STUDY

Requested by the LIBE committee

European Parliament

Strengthening the Fundamental Rights Agency

The Revision of the Fundamental Rights Agency Regulation

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
PE 653.056- May 2020

EN

Strengthening the Fundamental Rights Agency

The Revision of the Fundamental Rights Agency Regulation

Abstract

Since it was set up in 2007, the EU Agency for Fundamental Rights has demonstrated its ability produce high-quality research, and to provide the EU institutions and the EU Member States implementing Union law with expert advice on fundamental rights issues. The regulatory framework under which the Agency operates, however, is not fully appropriate to discharge its mandate effectively. This in-depth study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Civil Liberties, Justice and Home Affairs identifies how it could be improved.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

AUTHOR
Professor Olivier DE SCHUTTER, UCLouvain and SciencesPo, former coordinator of the EU Network of Independent Experts on Fundamental Rights (2002-2007), and former member of the Scientific Committee of the EU Fundamental Rights Agency (2012-2017).

ADMINISTRATOR RESPONSIBLE
Ottavio MARZOCCHI

EDITORIAL ASSISTANT
Ginka TSONEVA

LINGUISTIC VERSIONS
Original: EN

ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
Email: poldep-citizens@europarl.europa.eu

Manuscript completed in May 2020

This document is available on the internet at:
http://www.europarl.europa.eu/supporting-analyses

CONTENTS

LIST OF ABBREVIATIONS

EASO	European Asylum Support Office
EFRIS	European Union Fundamental Rights Information System
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)
EUMC	European Union Monitoring Centre on Racism and Xenophobia (Vienna Observatory)
FRA	EU Agency for Fundamental Rights
ILO	International Labour Organisation
MAF	Multiannual Framework

LIST OF TABLES

EXECUTIVE SUMMARY

Twelve years after the establishment of the EU Agency for Fundamental Rights, it has becoming increasingly clear that the regulatory framework under which the Agency operates is not fully appropriate to discharge its mandate effectively in an institutional and policy landscape that has changed significantly since its foundation. With the Treaty of Lisbon, the European Communities and the European Union have become a single organisation, and "third pillar" policy areas (police cooperation and judicial cooperation in criminal matters), formerly dealt with under Title VI of the Treaty on European Union, are now dealt with under the standard "Community method". And a sense of urgency has emerged, particularly since the rule of law is being challenged in certain EU Member States: Article 7 TEU procedures have been launched against two Member States, and the Commission has established a new EU mechanism on the Rule of Law.

Four important limitations apply to the ability of the Fundamental Rights Agency to fulfil its mandate. A **first** limitation is that the Agency may only work under the thematic areas covered by the **Multiannual Framework** adopted every five years by the Council on the basis of a proposal of the Commission and with the consent of the European Parliament. This restriction significantly limits the ability for the Agency to be relevant and to meet the expectations of its stakeholders, in the face of emerging fundamental rights issues; it also may raise doubts about the real independence of the Agency vis-à-vis both the EU institutions and the EU Member States. Moreover, the MAF has little added value, given that multiyear strategic planning of its work is already required under the 2012 Common Approach on EU decentralized agencies and under the 2013 Financial Framework Regulation. **The MAF should be abolished so as to remove the restriction of the activities of the Agency to the thematic areas currently covered by it**.

A **second** limitation is that the Founding Regulation does not extend the role of the Agency to the areas of **police cooperation and judicial cooperation in criminal matters**, areas that belonged, at the time when the Founding Regulation was adopted, under Title VI of the EU Treaty (the "third pillar"). The Preamble of the Founding Regulation explicitly leaves open the possibility of a later extension, however. Moreover, whereas the Preamble of the Founding Regulation states that "the Agency should act only within the scope of application of Community law" (para. 8) and Article 3(1) of the Founding Regulation states that the Agency shall fulfil its tasks "within the competencies of the Community", such references should be read, following the entry into force of the Lisbon Treaty, as a reference to Union law, including the "third pillar" areas formerly covered under Title VI of the Treaty on European Union. In order to remove any outstanding doubt on this point, it is suggested that the expression **"Community law" be replaced by "Union law"** in the Founding Regulation, and that Article 3(1) of the Founding Regulation be either removed, or rephrased, to make it clear that the Agency's scope extends to the full scope of application of **Union law**, and that it may contribute to assisting the institutions in fulfilling their role under Articles 2 and 7 TEU.

A **third** limitation is that, while the FRA may adopt opinions on specific thematic topics, it may do so only **at the request of one of the institutions** where such opinions concern **legislative proposals** or **positions** adopted by the institutions in the **legislative process**: in other terms, it cannot intervene in the legislative process at its own motion, in order to draw the attention of the institutions to the fundamental rights issues raised by the legislative file.

Removing this limitation would allow the FRA to effectively discharge its mandate, enhance its efficiency and impact. It also would align the mandate of the FRA with the requirements of the Paris Principles on national institutions for the promotion and protection of human rights. If agreement cannot be found on an amendment to the Founding Regulation on this point, an alternative solution would be to provide the FRA on a systematic basis with the opportunity to express its opinion as to the

fundamental rights implications of legislative files. It would be left to the Agency to decide whether or not to respond to the invitation to intervene, based on its own assessment of the fundamental rights sensitivity of any particular legislative proposal, and taking into account the human and financial resources at its disposal.

The study proposes also to allow a **group of Member States** (comprising at least one quarter of the EU Member States), as well as **individual Member States** when they are confronted with fundamental rights issues in the implementation of EU law, to seek an **opinion** of the FRA. These proposals would improve the quality of the information provided to the Council when considering a legislative proposal, at the earliest stage possible. They would strengthen the relevance of the Agency's work for national authorities. And they would reduce the likelihood of the compatibility with fundamental rights being challenged before European and domestic courts.

A **fourth** limitation is that the Founding Regulation does not explicitly mention a role for the Agency in the implementation of **Articles 2 and 7 TEU** to ensure compliance with the values on which the Union is founded. An **amendment** could clarify that the FRA may assist the institutions to carry out their mandate by preparing **regular reports on the situation of democracy, the rule of law and fundamental rights** in the EU and in its Member States. This would allow the FRA to play the "independent expert" role requested by the European Parliament in its proposal of 2016 for an EU Pact for Democracy, the Rule of Law and Fundamental Rights ("DRF"), and to contribute to the EU mechanism on Rule of Law announced by the Commission in July 2019. Alternatively, this could also be foreseen in an **inter-institutional agreement**, or through **requests** made to the Fundamental Rights Agency for periodic reports on the situation of democracy, the rule of law and fundamental rights in the EU and in its Member States. Such request **can already be done by the European Parliament on the basis of Article 4(1)(d) of the current Regulation: the European Parliament and notably its LIBE committee, as well as its Monitoring Group on Democracy, the Rule of Law and Fundamental Rights, could seize this opportunity and request the FRA for such a report in the view of the first 2019-2020 activation of the annual mechanism on the Rule of Law.**

1. INTRODUCTION

KEY FINDINGS

The Fundamental Rights Agency was established in 2007 as a centre of expertise on fundamental rights, to provide advice on fundamental rights issues to the EU institutions and the EU Member States in the implementation of EU law.

The FRA performs four tasks: it does research on thematic topics, preparting cross-country analyses based on the comparison between EU Member States and examining not only legal frameworks but also effective implementation ; it provides expert advice on fundamental rights issues to the EU institutions and to the EU Member States in the scope of application of EU law, in particular in the form of "opinions" it adopts either at its own initiative or at the request of the EU institutions ; it contributes to dissemination of information and awareness-raising in the area of fundamental rights ; and it contributes to certain operational activities, particularly in collaboration with other EU agencies.

Under its Founding Regulation, the FRA faces four limitations in the fulfilment of its mandate. Its thematic areas of work are defined every five years by the Council, adopting by unanimity the Multiannual Framework for the Agency. This limits the ability of the FRA to work outside these areas, even where emerging issues might justify such an extension. Second, the Founding Regulation also does not explicitly refer to the role of the Agency on the matters that, at the time of its adoption, fell under Title VI of the EU Treaty, the so-called "third pillar" areas of police cooperation and judicial cooperation in criminal matters. Third, Article 4(2) of the Founding Regulation also provides that the FRA can only submit opinions in the course of legislative procedures on the basis of a request of one of the institutions: thus, the Agency cannot intervene on its own motion to draw the attention of the institutions to the fundamental rights issues raised by legislative proposals or by the positions taken by the institutions in the legislative process. Fourth, the Founding Regulation does not explicitly mention a role for the Agency in the implementation of Article 7 TEU, to contribute to ensure compliance with the values on which the Union is founded.

Finally, one potential limitation to the ability of the FRA to effectively fulfil its mandate stems from its focus on the EU Charter of Fundamental Rights, which may be at the expense of a broader reliance on the full range of fundamental rights that are part of the EU legal order, including those that derive from the international human rights agreements that all EU Member States have joined.

Regulation (EC) No. 168/2007 establishing the Fundamental Rights Agency of the European Union (hereafter "the Founding Regulation") entered into force on 1 March 2007.[1] In the absence of any provision in the treaties attributing to the European Union (or, at the time, the European Community) a general competence in the field of fundamental rights, the Regulation was adopted on the basis of the "implicit powers" clause of what was then the EC Treaty, which requires unanimity within the Council and the consent of the European Parliament.[2] The mandate of the EU Agency for Fundamental Rights (FRA), as defined in the Founding Regulation, is to "provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law

[1] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1.
[2] At the time, this was Article 308 EC, which corresponds to Article 352 of the Treaty on the Functioning of the European Union (OJ C 83 of 30.3.2010, p. 47).

with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights" (Art. 2).

