: [http://www.amnesty.eu/content/assets/Doc2014/AI\\_Contribution\\_Shaping\\_the\\_future\\_of\\_justice\\_and\\_home\\_affairs\\_in\\_the\\_EU.pdf](http://www.amnesty.eu/content/assets/Doc2014/AI_Contribution_Shaping_the_future_of_justice_and_home_affairs_in_the_EU.pdf).

more effective mechanism.<sup>35</sup> It relies on the same high threshold and political will required by Article 7 to be triggered.<sup>36</sup>

To protect fundamental rights effectively, the EU should create a mechanism to monitor member-states continuously. The mandate of the Fundamental Rights Agency could be expanded to allow it to perform this monitoring function. This additional task would also require new resources. The mechanism should use the data collected and analysis conducted by Council of Europe and UN human rights bodies. Continuous monitoring would allow for early warning of problems. The Council, together with the Commission and European Parliament should review member-states periodically, and formulate and enforce recommendations to correct breaches of rights. The EU could take measures at national level to help prevent such breaches. These could include technical and financial assistance to national human rights institutions and civil society organisations, which the Commission currently provides to accession countries.<sup>37</sup>

## Promotion of fundamental rights by the EU

The EU does not have a distinct and express area of competence under its treaties mandating it to legislate on fundamental rights in general. This does not mean that it has no powers to take positive measures that improve fundamental rights implementation. Just as any EU power may infringe on rights, any EU power may also promote rights. However, the EU has yet to explicitly recognise this.

The Commission could perform an audit of EU competences to identify how the powers of each Directorate General (DG) can be directed towards improving the enjoyment of fundamental rights. This would allow fundamental rights to be mainstreamed into all policy areas. A similar approach

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**There are signs that some Commission DGs have recognised their role in promoting fundamental rights.**

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has already been taken in relation to the rights of persons with disabilities. The European Disability Strategy<sup>38</sup> and the Declaration of Competences annexed to the Decision for the Conclusion of the UN Convention on the Rights of Persons with Disabilities,<sup>39</sup> identifies which areas of EU competence are relevant to implementing the EU's responsibilities under this treaty.

There are signs that some Commission DGs have recognised their role in promoting fundamental rights. For instance, DG Justice has taken measures to protect the rights of victims of crime.<sup>40</sup> DG

Connect has begun exploring how better to defend media freedom and pluralism.<sup>41</sup> DGs Regional Policy and Employment and Social Affairs have taken measures to promote the rights of Roma and persons with disabilities through conditions imposed on the use of structural funds.<sup>42</sup> This

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<sup>35</sup> European Commission, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11 March 2014.

<sup>36</sup> Butler, 'EU still failing to protect fundamental rights', Open Society European Policy Institute, (2014), available on: <http://www.opensocietyfoundations.org/voices/eu-still-failing-protect-fundamental-rights>.

<sup>37</sup> European Commission, Communication on enlargement strategy and main challenges 2013-2014, COM(2013) 700 final, 16 October 2013.

<sup>38</sup> European Commission, European Disability Strategy, 2010-2020, COM(2010) 636 final, 15.11.2010.

<sup>39</sup> Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Annex II, Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Rights of Persons with Disabilities, Official Journal, L 23, 27 January 2010, p. 55.

<sup>40</sup> Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, Official Journal, L 315, 14 November 2012, p. 57.

<sup>41</sup> See collection of initiatives on media freedom and pluralism under the EU's Digital Agenda, available on: <http://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism>.

<sup>42</sup> Regulation 1303/2013 laying down common provisions on European Structural Funds, Official Journal, L 347, 20 December 2013, p. 320.



approach should be systematised so that each DG is able to maximise its potential beneficial impact on the promotion of fundamental rights.