FRA operates with an annual budget of 21 to 22 million euros. This figure which has been stable since 2013, but it pales in comparison to the budgets of Frontex (European Border and Coast Guards Agency) or Europol, and is less than half the budget of the European Asylum Support Office (EASO) or Eurojust[3]; moreover, whereas other EU agencies in the area of Justice and Home Affairs have witnessed a considerable budgetary increase during the recent period, the budget of the FRA did not follow a similar evolution: whereas the FRA accounted for 8.8% of the budget dedicated to JHA agencies in 2007, this percentage has fallen to 3.0% in 2017.[4]

1.1. The four functions of the Fundamental Rights Agency

In practice, the FRA performs essentially four functions. First, building on the work of the EUMC between 1998 and 2007, it has developed a strong research capacity in the area of fundamental rights, preparing cross-country analyses based on the comparison between EU Member States and examining not only legal frameworks but also effective implementation. The added value of the FRA is that it can provide the EU institutions and national authorities with studies relying on data that are comparable across the EU Member States, and that it combines legal analysis with social sciences (empirical) findings. Some of the reports prepared by the FRA relied on extensive fieldwork, for instance in the area of borders control: the 2013 report on *Fundamental Rights at Europe's Southern Sea Borders* was based on some 280 interviews with migrants, members of non-governmental organisations involved in rescuing persons arriving by sea, national authorities, fishers and ship captains, as well as on the observation of operations at points of arrival and accommodation of newly arrived migrants; the 2014 report on *Fundamental Rights at Land Borders* was based on observations and interviews in airport facilities, though for the preparation of both reports certain obstacles were encountered, including a failure to ensure cooperation from officials.[5]

Since November 2018, the research work is supported in its comparative dimension by a multidisciplinary research network called FRANET,[6] coordinated by Human European Consultancy, and

[3] J. Wouters and M. Ovádek, "Exploring the political role of FRA. Mandate, resources and opportunities", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 82-102, at p. 92.

[4] The calculation is made in the second independent evaluation of the FRA, completed in November 2017 (available at: https://fra.europa.eu/sites/default/files/fra_uploads/2nd-fra-external-evaluation-october-2017_en.pdf). The JHA agencies referred to for this comparison are the European Asylum Support Office (EASO), established by Regulation (EU) No 439/2010 of the European Parliament and of the Council (OJ L 132, 29.5.2010, p. 11); the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), initially established by Council Regulation (EEC) No 302/93 of 8 February 1993 and operating now under Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (recast) (OJ L 376, 27.12.2006, p. 1); and Eurojust, established by Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1). The comparison thus does not include the European Border and Coast Guards Agency (formerly Frontex), established by Council Regulation (EC) No 2007/2004 (OJ L 349, 25.11.2004, p. 1) and renamed by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and (OJ L 251, 16.9.2016, p. 1).

[5] See J. Vedsted-Hansen, "Borders and migration control. FRA's research at protection back spots", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 185-196, at pp. 187-188. The 2013 report on *Fundamental Rights at Europe's Southern Sea Borders* notes that FRA researchers were denied access to a patrol boat in one Frontex operation (see EU Agency for Fundamental Rights, *Fundamental Rights at Europe's Southern Sea Borders* (2013), p. 121).

[6] The FRANET multidisciplinary research network was established in accordance with Article 6(1)(a) of the Founding Regulation, which states that "In order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organisations and bodies in each Member State and taking account of the need

composed of contractors in each EU Member State, the United Kingdom and North Macedonia. (North Macedonia joined the work of the FRA since October 2017 with observer status; Serbia, which joined with observer status since July 2018, does not yet have a contractor within FRANET).[7] The FRA also relies on EU-wide surveys, such as the 2012 survey on violence against women (based on interviews with 42,000 women across the EU) or the 2016 second survey on minorities and discrimination in the EU (EU MIDIS-II) (based on interviews with 25,515 people with various minority and immigrant backgrounds across the EU). Though most of the research prepared by the FRA is initiated at its own motion, within the limits set by the Multiannual Framework (MAF) defining the thematic areas it should focus on at five-year intervals (see below, section 2.1.), some of the reports prepared by FRA have been at the request of the EU institutions and have been useful in preparing legislative or policy initiatives.

Secondly, the FRA provides expert advice on fundamental rights issues to the EU institutions and to the EU Member States in the scope of application of EU law. Most of the advice provided is in the form of FRA staff taking part in meetings or events attended by policy-makers from EU institutions, bodies or agencies, or from EU Member States; or it is *ad hoc* and more or less formal, as when the FRA joined with the UN High Commissioner for Human Rights to contribute to the preparation of the review, in five EU Member States, of the implementation of the Sustainable Development Goals.[8]

This advisory function takes a more formal dimension through the delivery of opinions. Article 4(2) of the Founding Regulation provides that the FRA can adopt conclusions, opinions or recommendations, either at its own initiative, or at the request of the EU institutions (Council, Commission and European Parliament). To date, the FRA has adopted 29 opinions. The number of opinions delivered each year has been on the increase, although this remains manageable: the maximum number of opinions adopted in a single year was 5, in the year 2018. Some of the opinions delivered by the FRA are based on field studies: since 2016, the FRA has dispatched staff in the hotspots in Greece and Italy where migrants are received, in order to provide practical advice to the national authorities concerned, and this led the agency to adopt two opinions (opinion 5/2016 of 29 November 2016 and opinion 3/2019 of 4 March 2019) bringing together the key recommendations.

Thirdly, the FRA has a strong role in the dissemination of information and in awareness raising. This has been facilitated since 2016 by the creation of the Fundamental Rights Promotion Department (FRPD), which is tasked with such promotional work, to ensure that the research done within the FRA is more widely known and used. In addition to a large range of publications, it has developed both a data base collecting the decisions by the Court of the Justice of the European Union and by the European Court of Human Rights that refer to the EU Charter of Fundamental Rights, that also includes a selection of national cases -- mainly, though not exclusively, from the highest courts of the EU Member States ; and a database collecting information from Council of Europe and United Nations human rights monitoring bodies (European Union Fundamental Rights Information System - EFRIS). It proposes an "e-Media toolkit", providing tools from different media genres to encouraging quality reporting about fundamental rights issues. It also has put in place an interactive data explorer facilitating a quick search across the data collected by the FRA.

Fourth, more recently, the FRA has also increased its role in operational activities, for instance assisting on fundamental rights issues in the migration "hotspots" in Greece and Italy as mentioned above, training NGO lawyers in the use of the Schengen Borders Code at the request of the UN High Commissioner for Refugees,[9] training immigration services and border police on the fundamental

to involve national authorities in the collection of data … set up and coordinate information networks and use existing networks".

[7] Article 28 of the Founding Regulation provides that candidate countries can participate as observers in the activities of the Agency.

[8] See https://fra.europa.eu/en/news/2020/supporting-eu-member-states-reporting-sdg-implementation

[9] See https://fra.europa.eu/en/news/2019/training-ngo-lawyers-schengen-borders-code-and-fundamental-rights (describing the training of NGO lawyers in Budapest on 29 March 2019).

rights issues related to returning unaccompanied children through a seminar organised by the European Union Agency for Law Enforcement Training (CEPOL)[10] or training border guards.[11] The FRA also is a member of the *Frontex Consultative Forum* on fundamental rights, which in principle may observe joint border control operations coordinated by Frontex. (In practice, the members of the Consultative Forum must be invited or at least authorized to do so by Frontex: they are not "monitors" allowed to exercise a "right to visit" operations based on their own unilateral decision.[12]) This fast-growing area of activities of the FRA[13] is not fully reflected in the definition of its tasks in the Founding Regulation.

1.2. The limitations imposed on the Fundamental Rights Agency

The Fundamental Rights Agency was established as a centre of expertise equipped to provide advice to the EU institutions and to the EU Member States in the implementation of EU law. It was not intended as a monitoring body playing in the EU legal order a role similar to that played at domestic level by ombuds institutions or independent national human rights institutions operating in accordance with the 1993 Paris Principles on national institutions for the promotion and protection of human rights.[14] The wording of Article 2 of the Founding Regulation conveys this well, by referring to the role of the Agency to provide the institutions and the Member States with "assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights". The formulation chosen is closely inspired by the definition of the tasks of the European Union Centre on Racism and Xenophobia (sometimes referred to as the "Vienna Observatory"), which was established in 1997 and which the new Fundamental Rights Agency was meant to succeed.[15]

However, there is sometimes a thin line between the collection and analysis of information on the one hand, and supervision of compliance with fundamental rights standards on the other hand. The Founding Regulation itself preserves a certain degree of ambiguity in this regard, for instance where it refers to the Agency having to assess legislative proposals or positions adopted by the EU institutions in the legislative process "as far as their compatibility with fundamental rights are concerned".[16] As clearly indicated by the reference, in Article 4(1)(d) of the Founding Regulation, to the FRA's task to "formulate and publish conclusions and opinions on specific thematic topics" -- "thematic", and therefore not focused on any particular Member State --, the initial intent when the Founding Regulation was drafted was that the Agency would not assess the situation of fundamental rights in individual EU Member States : at the time, this was in part a concession to the Council of Europe, which

[10] See https://fra.europa.eu/en/news/2020/cepol-webinar-returning-unaccompanied-children-and-fundamental-rights.
[11] See https://fra.europa.eu/en/news/2020/training-croatian-border-guards
[12] J. Vedsted-Hansen, "Borders and migration control. FRA's research at protection back spots", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 185-196, at p. 196.
[13] On this evolution, see G.N. Toggenburg, "The European Union Fundamental Rights Agency", in G. Oberleitner (ed), *International Human Rights Institutions, Tribunals and C*ourts (New York: Springer, 2018), p. 443.
[14] The Paris Principles on national institutions for the promotion and protection of human rights were approved by the United Nations General Assembly in Res. 48/134 of 20 December 1993. See further *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995).
[15] Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1 (later amended by Regulation (EC) No. 1652/2003, OJ L 245 of 29.9.2003, p. 33). As defined by this regulation, the main task of the EUMC was to provide the Community and its Member States with "objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence" (Art. 2(1)). The Founding Regulation of the FRA recalls in its Preamble that the Member States, "meeting within the European Council on 13 December 2003, agreed to *build upon* the existing European Monitoring Centre on Racism and Xenophobia established by Regulation (EC) No 1035/97 and to *extend its mandate* to make it a Human Rights Agency" (para. 5 (emphasis added)).
[16] Founding Regulation, Preamble, para. 13.

feared that the monitoring role of Council of Europe bodies would be undermined by the emergence of a new independent agency governing the EU Member States.[17]

In practice however, the line is easily crossed in the preparation of reports between a focus on certain thematic issues, and a focus on certain situations that occur in specific Member States: it is in specific Member States, indeed, that the said thematic issues may appear the most relevant, and even thematic reports include national-level examples, as well as cross-country comparisons that may involve at least an implied critique that certain Member States are failing to effectively conform to the standards that other States do abide by. In fact, certain reports of the FRA do explicitly cross that line: the 2011 report on *The Situation of Persons Crossing the Greek Land Border in an Irregular Manne*r not only focuses on one Member State alone, it also speaks of a "fundamental rights emergency", of "inhumane" treatment in the centers in which migrants are detained, and of a failure of the Greek authorities to take action in order to remedy the problems identified.[18]

In addition to this general constraint implied by the definition of the mandate of the FRA, the Founding Regulation imposes four major limitations to the role it may exercise. First, the Founding Regulation provides that the Council, acting on a proposal of the Commission, shall adopt a Multiannual Framework for the Agency, determining every five years its thematic areas of work (Art. 5). Although, in defining the MAF, the Council is to take "due account of the orientations resulting from European Parliament resolutions" (Art. 5(2)(c)),[19] the restriction of the work of the Agency to the areas covered in the MAF was intended in large part to ensure that the Member States would maintain some degree of control over the priorities of the FRA: this is what the Preamble of the Founding Regulation alludes to when it mentions the "political significance" of the MAF.[20] This restriction however is without prejudice of the requests that the FRA could receive from the Council, the Commission or the European Parliament, to "carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies", or to "formulate and publish conclusions and opinions on specific thematic topics" (Art. 4(1)(c) and (d)), even outside the areas defined in the MAF.

A second limitation is that the Founding Regulation does not extend the remit of the Agency to police cooperation and judicial cooperation in criminal matters. Indeed, the Regulation was adopted on the basis of the "flexibility clause" of Article 308 of the EC Treaty (now Article 352 of the Treaty on the Functioning of the European Union), and the areas that belonged under Title VI of the EU Treaty (the "third pillar") were therefore naturally excluded. The Preamble of the Founding Regulation explicitly leaves open the possibility of a later extension, however, and various stakeholders have advocated in favor of this.[21]

A third limitation concerns the possibility for the FRA to intervene at its own initiative to ensure fundamental rights are fully considered in the legislative process. Article 4(2) of the Founding Regulation provides that the FRA can only adopt conclusions, opinions or recommendations on legislative proposals tabled by the Commission or positions taken by the institutions in the course of legislative procedures "only where a request by the respective institution has been made". This

[17] See O. De Schutter, "The EU Fundamental Rights Agency: Genesis and Potential", in K. Boyle (ed.), *New Institutions of Human Rights Protection* (Oxford: Oxford University Press, 2009), pp. 93-135.
[18] See R. Byrne, "Embedded EU research on refugee protection. FRA's work on asylum and irregular migration", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 197-205, at p. 201.
[19] The other considerations that should guide the adoption of the MAF according to the Founding Regulation, are the Council conclusions in the field of fundamental rights; the resources at the disposal of the Agency; and finally, the need to ensure "complementarity with the remit of other Community and Union bodies, offices and agencies, as well as with the Council of Europe and other international organisations active in the field of fundamental rights" (Art. 5(2)(e)).
[20] See Founding Regulation, Preamble, para. 11.
[21] See Preamble, para. 32: "Nothing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters".

limitation is in contrast to the competences that are normally attributed to national institutions for the promotion and protection of human rights (national human rights institutions - NHRIs) under the 1993 Paris Principles referred to above,[22] which stipulate clearly that NHRIs should be recognized a "power to hear a matter without higher referral", and to "examine the legislation and administrative provisions in force, *as well as bills and proposals*, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights" (emphasis added).[23]

These three limitations are closely interlinked. This in-depth study will show that the absence, in the Founding Regulation, of an explicit reference to the possibility for the FRA to fulfill its mandate also in the areas of police cooperation and judicial cooperation in criminal matters, is only a problem insofar as this is invoked by the Council as a reason not to include this area in the Multiannual Framework it must adopt by a unanimous vote: if the MAF were not restricting the themes on which the FRA can work, it would be easy and indeed natural for the FRA to extend its activities also to these so-called "third pillar" areas. Similarly, if the FRA could decide, on its own motion, to prepare opinions on legislative proposals submitted by the Commission (or on positions adopted by the co-legislators on such proposals), the absence of a reference to police cooperation and judicial cooperation in criminal matters among the areas of work listed in the MAF would be less consequential: the problem today is that the FRA can only adopt opinions in this area if requested to do so by one of the EU institutions.

A fourth limitation is that the Founding Regulation does not explicitly mention a role for the Agency in the implementation of Article 7 TEU. The choice not to refer to Article 7 TEU in the Founding Regulation is to be explained by the legal basis on which the Regulation is adopted. As this in-depth study shall explain, an analysis of the circumstances which led to the choice of wording when the Founding Regulation was adopted shows that this should not be interpreted as necessarily excluding the FRA from playing any role in Article 7 proceedings. It may be asked however whether the omission of any explicit reference to Article 7 TEU in the Regulation establishing the FRA was not a missed opportunity to strengthen the objective and non-discriminatory character of the monitoring of compliance with the values on which the Union is founded. If the Founding Regulation cannot be amended on this point, this study shall argue, other solutions may have to be found to ensure that the expertise of the FRA can contribute to ensure that Article 7 TEU proceedings are perceived as credible, and based on an impartial and objective assessment of the situation of democracy, the rule of law and fundamental rights in the EU Member States.

1.3. The focus of the Fundamental Rights Agency on the EU Charter of Fundamental Rights

The four limitations cited in the preceding section are imposed by the Founding Regulation. Another restriction to the work of the Agency is arguably one that is self-imposed, and that concerns the relationship to the various sources of fundamental rights in the European Union's legal order. The Agency has systematically been referring in its work to the EU Charter of Fundamental Rights, initially proclaimed in 2000[24] and, following a number of minor changes to facilitate its incorporation,[25] integrated to the Treaties with the Treaty of Lisbon.

The focus on the Charter is understandable. The Preamble of the Founding Regulation itself mentions the Charter of Fundamental Rights as the most authoritative catalogue of rights within the legal order

[22] See above, fn. 14.
[23] Paris Principles, para. 3(a)(i).
[24] OJ C 364 of 18.12.2000, p. 1.
[25] OJ C 303 of 14.12.2007, p. 1.

of the European Union.[26] However, far from limiting the scope of the mandate of the FRA to the Charter of Fundamental Rights alone, the Founding Regulation states in Article 3(2) that "The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union". Following the revision of the TEU by the Treaty of Lisbon, this should be read as referring to Article 6(3) TEU, which makes it clear that, beyond the Charter of Fundamental Rights itself, the Court of Justice of the European Union should continue to protect fundamental rights as they derive from the international human rights instruments that the EU Member States are parties to as well as from the constitutional traditions common to the Member States. Therefore, the focus of the work of the Agency on the Charter of Fundamental Rights and its efforts to promote the understanding of that instrument, should not distract the Agency from the equally urgent need to maintain and indeed deepen the connection with other sources of fundamental rights in the EU legal order, including the human rights instruments of the Council of Europe and of the United Nations.

1.4. The focus of this in-depth study

The main question explored in this in-depth study is whether the various limitations outlined in sections 1.2. and 1.3. above should be reconsidered, in the light of the achievements of the FRA to date and of the positions adopted by various stakeholders, as well as of the legal and institutional framework under which the FRA operates. The legislative proposals made by the Commission on 30 June 2005 for the establishment of the Fundamental Rights Agency[27] followed a wide-ranging consultation based on a public consultation document released on 25 October 2004[28] and a public hearing held on 25 January 2005. These proposals took into account, in particular, the fears expressed by the Council of Europe that its role as the main international European organisation setting standards on democracy and human rights and ensuring compliance with these standards through its monitoring bodies, might be marginalized by the establishment of an independent body, with an overlapping mandate, within the European Union: this is in part why the FRA was not given an explicitly monitoring role, and why it was agreed that it should prepare thematic studies, rather than country-specific reports -- although of course, some EU Member States were in any case reluctant to trust the new agency with such a role.

This in-depth study asks whether the considerations that prevailed in 2003-2007, when the mandate and structure of the Fundamental Rights Agency were debated, are still pertinent today. It also takes into account the two independent evaluations of the FRA, prepared respectively in 2012 and in 2017. In accordance with Article 30 of the Founding Regulation, a first independent evaluation of FRA's achievements was presented in November 2012, at a time when the FRA had grown from 41 staff members initially to 92 staff by the end of 2011, and had put in place its main procedures and tools.[29] Based on surveys, interviews and focus groups with the key stakeholders of the FRA (both internal and external stakeholders were consulted), the evaluation concluded that the FRA was generally effective in fulfilling its mission. It included a number of remarks related to the mandate of the FRA, which the present in-depth study shall refer to. The second independent evaluation of the FRA, prepared by the consultancy Optimity Advisors in November 2017, covered the period 2013-2017.[30] That independent evaluation also concluded that the Agency's Founding Regulation should be amended, both in order to make it explicit that the mandate of the Agency covers judicial cooperation in criminal matters (formerly dealt with under Title VI of the Treaty of the European Union, i.e., its "third pillar"), and in order

[26] See Preamble, para. 2.
[27] COM(2005) 280 final, 30.6.2005.
[28] COM(2004) 693 final.
[29] The independent evaluation was prepared by the Danish consultancy firm Ramboll. It is available here: https://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf
[30] In addition to desk research, the evaluation was based on a total of 107 interviews, including 26 interviews of the FRA's staff, 27 interviews at Member State level (public servants and NGOs), and 24 interviews in EU institutions. It also included an online survey, which collected 156 responses.

to take account the new status of the Charter of Fundamental Rights, following the entry into force of the Treaty of Lisbon.