For example, the EU's most far-reaching powers lie in the area of trade between its member-states. Internal market rules are designed to give consumers a broader choice of products, and businesses a wider pool of customers. But internal market policy – just as competition policy – can also be used to promote fundamental rights. The e-Commerce Directive regulates how goods and services are sold online.<sup>43</sup> Sometimes individuals use the internet to share illegal materials, such as films or music protected by copyright, or defamatory or offensive photos and articles. The directive states that, in general, internet service providers, search engines and social platforms are not responsible when individuals use their services to put these materials on the internet. Only if internet companies know about this and do nothing, can they be sued. However, it is often not clear when material breaks the law, such as whether a blog critical of a politician could be considered defamatory or merely fair comment. The directive does not provide guidelines on how internet companies should decide if material is illegal. It is not clear if internet companies should remove content immediately, or if they should: investigate themselves, ask the person who posted the content to explain, ask an independent body to investigate, or wait for a court order. To avoid legal action against them, these internet companies are cautious about the material they allow online and often remove material immediately after receiving a complaint.<sup>44</sup> This restricts the freedom of people to communicate and share information and ideas over the internet. The internet has great potential to make freedom of expression and access to information easier for the public, and the EU could promote these rights by introducing clear guidelines. If protection and promotion of fundamental rights became one of the goals of DG Internal Market, it would allow the Commission to use its existing powers to improve the implementation of rights to greater effect.

In the long term, the EU could become party to the same Council of Europe and UN human rights treaties that bind its member-states. As shown in the area of disability, when the EU joins a human rights treaty it gives due consideration to where its powers can be used to promote fundamental rights. As a party to these treaties, the EU would also benefit from the guidance of the expert bodies that supervise implementation.

## Participation and transparency

The EU institutions will need to collaborate closely with organisations that have expertise on fundamental rights, if they are to implement the strategy successfully. These include civil society organisations, the Council of Europe and United Nations human rights mechanisms, as well as the Fundamental Rights Agency.

Dialogue between all of these bodies does take place, but this tends to occur *ad hoc* and does not gather all participants simultaneously. Channels for regular and structured dialogue would allow these bodies to assist the EU in three ways. First, through consultation of these bodies to ensure that proposed policies and legislation respect fundamental rights standards. Second, by seeking the assistance of these bodies in auditing where EU competences can be used to promote fundamental rights. Third, by following up on the monitoring and data collection work of these bodies and the recommendations issued to member-states in order to better protect fundamental rights at national level. These bodies could also be included in regular inter-institutional dialogue on fundamental rights between DG Justice, FREMP and LIBE.

Greater transparency in the EU institutions would help these bodies – particularly civil society organisations – to participate more effectively. Negotiations in the Council are opaque, which

<sup>43</sup> Directive 2000/31 on Electronic Commerce, Official Journal, L 178, 17 February 2000, p. 1.

<sup>44</sup> European Digital Rights, 'EDRI response to European Commission e-Commerce Directive consultation', 2010, [http://www.edri.org/files/EDRI\\_ecommerceresponse\\_101005.pdf](http://www.edri.org/files/EDRI_ecommerceresponse_101005.pdf).

makes it difficult for civil society to make timely and pertinent contributions. Some progress was made through a CJEU ruling towards disclosure of member-state negotiating positions on legislative proposals.<sup>45</sup> However, the main mechanism for negotiating legislative positions between member-states, the European Parliament and the Commission – the *trialogue* – is neither referred to in the treaties nor open to scrutiny.<sup>46</sup> Certain processes in the Commission are also difficult to track, such as decisions to begin or abandon infringement proceedings. Without access to this information the institutions and the member-states cannot be held to account to their citizens.

## Conclusion

The EU would move a long way towards achieving its overarching goal of improving the well-being of its peoples, if it fully implemented fundamental rights standards. Fundamental rights embody the values that give full realisation to human dignity when put into practice. The EU and its member-states should ensure that the standards contained in the Charter of Fundamental Rights become the guiding light of EU law and policy-making.

The EU has progressively given greater prominence to fundamental rights through its institutional framework, legal standards and policies. Good practices that are already in place can be replicated and systematised to form an overarching fundamental rights strategy. Such a strategy would not require new institutions, new legislation, or changes to the EU treaties. Rather it requires a change in practice and culture, both in the EU's institutions and among national governments.

The strategy will bolster the EU's legitimacy by improving the lives of its citizens. The Union will be much better placed to defend itself against populist attacks, if it can point to the rights that it has put into practice for its peoples.

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<sup>45</sup> Case C-280/11 P, *Council v Access Info Europe*, 17 October 2013.

<sup>46</sup> Transparency International-EU, 'The European Union Integrity System', (2013), available on: [http://www.transparencyinternational.eu/wp-content/uploads/2014/04/EU\\_Integrity\\_System\\_Report.pdf](http://www.transparencyinternational.eu/wp-content/uploads/2014/04/EU_Integrity_System_Report.pdf).

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