Chapter 2 of the in-depth study considers the limitations imposed by the Founding Regulation to the remit of the Fundamental Rights Agency. It examines the role of the Council in adopting the Multiannual Framework (MAF) defining the thematic areas which the Agency may work on every five years; the absence of any reference to the so-called "third pillar" issues of police cooperation and judicial cooperation in criminal matters in the Founding Regulation; and the prohibition imposed on the Agency to submit opinions, at its own motion, in legislative procedures. Chapter 3 then turns to the role of the Fundamental Rights Agency in Article 7 TEU proceedings. Chapter 4 considers whether it would be appropriate to make the focus on the EU Charter of Fundamental Rights more explicit in the work of the Agency. Chapter 5 provides a conclusion.

2. THE REMIT OF THE FUNDAMENTAL RIGHTS AGENCY

KEY FINDINGS

The FRA may only work under the thematic areas covered by the Multiannual Framework adopted every five years by the Council on the basis of a proposal of the Commission and with the consent of the European Parliament, unless it receives a request from the EU institutions that goes beyond those thematic areas. This may make it difficult for the Agency to respond to the expectations of its stakeholders, and to remain relevant when the situation of fundamental rights in the EU evolves; it creates confusion about the real independence of the Agency vis-à-vis both the EU institutions and the EU Member States. The MAF moreover has little added value, given that multiyear strategic planning of its work is already required under the 2012 Common Approach on EU decentralized agencies and under the 2013 Financial Framework Regulation.

It is especially striking that no agreement could be found within the Council to include police cooperation and judicial cooperation in criminal matters in the successive MAFs that it had adopted so far. There is however no legal obstacle to do so. Although the Preamble of the Founding Regulation states that "the Agency should act only within the scope of application of Community law" (para. 8), this should be read, following the entry into force of the Lisbon Treaty, as a reference to Union law, including the "third pillar" areas formerly covered under Title VI of the Treaty on European Union. While an amendment to the Founding Regulation might be suggested to dispel any ambiguity in this regard, agreement on such amendment may be difficult to find.

The FRA may adopt opinions on specific thematic topics. Where such opinions concern legislative proposals or positions adopted by the institutions in the legislative process however, the FRA may only adopt such opinions at the request of one of the institutions. Moreover, the opinions adopted by the FRA may deal neither with the legality of acts adopted by the institutions, nor with the question of whether a Member State has failed to fulfil an obligation under the Treaty. Such opinions, finally, may only concern the thematic areas determined by the Multiannual Framework, unless the FRA is requested by an institution to provide an opinion in an area not covered by the MAF. In practice, most requests for an opinion (21 out of a total of 29) have originated from the European Parliament.

The limitation imposed under Article 4(2) of the Founding Regulation, according to which the FRA can only adopt opinions on legislative proposals or on positions taken by the institutions in the course of legislative procedures following a request by an institution, is an obstacle to the ability for the Agency to effectively discharge its mandate. Removing this limitation would enhance the efficiency and impact of the FRA. It also would align the mandate of the FRA with the requirements of the Paris Principles on national institutions for the promotion and protection of human rights. If that cannot be achieved, an alternative solution would be to provide the FRA on a systematic basis with the opportunity to express its opinion as to the fundamental rights implications of legislative files would allow it to decide whether or not to do so, based on its own assessment of the fundamental rights sensitivity of any particular legislative proposal, and taking into account the human and financial resources at its disposal.

It might also be considered to allow a group of Member States to request an opinion from the FRA. This would allow a group of States who have doubts as to the compatibility with fundamental rights of a legislative proposal to seek the views of the Agency, without it being necessary to find a unanimity within the Council. It would also allow a group of States proposing the adoption of an act in the establishment of the area of freedom, security and justice to be fully informed about the fundamental rights issues raised by their proposal. This would improve the quality of the information provided to the Council when considering the proposal, at the earliest stage of its deliberations.

Finally, allowing individual Member States to seek an opinion of the FRA when they are confronted with fundamental rights issues in the implementation of EU law may be an option to explore. This may strengthen the relevance of the Agency's work for national authorities, and it may prove particularly useful where States are asked to implement broadly worded directives, or directives allowing for a range of exceptions that they may choose to rely on: providing the possibility for the FRA to provide an opinion in such cases, ideally before the adoption of measures by the national authorities concerned, might reduce the likelihood of the compatibility with fundamental rights being challenged before domestic courts.

2.1. The Multiannual Framework

2.1.1. The current situation

Article 5 of the Founding Regulation provides that the FRA may only work under the areas covered by the Multiannual Framework adopted by the Council on the basis of a proposal of the Commission and after consultation of the European Parliament. Since 2013 however, the consent of the European Parliament is required in addition to the unanimity within the Council.[31] The MAF is adopted every five years. In accordance with Article 5(3) of the Founding Regulation, the FRA may only go beyond these areas when asked to do so following a request from the EU institutions, provided it has sufficient resources to do so. Therefore, the definition by the MAF of the perimeter of action of the Agency imposes a significant constraint on its activities. It also is one characteristic of its functioning that distinguishes it from the competences normally attributed to independent human rights institutions established in accordance with the 1993 Paris Principles. The second independent evaluation of the FRA also reported that, according to a significant proportion of those surveyed for the evaluation, while there are advantages to adopting a multi-year planning cycle, this may make it more difficult for the Agency to respond adequately to emerging issues, thus diminishing the relevance of the Agency's work.[32]

[31] It is indeed only since 2013 that the adoption of the MAF relies on Article 352 TFEU as its legal basis, requiring therefore unanimity within the Council and the consent of the European Parliament. The initial MAF (2008-2012) was adopted exclusively on the basis of Article 5(1) of the Founding Regulation, which only requires consultation of the European Parliament (see Council Decision 2008/203/EC of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, OJ L 63 of 7.3.2008, p. 14). The use of a basis in secondary legislation for the adoption of a decision by the Council is considered by both the Commission and the Legal Service of the Council as invalid (see Case C-133:06, *Parliament v. Council*, ECLI:EU:C:2008:257, paras. 55-61).

[32] Second independent evaluation, cited above, pp. 66-67.

This in-depth study is presented as the FRA is operating under its third Multiannual Framework (MFA), covering the period 2018-2022.[33] The previous MFAs covered the periods 2008-2012 and 2013-2017 respectively,[34] although the 2013-2018 MAF in fact could only be agreed on in March 2013, three months after the deadline. A comparison between the various iterations of the MAF leads to the following conclusions:

- Certain areas have been permanently included in the MAF. Consistent with Article 5(2)(b) of the Founding Regulation, which stipulates that the MFA must "must include the fight against racism, xenophobia and related intolerance", this area has been systematically referred to in the successive MAFs. Equality and non-discrimination have also been systematically included, albeit with minor variations between the various iterations of the MAF. (Interestingly, the definition of this area has gone beyond the formulation of Article 19 TFEU, which attributes to the EU a competence to adopt instruments to fight discrimination: the current MAF includes explicitly "race, colour, ethnic and social origin", and not only "racial or ethnic origin" as in Article 19 TFEU; it also includes "genetic features", "language", "political or any other opinion", "membership of a national minority", "property", "birth" and "nationality", as grounds of discrimination that the Agency may focus on in its work; indeed, the list that appears in the MAF is open (referring to "equality and discrimination based on *any ground such as*...")).[35]
- Again with some variations, the situation of victims of crime and their right to compensation, as well as access to justice, have figured in all MAFs; and so have the rights of the child ; migration, borders, asylum and integration of refugees and migrants; and "information society and, in particular, respect for private life and protection of personal data".
- "Participation of the EU citizens in the democratic functioning of the Union" is the only area that, after it was initially referred to in the MAF 2008-2012, was dropped from later MAFs.
- Judicial cooperation first appeared in the second MAF, covering the period 2013-2017, excluding however judicial cooperation in criminal matters. This is still the case in the MAF 2018-2022. It illustrates the reluctance of the Council to allow the Agency to seize itself of matters falling under the former "third pillar" of the EU, in the absence of an ad hoc request from the institutions.
- Roma integration appeared for the first time in the MAF 2013-2017. The MAF 2018-2022 now refers to "integration and social inclusion of Roma". The proposal of the Management Board of the FRA to extend the framework of the Agency to "social exclusion", beyond the situation of the Roma alone, was not followed by the Council. This illustrates the reluctance of the Member States to allow the Agency to play a more active role in the monitoring of social and economic rights, beyond the requirement of equality and non-discrimination and the rights of the child.

[33] Council Decision (EU) 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018-2022, OJ L 326 of 9.12.2017.
[34] See Council Decision 2008/203/EC of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi- annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, OJ L 63, 7.3.2008, p. 14; and Council Decision 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, OJ L 79, 21.3.2013, p. 1.
[35] See Council Decision (EU) 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018-2022, cited above, Art. 2, b) (mentioning as an area of the MAF 2018-2022 "equality and discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on the grounds of nationality").

2.1.2. The issues raised by the current situation

The first independent evaluation of the FRA, finalized in November 2012, concluded that "the mandate and the Multi Annual Framework set limits to what the FRA can undertake and what advice it can bring forward [leading to a perception by stakeholders that] the Agency's full potential towards providing advice in the field of fundamental rights is not being utilised".[36] There are indeed strong reasons to doubt the need to maintain in the Founding Regulation the requirement for the FRA to work in accordance with the Multiannual Framework (MAF) adopted by the Council.

In addition to the considerable time and energy required from the three institutions to agree on the content of a MAF (the Member States must agree by unanimity within the Council, and in some Member States the procedures includes going through the national parliament), the exercise may delay the action of the Agency (as happened in 2013). Most importantly, it may make it difficult, or even impossible, for the Agency to respond to the expectations of its stakeholders, and to remain relevant when the situation of fundamental rights in the EU evolves in ways that could not be anticipated, or that were considered too politically sensitive to be included in the MAF. Although the example most frequently referred to is the absence of any reference, in the MAFs adopted to date, to police cooperation and judicial cooperation in criminal matters (an issue this in-depth study returns to below, in section 2.3.), the absence of a reference to the rule of law (as referred to in Article 2 TEU) in the successive MAFs, despite the rise of self-proclaimed "illiberal democracies" in the EU,[37] as well as the inability of the Agency to respond to the threats to a range of fundamental rights resulting from the Euro Area crisis in 2010-2012,[38] also provide spectacular illustrations of this. Finally, the constraint imposed by the MAF reflects poorly on the perception of the Agency as an agency which should be independent both from the EU institutions and from the Member States[39]: it has been remarked that "the fact that the MAF must be adopted following a special legislative procedure implies a degree of political control over FRA which is inimical to the Agency's independent image, regardless of the actual extent of direct political interference, in particular from the Council, being virtually non-existent".[40]

The added value of the MAF is also unclear, considering that the themes listed are very general and change only marginally from period to period. Moreover, the Common Approach on EU decentralized agencies, a non-binding document adopted on 19 July 2012 jointly by the Council of the EU, the Commission and the European Parliament (which the Council has acknowledged would be relevant to any future revision of the Regulation establishing the Fundamental Rights Agency[41]), provides that agencies should adopt, in addition to annual work programmes, multiannual strategic programmes or guidelines, "tailored to the specificities of their activites" and "linked with multiannual, resource planning (budget and staff in particular)"; the Commission should be consulted on both the annual work programme and the multiannual programme, and the European Parliament should consulted on

[36] Id., pp. VI-VII.
[37] See L. Pech and J. Grogan, "Upholding the rule of law in the EU. What role for FRA?", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 219-236, at p. 222.
[38] See A. Hinajeros, "A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis", *European Law Journal*, vol. 22 (2016), pp. 61-73, at p. 68.
[39] See Founding Regulation, Preamble, para. 20 (referring to "the Agency's independence from both Community institutions and Member State governments"); the Fundamental Rights Agency is to "fulfil its tasks in complete independence" (Art.16(1) of the Founding Regulation).
[40] J. Wouters and M. Ovádek, "Exploring the political role of FRA. Mandate, resources and opportunities", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 82-102, at p. 87.
[41] See Council of the European Union, Conclusions on the evaluation of the European Union Agency for Fundamental Rights, Annex to Council doc. 16622 of 21 November 2013, para. 6.

the multiannual programme.[42] A multiyear work programme, encouraging each agency to develop a strategic vision, is certainly useful; the question is whether it should take the form of a MAF adopted unanimously within the Council of the EU, at the risk of limiting the independence of the Agency to act within its mandate and to respond adequately to emerging human rights issues as well as to the expectations of its stakeholders.

In its reaction to the second independent evaluation of the Agency, the Management Board voiced its concerns about the Multiannual Framework (MAF), recommending that this restriction to the ability of the FRA to set its priorities be removed:

> Constituting an anomaly compared to other EU agencies, the provision to adopt every five years a Council decision on the basis of Article 352 of the TFEU (unanimity in Council, consent by the European Parliament) to define general "thematic areas" has proven to be inefficient, institutionally cumbersome and redundant with the introduction of the 'Common Approach on EU decentralised agencies'. The procedures proposed by the Common Approach are far more efficient and allow for a true prioritisation taking due account of the Member States' views, and the orientations and priorities of the EU institutions.

The Commission concurs with this view.[43] It adds an important argument, which is that according to the Financial Framework Regulation, the FRA must adopt a multiannual programming document covering a period of three years.[44] This document is relatively flexible (it can be adapted each year). It also allows for the consultation of the Commission, of the Council and of the European Parliament (Art. 33(5) of the Financial Framework Regulation provides that these institutions must receive the draft programming document on 31 January of each year); and National Liaison Officers moreover are consulted, to ensure that the main concerns of the Member States can be taken into account in its preparation. The fact that the multiannual programming document covers a period of three years implies that it is often disconnected from the time frame of the MAF, which is an additional source of complication and may result in a less efficient use of the budget at the disposal of the Agency.

2.2. The role of the Fundamental Rights Agency in police cooperation and judicial cooperation in criminal matters

2.2.1. The current situation

In order to understand the background of the lack of reference, in the Founding Regulation, to the role of the Agency in so-called "third pillar" areas, covered at the time when the Regulation was adopted under Title VI of the Treaty on European Union, it is useful to recall the debate that took place at the time. The legislative proposals made by the Commission on 30 June 2005 for the establishment of the Fundamental Rights Agency included both a Proposal for a Council Regulation establishing a European Agency for Fundamental Rights and a Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union.[45] The choice of presenting two separate proposals was justified by the fact that, in the

[42] Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, Annex (19 July 2012), paras. 27-32 (see https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf).
[43] Commission Staff Working Document. Analysis of the Recommendations to the Commisison following the Second External Evaluation of the EU Agency for Fundamental Rights, SWD(2019) 313 final, of 26.7.2019, pp. 19-20
[44] Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council, OJ L 328, 7.12.2013, p. 42. According to article 32(2) of the Regulation, the multiannual programme should set out the overall strategic programming including objectives, expected results and performance indicators and resource programming including multiannual budget and staff.
[45] COM(2005) 280 final, 30.6.2005.

organisation of the European Treaties at the time, two separate legal bases had to be relied on : the Proposal for a Council Regulation establishing a European Agency for Fundamental Rights was to be adopted on the basis of Article 308 of the EC Treaty (now Article 352 of the Treaty on the Functioning of the European Union), the "implied powers" clause which allows the unanimous Council to adopt measures necessary for the fulfiment of the objectives of the European Community where the EC Treaty does not provide for the necessary powers to that effect[46] ; the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union was based on Articles 30, 31 and 34 of the EU Treaty.

The Council however decided to adopt a Regulation only on the basis of the first legislative proposal of the Commission, ignoring the second. Instead, a political declaration was attached to the Regulation adopted containing a "rendez-vous" clause allowing the mandate to be re-examined in 2009, "with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters".[47] In addition, according to another declaration by the Council appended to the Regulation, "the Union institutions may, within the framework of the legislative process and with due regard to each others' powers, each benefit, as appropriate and on a voluntary basis, from [the expertise gained by the Agency in the field of fundamental rights] also within the areas of police and judicial cooperation in criminal matters" ; this expertise "may also be of use to the Member States that wish to avail themselves thereof when they are implementing legislative acts of the Union in that area". Therefore, although under the Founding Regulation the remit of the Agency did not extend beyond Community law, to the domains of police cooperation and judicial cooperation in criminal matters covered by Title VI EU, it remained possible to request from the Agency opinions related to "third pillar" matters, particularly in the course of the legislative process, and the future was preserved.

The interpretation of the Founding Regulation should however take into account the entry into force of the Treaty of Lisbon on 1 December 2009. Article 1, al. 3, of the Treaty on European Union provides that "The Union shall replace and succeed the European Community". The reference to Community law in the Founding Regulation should therefore, following the entry into force of the Treaty of Lisbon, be interpreted as a reference to Union law. This also applies to paragraph 8 of the Preamble of the Founding Regulation, which states that "It is recognised that the Agency should act only within the scope of application of Community law". In other terms, the Treaty of Lisbon has automatically extended the mandate of the Agency to the provision of assistance and expertise to all institutions, bodies, offices and agencies of the Union and to the Member States when implementing Union law, in whatever area they operate. This is also the position of the Commission, which considers that the Treaty of Lisbon has extended the remit of the FRA to areas formerly covered under Title VI of the Treaty on European Union (the "third pillar" areas): "In the Commission's dynamic reading of the founding Regulation post Lisbon, the scope of the Agency's work is Union law and therefore covers police cooperation and judicial cooperation in criminal matters".[48] Indeed, after the Council refused to include police cooperation and judicial cooperation in criminal matters in the MAF 2018-2022, the Commission stated its "regret", and reiterated its position that "following the entry into force of the Treaty of Lisbon, police cooperation and judicial cooperation in criminal matters have become part of Union law and are

[46] According to the Commission, justifying the reliance on Article 308 EC: "It is a general objective of the Community to ensure that its own action fully respects fundamental rights. The Agency's establishment will further that objective, without there being specific powers provided for in the Treaty to that end." (COM(2005)280 final, p. 7). See now Preamble of the Founding Regulation, paragraph 31.

[47] The Council adopted the following declaration: "The Council agrees to re-examine, before 31 December 2009, the remit of the Agency for Fundamental Rights, with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters. The Council invites the Commission to submit a proposal to this effect as appropriate." (Addendum to draft minutes of the 2781st meeting of the Council of the European Union (Justice and home affairs), held in Brussels on 15 February 2007. Document 6396/07 ADD 1, PV/CONS 7 JAI 80, of 27 February 2007).

[48] Commission Staff Working Document. Analysis of the Recommendations to the Commisison following the Second External Evaluation of the EU Agency for Fundamental Rights, SWD(2019) 313 final, of 26.7.2019, p. 14.

therefore covered by the scope of the tasks of the Agency, as all areas falling within the competences of the Union, under Article 3(1) of Council Regulation (EC) n°168/2007".[49]

2.2.2. The issues raised by the current situation

It is against this background that the position of the Management Board of the FRA can be understood. The Management Board takes the view that extending the Agency's work to cover police cooperation and judicial cooperation in criminal matters does not require an amendment to the Founding Regulation. Instead, in its opinion of 12 February 2016 on the 2018-2022 MAF, the Management Board took the view that police cooperation and judicial cooperation in criminal matters should be included in the MAF, since these are areas "where fundamental rights are at great risk", and that "a stronger role of the FRA could encourage trust in the EU and its justice system among people in the EU, and benefit the status of the EU externally".[50]

Nevertheless, many stakeholders consulted in the course of the second independent evaluation of the FRA, completed in November 2017, took the view that "the mandate of the FRA should be amended to explicitly include judicial cooperation and police cooperation in criminal matters"[51]: the evaluation found that "a substantial cross-section of the Agency's stakeholders believe that the FRA's mandate should be changed in order for the Agency to meet an existing fundamental rights need in the EU around police and judicial cooperation in criminal matters".[52]

The European Parliament also has consistently taken the view that the Founding Regulation should be amended to make an explicit reference to the areas of police cooperation and judicial cooperation in criminal matters. In 2017, it requested the Commission to "present a proposal for amendments to Regulation (EC) No 168/2007 which it considers necessary to improve the procedures for the governance and the functioning of the Agency and to align the Regulation with the Lisbon Treaty, as provided for in Article 31(2) of that Regulation."[53] In its resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017[54], the European Parliament reiterated "its call for alignment of the FRA's mandate with the Lisbon Treaty, including by making it explicit that the Founding Regulation covers police and judicial cooperation" (par. 45).

In other terms, there is broad agreement that it would be relevant to extend the mandate of the FRA to cover police cooperation and judicial cooperation in criminal matters. However, there exists a debate as to whether this should be done by amending the Founding Regulation, or whether merely adapting the MAF would be sufficient.

This debate should take into consideration that, after the Commission proposed, both in preparation of the MAF 2013-2017 and in preparation of the MAF 2018-2022, that police cooperation and judicial cooperation in criminal matters be included, the Council twice refused. The Member States opposing this proposal ostensibly justified their opposition on the consideration that the remit of the Agency,

[49] Declaration of the Commission appended to the minutes of the Council meeting of 7 December 2017, reproduced as annex IV of the Commission Staff Working Document. Analysis of the Recommendations to the Commisison following the Second External Evaluation of the EU Agency for Fundamental Rights, SWD(2019) 313 final, of 26.7.2019.
[50] See https://fra.europa.eu/sites/default/files/fra_uploads/mb-opinion-maf-2018-2022_en.pdf
[51] Second independent evaluation, cited above, p. 4. See also id., p. 61 ("significant and diverse group of stakeholders believe that the current mandate limits the Agency's ability to meet the fundamental rights needs of the Agency's target groups,particularly with regard to police and judicial cooperation in criminal matters").
[52] Id., p. 141.
[53] European Parliament resolution of 1 June 2017 on the Multiannual Framework for 2018-2022 for the European Union Agency for Fundamental Rights (2017/2702(RSP)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0239+0+DOC+XML+V0//EN&language=EN
[54] See https://www.europarl.europa.eu/doceo/document/TA-8-2019-0032_EN.html?redirect

according to its Founding Regulation, does not extend beyond matters that belonged to what was part of Community law at the time the Regulation. Although that was the position taken by the Council's Legal Service in two successive legal opinions adopted in 2011 and 2012,[55] this in fact obfuscates a political choice behind an incorrect legal argument.

The most economical way to overcome this limitation is by abandoning the requirement of a MAF adopted by the Council of the EU altogether, and to allow the FRA to adopt, in accordance with the 2012 Common Approach on EU decentralized agencies, its own multiyear strategic programme, after consultation with the Commission and the European Parliament. If however the MAF is maintained, an amendment to the Founding Regulation clarifying that the mandate of the Agency extends to all areas covered by EU law might be recommended, in order to encourage the Council to explicitly include police cooperation and judicial cooperation in criminal matters among the thematic areas on which the Agency should work.

There is strong support for that approach, including among the EU Member States. Twelve Member States (Austria, Belgium, Finland, Germany, Portugal, Slovenia, Sweden, Lithuania, Czech Republic, Italy, Luxembourg and Ireland) have appended a declaration to the minutes of the Council meeting of 7 December 2017, which decided to adopt the MAF 2018-2022, expressing their "regret that the areas of police cooperation and judicial cooperation in criminal matters could not be included in the Multiannual Framework of the Fundamental Rights Agency, despite the fact that these areas are particularly fundamental rights-sensitive and should, therefore, be part of the regular activities of the Agency".[56] Recalling that "the Agency is already active in these areas upon request in accordance with Article 5 (3) of Council Regulation (EC) No 168/2007", these governments invited the Commission to submit a proposal for the revision of the Founding Regulation including an explicit reference to the fact that the Agency's mandate extends to Union law, including police cooperation and judicial cooperation in criminal matters. While the Commission appears to agree with this suggestion,[57] it is important to note however that the real obstacle today is not of a legal kind. The obstacle is political: there is no unanimity within the Council to include police cooperation and judicial cooperation in criminal matters among the priority areas covered in the MAF. This same obstacle may stand in the way of amending the Founding Regulation as suggested, since in accordance with Article 352 TFEU, the same rule of unanimity applies to such amendment.

2.3. The role of opinions in the work of the Fundamental Rights Agency

2.3.1. The current situation

According to Article 4(1)(d), the FRA may "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission". Three limitations apply, however. First, such conclusions and opinions may concern legislative proposals from the Commission or positions taken by the institutions in the course of legislative procedures only on the basis of a request by the respective institution (Art. 4(2)). Secondly, they shall "not deal with the legality of acts" within the meaning of Article 263 of the Treaty on the

[55] Council of the European Union, Opinion of the Legal Service, doc. 6138/11, 4 Feb. 2011; and Opinion of the Legal Service, doc. 6318/12, 9 Feb. 2012.

[56] The declaration is reproduced as annex IV to the Commission Staff Working Document. Analysis of the Recommendations to the Commisison following the Second External Evaluation of the EU Agency for Fundamental Rights, SWD(2019) 313 final, of 26.7.2019.

[57] See Commission Staff Working Document. Analysis of the Recommendations to the Commisison following the Second External Evaluation of the EU Agency for Fundamental Rights, SWD(2019) 313 final, of 26.7.2019, p. 16 ("Given the outcomes of these discussions and the declarations put forward,and given the importance of these areas from a fundamental rights perspective, there would beabenefit in clarifying that the scope of the Agency is EU law").

Functioning of the European Union (actions for annulment) or "with the question of whether a Member State has failed to fulfil an obligation under the Treaty" within the meaning of Article 258 of the Treaty (infringement proceedings against Member States). Third and finally, such conclusions and opinions may only concern the thematic areas determined by the Multiannual Framework. This however is "without prejudice to the responses of the Agency to requests from the European Parliament, the Council or the Commission ... outside these thematic areas, provided its financial and human resources so permit" (Art 5(3)).

The adoption of opinions has played a growing role in the FRA's activities, as illustrated by Table 1 below, which lists the opinions adopted in a chronological order: whereas 6 opinions were adopted during the 4 initial years of operation of the Agency (2008-2011),[58] and 7 opinions were adopted during the following 4 years (2012-2015), 16 opinions were adopted in most recent four years period (2016-2019).

Table 1 : List of opinions adopted by the Fundamental Rights Agency, topics concerned, and initiative of the adoption of the opinion

Date	Topic	Own-initiative	Request from the European Parliament	Request from the Council	Request from the Commission
28.10.2008	**Proposal for a Council Framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes**			**X**	
29.7.2009	The Stockholm programme	X			
3.11.2009	Comments on the Swedish Presidency "draft of the Stockholm Programme"	X			
27.7.2010	The use of body scanners: 10 questions and answers	X			
23.2.2011	**Draft directive regarding the European Investigation Order (EIO) in criminal matters**		**X**		
15.6.2011 (1/2011)	**Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (follow-up)**		**X**		
31.5.2012 (1/2012)	**Proposal for a Regulation on the jurisdiction, applicable law and recognition and enforcement of decisions regarding the property**		**X**		

[58] The count in Table 1 does not include the three opinions adopted by the European Union Monitoring Centre on Racism and Xenophobia (EUMC), which the FRA decided to reproduce on 12 December 2010.

	consequences of registered partnerships				
9.10.2012 (2/2012)	**Fundamental rights issues associated with the proposed EU data protection reform package**		**X**		
4.12.2012 (3/2012)	**Proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union**		**X**		
1.10.2013 (1/2013)	Opinion aimed at improving the protection against discrimination	X			
22.10.2013 (2/2013)	Impact of the Framework Decision on the rights of the victims of crimes motivated by hatred and prejudice, including racism and xenophobia			X	
10.2.2014 (1/2014)	**Proposal to establish a European Public Prosecutor's Office (EPPO)**		**X**		
11.12.2015 (1/2015)	**Proposal to establish a possible legislative instrument supplementing the existing European Criminal Records Information System with information on third-country nationals convicted in the EU**				**X**
23.3.2016 (1/2016)	**Proposal for a Regulation establishing an EU common list of safe countries of origin**		**X**		
8.4.2016 (2/2016)	Development of a integrated tool of objective fundamental rights indicators to measure compliance with the shared values of article 2 TEU		X		
3.5.2016 (3/2016)	Requirements of article 33(2) of the UN Convention on the Rights of Persons with Disabilities in the EU context		X		
23.11.2016 (4/2016)	**The effects on children of the proposed recast Dublin Regulation**		**X**		
29.11.2016 (5/2016)	Fundamental rights in the "hotspots" set up in Greece and Italy		X		
22.12.2016 (6/2016)	**Fundamental rights impact of the proposed revision of the Eurodac Regulation on children**		**X**		

10.4.2017 (1/2017)	Possible avenues to lower barriers for access to remedy in the area of business and human rights at the EU level			X	
30.6.2017 (2/2017)	**Fundamental rights and personal data protection implications of the proposed Regulation for the creation of a European Travel Information and Authorisation System (ETIAS)**		**X**		
11.4.2018 (1/2018)	**Fundamental rights implications of the interoperability between EU information technology systems (IT systems)**		**X**		
30.8.2018 (2/2018)	**Proposal amending the Visa Information System, the Visa Code and other related provisions of EU law**		**X**		
5.9.2018 (3/2018)	**Proposal for a Regulation on strengthening the security of identity cards of European Union (EU) citizens and of residence documents issued to EU citizens and their family members exercising their right of free movement**		**X**		
30.9.2018 (4/2018)	Contribution to the European Parliament's own-initiative report on the "Implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework"		X		
27.11.2018 (5/2018)	**Proposal on the European Border and Coast Guard (EBCG)**		**X**		
10.1.2019 (1/2019)	**Proposal for a recast Directive on common standards and procedures in Member States for returning illegally staying third country nationals (Return Directive)**		**X**		
12.2.2019 (2/2019)	**Proposal for a Regulation on preventing the dissemination of terrorist content online**		**X**		
4.3.2019 (3/2019)	Update to the the 2016 opinion on the fundamental rights shortcomings		X		

	identified in the implementation of the hotspot approach in Greece and Italy				

The Table above illustrates the important role of the European Parliament in seeking opinions of the FRA: out of a total of 29 opinions delivered by the FRA, 21 were adopted at the request of the European Parliament. In contrast, the Council sought an opinion from the FRA only on three occasions, and only once did the Commission do so.[59] The FRA also adopted four own-initiative opinions.

18 of the total 29 opinions concerned legislative proposals (highlighted in bold characters in the table), on the fundamental rights impacts of which the Council (once), the Commission (once) or the European Parliament (the remaining 16 occasions) requested the views of the Fundamental Rights Agency.

2.3.2. The issues raised by the current situation

The current practice of the Agency in the adoption of opinions raises three separate issues. The first issue concerns the limitation imposed under Article 4(2) of the Founding Regulation, according to which the FRA can only adopt conclusions, opinions or recommendations on legislative proposals tabled by the Commission or positions taken by the institutions in the course of legislative procedures "where a request by the respective institution has been made". The second issue is whether a group of Member States should be allowed to request an opinion from the FRA. A third issue is whether an individual Member State should be allowed to request such an opinion in the implementation of Union law.

1. Allowing the FRA to adopt opinions on legislative proposals or positions taken in the legislative process at its own initiative

One of the questions examined in the first independent evaluation (2012) concerned the perception of the role played by the Agency by delivering opinions at the request of the institutions in the course of the legislative process. The evaluators found that whereas "the amount of requests has so far been manageable for the Agency", the gradual increase in the number of requests may be difficult to cope with by the Agency within the existing level of resources; this increase however was also considered "as a positive proxy indicator for the Agency's relevance to stakeholders". The evaluation also noted that "Concerning the FRA's role in providing input to the legislative process at the European level, there were several voices in support of an increased role for the Agency in providing opinions on future legislation on a more regular basis".[60] Stakeholders from the European Parliament and from civil society in particular, but also some of the policymakers surveyed within Member States, appeared to support allowing the FRA to take a more important role in the legislative process. The evaluation's findings "support the notion of a more independent fundamental rights agency, along the Paris principles of National Human Rights Institutions".[61] This is a cautious formulation, and the second independent evaluation of the FRA, in 2017, refrained from taking a clear position on this issue. In contrast, in its reaction to the second independent evaluation, the Management Board of the FRA took a firm position in favor of removing this limitation to the work of the Agency:

> Where the EU legislator deals with legislative files that raise fundamental rights questions, the Agency should be able to provide its assistance and expertise where and when it is needed and

[59] It should be noted however, that the FRA has also been requested by the Commission to prepare studies, including studies related to "third pillar" issues: see EU Agency for Fundamental Rights, *Criminal detention and alternatives: fiundamental rights aspects in EU cross-border transfers*, Report, Nov. 2016; EU Agency for Fundamental Rights, *Rights of suspected and accused persons across the EU: translation, interpretation and information*, Report, November 2016.
[60] Id., p. III.
[61] Id., p. VII.

> not only when it is formally requested. Therefore, in order to make full use of the Agency's expertise in the legislative process, the Founding Regulation should allow the Agency to deliver non-binding opinions on draft EU legislation on its own initiative.

This, the Management Board argued, would enhance the efficiency and impact of the FRA. It also would align the mandate of the FRA with the requirements of the Paris Principles on national institutions for the promotion and protection of human rights: while acknowledging that the FRA does not present all the characteristics of a national human rights institutions as intended by the Paris Principles, the Management Board notes that the Fundamental Rights Agency is nevertheless to "fulfil its tasks in complete independence" (Art.16(1) of the Founding Regulation); the Management Board itself is composed of persons who are independent (the Preamble of the Founding Regulation provides in that regard that "Having regard to [the Paris Principles], the composition of that Board should ensure the Agency's independence from both Community institutions and Member State governments and assemble the broadest possible expertise in the field of fundamental rights" (para. 20)); and the Council has acknowledged that the Paris Principles should guide any future reform of the Fundamental Rights Agency.[62]

The requirement that the FRA should not commit any "interference with the legislative and judicial procedures established in the Treaty",[63] should not be seen as creating an obstacle to allowing the Agency to adopt opinions, at its own initiative, on proposals going through the legislative process. At national level, national human rights institutions routinely adopt similar opinions, including opinions stating clearly their view as to whether or not a particular proposal is compatible with the requirements of human rights (and the Founding Regulation itself refers to the Agency having to assess legislative proposals or positions adopted by the EU institutions in the legislative process "as far as their compatibility with fundamental rights are concerned"[64]), without this being perceived as an "interference", and without prejudice of the final determination, by a competent court, of the requirements of fundamental rights. It also deserves notice that the European Data Protection Supervisor may, at his or her own initiative, "advise" the EU institutions and bodies, on issues related to personal data.[65] Allowing an external body to intervene at its own motion in the legislative process in order to make its views known to the EU institutions is therefore not without precedent.

If it were not possible remove the limitation imposed under Article 4(2) of the Founding Regulation by an amendment thereof, another option would be to make the practice of consulting the FRA more systematic in the course of the legislative process. This was, for instance, the recommendation made by the United Kingdom's House of Lords EU Committee already in 2006 when it examined the proposals concerning the establishment of the Fundamental Rights Agency.[66] This suggestion has been reiterated since on a number of occasions. In its resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017, the European Parliament expressed its "opinion that the EU institutions should provide for enhanced forms of consultation, impact assessment and legal scrutiny, including by requesting advice from appropriate independent expert bodies such as the

[62] Council of the European Union, Conclusions on the evaluation of the European Union Agency for Fundamental Rights, Council doc. 16622 of 21 November 2013, para. 18.
[63] Founding Regulation, Preamble, para. 13.
[64] Id.
[65] The EDPS is established as an independent authority under chapter VI of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39. According to Article 57(1) (g), the EDPS may, *inter alia,* "advise, on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data".
[66] UK House of Lords, EU Comittee, *Human Rights Protection in Europe: the Fundamental Rights Agency*, 29th Report of Session 2005-06, HL Paper 155, para. 45.

FRA, whenever a legislative file potentially promotes or negatively affects fundamental rights; considers in this regard that more regular consultation of the FRA could be provided for in a revised version of the Interinstitutional Agreement on Better Law-Making".[67] Even in the absence of a provision concerning the consultation of the FRA in a revised version of the Interinstitutional Agreement on Better Law-Making, the European Parliament could decide, without seeking the agreement of the other institutions, to systematically refer legislative proposals presented by the Commission to the FRA in order to allow it to makes its views known.

This is consistent with the position expressed by the FRA itself, in Opinion 4/2018 delivered on 24 September 2018 on the implementation of the Charter of Fundamental Rights.[68] As expressed in opinion 1 contained in that document:

> The EU institutions should provide for enhanced forms of consultation, impact assessments and legal scrutiny, including by requesting advice from appropriate independent expert bodies, such as FRA, whenever a legislative file potentially promotes or negatively affects fundamental rights. More regular consultation of FRA could be provided for in a revised version of the inter-institutional agreement on better lawmaking. Charter focal points within the EU institutions –or their legal services –could help guarantee that fundamental rights-sensitive files receive the attention and scrutiny they deserve. This will help ensure Charter-compliant and thus sustainable EU legislation that avoids fundamental rights issues during implementation at national level and the risk of annulment by the Court of Justice of the European Union.

The limiting factor here, of course, are the resources at the disposal of the Agency, which cannot provide an opinion on all legislative proposals, and would not even have the capacity to provide an opinion on all the files that may potentially raise fundamental rights issues -- which would in any case represent a large proportion of the legislative proposals presented by the Commission. At the same time, the objective of allowing the FRA to alert the institutions to the potential fundamental rights implications of certain legislative proposals, even where such implications would not be immediately obvious to the non-expert observer, would not be met by trusting the European Parliament (or, indeed, the other institutions) to select, among the legislative proposals under preparation or presented, which ones deserve a scrutiny by the Agency. There is no real dilemma, however, between the risk of overburdening the FRA with requests for an opinion or to take a more selective approach, with the risk that certain legislative files shall not benefit from the FRA's scrutiny despite their sensitive nature. The requests made under Article 4(1)(d) of the Founding Regulation (which Article 4(2) refer to) do not impose any obligation on the Agency to respond, but provide it with an opportunity to deliver an opinion if it believes it appropriate and necessary to do so; and in making that decision, the Agency is to have "due regard to the available human and financial resources" (Article 5(4) of the Founding Regulation).

In its resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017,[69] the European Parliament notably recommended "that EU legislators should request independent and external human rights advice from the FRA whenever a legislative file raises serious fundamental rights issues", and it called on the Commission to "ensure that the FRA has the requisite mechanisms to enable it to fulfil its mandate" (par. 48)

While a commitment to ensure that the FRA shall be regularly consulted whenever a legislative file raises issues related to fundamental rights could be included in the Interinstitutional Agreement on

[67] European Parliament resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017 (2018/2103(INI)), para. 47.
[68] See https://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-04-2018_charter-implementation.pdf.
[69] European Parliament resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017 (2018/2103(INI)).

Better Law-Making, this is not necessary to achieve the desired result. The European Parliament could on its own motion choose to provide the FRA on a systematic basis with the opportunity to express its opinion as to the fundamental rights implications of legislative files, by including the request of an opinion from the FRA a standard part of its examination of the legislative proposals it is presented with. This would allow the FRA to decide when, or when not, to respond to such request, based on its own assessment of the fundamental rights sensitivity of any particular legislative proposal, and taking into account the human and financial resources at its disposal.

2. Allowing a group of Member States to request an opinion from the FRA

A second issue is whether other actors than the Commission, the Council and the European Parliament should be allowed to request an opinion from the Agency. In its reactions to the first independent evaluation of the FRA, the Management Board of the Agency suggested that the Agency's tasks enumerated in Article 4 of the Founding Regulation could "include the possibility for a (group of) Member States to request assistance from the FRA within the scope of its mandate".[70] The Council was more cautious in its response: it took the view that "further discussions are necessary" in this regard, "in particular, in the light of the Agency's broad mandate and limited resources".[71]

The proposal to allow a group of Member States to request an opinion from the FRA is relevant in two circumstances. First, when the Council is presented with a proposal of the Commission, certain States may have doubts as to the compatibility with fundamental rights with the proposal (or indeed, with any amendment to the proposal made in the course of the legislative process). It would be appropriate to allow those Member States to seek the opinion of the Agency in that regard, without it being necessary to find a unanimity within the Council (via the Committee of Permanent Representatives (COREPER), in accordance with Article 19(7)(h) of the Rules of Procedure of the Council concerning the "decision to consult an institution or body wherever such consultation is not required by the Treaties"). Of course, the Legal Service of the Council or the FREMP Working Party of the Council also might be consulted by the Council on this question, in accordance with the *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies* initially adopted in 2011 and revised in 2014.[72] The Fundamental Rights Agency however possesses a far stronger expertise in the area of fundamental rights, and its consultation would be far more legitimate.

Secondly, in the establishment of the area of freedom, security and justice, acts may be adopted to improve administrative cooperation between national authorities, as well as to improve judicial cooperation in criminal matters and police cooperation, at the initiative of one quarter of the Member States (i.e., 7 Member States).[73] It would be appropriate to allow such a group of Member States to request an opinion from the FRA concerning the compatibility of their proposal with the requirements of fundamental rights. This would improve the quality of the information provided to the Council when considering the proposal, at the earliest stage of its deliberations.

3. Allowing an individual Member State to seek an opinion from the FRA

It may also be asked whether individual Member States should be allowed to request an opinion from the Agency, when they are faced with a fundamental rights issue in the implementation of EU law. One reason why this should be considered is because it would significantly increase the relevance of the expertise of the Agency at the Member State level. The first independent evaluation of the FRA,

[70] See also the second independent evaluation, p. 53.
[71] Council of the European Union, Conclusions on the evaluation of the European Union Agency for Fundamental Rights, Council doc. 16622 of 21 November 2013, para. 10.
[72] For the original guidelines, adopted in 2011 under the responsibility of the Council's Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, see Council of the EU doc. 10140/11; for the revised guidelines, see Council of the EU doc. 16957/14 (16 Dec. 2014) (FREMP 228, JAI 1018, COHOM 182, JURINFO 58, JUSTCIV 327), reissued as doc. 5377/15.
[73] Article 76, TFEU.

presented in 2012, noted that the EU-wide comparative assessments were felt to be mainly of relevance to the EU institutions, whereas FRA was considered to be less useful to national and local policy-makers, since providing useful advice in the context of domestic policy processes required more in-depth and contextual understanding of the situation in each Member State, for which the FRA was less equipped. The evaluation therefore recommended strengthening further the relationship with the national liaison officers (NLOs) established within the national administrations of each Member State. At the same time however, whereas the independent evaluation concluded that the work of the Agency "contributes to policy development" primarily at the EU level, "while at the national level the contribution is less clear", it recognized that "this stems largely from the mandate of the FRA, which clearly emphasises the comparative aspect of the data collection and research undertaken by the Agency".[74] Moreover, instead of advocating in favor of the FRA's work focusing more on the need for individual Member States to be guided in order to take into account fundamental rights in the implementation of EU law, the evaluators recommended that the FRA "continue its on-going efforts to be relevant and useful for Member States, in order to create the necessary linkages to deliver pertinent evidence and advice. However, the work needs to target issues which are relevant to several Member States, rather than trying to cater specific needs of individual Member States".[75]

Nevertheless, the links to the EU Member States could be significantly enhanced by allowing them to request opinions from the FRA, when faced with fundamental rights issues related to the implementation of EU law. Indeed, at its meeting of 26 and 27 June 2014, the European Council noted that, among other measures, greater reliance on Eurojust and on the Agency for Fundamental Rights could support "the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States", by further enhancing "mutual trust in one another's justice systems".[76]

While the European Council, in adopting those conclusions, did not have in mind the possibility for individual Member States to request an opinion from the FRA, the establishment of such a mechanism would clearly serve a useful purpose. The national authorities should take into account fundamental rights in the implementation of Union law -- whether they transpose a directive, apply a regulation or execute a decision; take part in a decision-making process within the EU; or restrict an economic freedom recognized under EU law.[77] Member States however often have a broad margin of appreciation in the implementation of EU law, and they may be uncertain as to the exigences of fundamental rights in particular situations, particularly for the implementation of broadly worded directives, or directives allowing for a range of exceptions that Member States may choose to rely on in the adoption of implementation measures. Providing the possibility for the FRA to provide an opinion in such cases, ideally before the adoption of measures by the national authorities concerned, might reduce the likelihood of the compatibility with fundamental rights being challenged before domestic courts (potentially leading to a referral to the Court of Justice of the European Union). While the opinion of the FRA would of course not be binding upon the Member State concerned, it would nevertheless minimize the risk of diverging interpretations of the requirements of fundamental rights across the Member States, and at the same time allow the Member State concerned to be provided with an opinion informed by the diversity of legal systems across the EU, given the strong comparative expertise of the FRA.

[74] Id., p. VI.
[75] Id., p. VI.
[76] EUCO 79/14, para. 11 of the Conclusions.
[77] See, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24) ; Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (para. 81).

3. THE ROLE OF THE FUNDAMENTAL RIGHTS AGENCY IN UPHOLDING THE VALUES OF ARTICLE 2 TEU AND IN MONITORING COMPLIANCE WITH SUCH VALUES UNDER ARTICLE 7 TEU

KEY FINDINGS

The European Parliament, the Commission and the Council -- as well as the European Council --, are involved in the mechanism established by Article 7 TEU. Each institution has established certain procedures in order to discharge its functions under this provision, without coordination with the others. In 2016, the European Parliament proposed an EU Pact for Democracy, the Rule of Law and Fundamental Rights ("DRF"), conceived as a new mechanism to monitor compliance with the values of Article 2 TEU, to be established through an interinstitutional agreement between the European Parliament, the Commission and the Council of the EU. This would allow the monitoring of compliance with Article 2 TEU values to be more objective and systematic, and the three key institutions involved in the procedures defined in Article 7 TEU would be taking the same report as the basis for their monitoring, thus ensuring greater coherence and reducing the risk of politicization of the process.

Nevertheless, rather than an interinstitutional agreement involving the establishment of a new group of independent experts, perhaps a more efficient solution, and one that could be more realistic politically, would be to request that the Fundamental Rights Agency contribute periodic reports on the situation of fundamental rights in the EU, providing the European Parliament, the Commission and the Council with the information they need in order to exercise their powers under Article 7 TEU. This would be legally permissible: although the Founding Regulation makes no reference to Article 7 TEU, it was initially understood that the Agency could play a role in such proceedings, by assisting the institutions involved in performing their functions; moreover, whereas the legal basis on which the Fundamental Rights Agency was established (the implied powers clause of the EC Treaty) made it legally impossible to extend its mandate beyond Community law, this mandate has now been in effect expanded to cover all areas of Union law, which should be seen as including Article 7 TEU.

Involving the FRA more visibly in the procedures defined in Article 7 TEU would present a number of advantages, including to dispel the risk that the use of Article 7 TEU is perceived by some Member States as politicized or selective, and denounced as such. Giving the FRA a more visible role might allow the various institutions involved to more clearly exercise their political role (to assess the opportunity of triggering Article 7 TEU) from the role of an independent and non-political agency (to establish certain facts that might threaten the values listed in Article 2 TEU). If an interinstitutional agreement proves impossible to reach on the basis of on the basis of Article 295 TFEU, the European Parliament acting unilaterally could request from the FRA such periodic reports on the situation of democracy, the rule of law and fundamental rights in the EU, in order for such reports to inform the assessments made by the institutions involved in Article 7 TEU proceedings.

The Treaty of Amsterdam, adopted in 1997 (and in force since 1 May 1999) established for the first time a mechanism to ensure that the EU Member States would comply with the values on which the Union is founded.[78] The intention at the time was both to send a clear message to the eight countries of

[78] At the same time, the Treaty of Amsterdam clarified the content of these values, amending Article F, § 1, of the Treaty on the European Union to include a provision stating: "The Union is founded on the principles of liberty, democracy, respect for

central and Eastern Europe that were to join the Union in the following years (and effectively did become members on 1 May 2004) that they were joining more than an economic integration project, and that the Union was also about building a Union or rights and values; and to ensure that fundamental rights would be fully taken into account in the construction of the area of freedom, security and justice, in which the powers of the Union (then the European Community) were rapidly expanding.

The values on which the Union is founded are now listed in Article 2 TEU: they include democracy, the rule of law and fundamental rights.[79] The political mechanism established to ensure compliance has also evolved, following the amendments to Article 7 TEU introduced by the Treaty of Nice (in force since 1 April 2003). As it now stands, Article 7 TEU provides for three possibilities. Two preventive mechanisms have been added by the Treaty of Nice, they are both described in in paragraph 1 of Article 7 TEU. The third mechanism, which was initially the only one, is remedial; it is described in paragraphs 2 and 3 of Article 7 TEU.[80]

(a) The Council of the EU may decide, by a majority of four fifths of its members (i.e., if at least 21 Member States agree), and with the consent of the European Parliament (acting act by a two-thirds majority of the votes cast, representing the majority of its component Members), to **address recommendations to a Member State**, even prior to any finding that there is a "clear risk of a serious breach" by that Member State of the values listed in Article 2 TEU, if the situation is considered to be serious enough to justify such a move.[81]

The Council may adopt such recommendations on a "reasoned proposal" by one third of the Member States (i.e., by at least 9 States), by the European Parliament (acting with the same two-thirds majority as described above), or by the European Commission. Each of these institutions may therefore trigger the procedure, taking the initiative in this regard. The reference to a "reasoned proposal" suggests the institution in question explains the grounds of its concern; Article 7 TEU does not provide more details, however, on the kind of motivation that is required.

(b) The Council of the EU may also determine, according to the same procedure and with the same majority, that "there is a **clear risk of a serious breach** by a Member State of the values referred to in Article 2".[82] Because of the clearly condemnatory nature of such a finding, the Treaty provides that the Member State in question shall be heard before such a determination is made. This determination may be made even if no recommendations were initially addressed to the Member State concerned.

(c) Finally, the European Council, acting by unanimity (minus the voice of the Member State concerned by the procedure) on a proposal by one third of the Member States or by the Commission and after

human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". The original version of this clause, as it appears in the Treaty on the European Union signed in Maastricht on 7 February 1992 (in force on 1 November 1993), stated that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy".

[79] More precisely, Article 2 of the Treaty on the European Union lists the values on which the Union is founded as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

[80] See, in addition to Article 7 TEU, Article 354 TFEU, which defines how the majorities required for the decisions referred to in Article 7 TEU are to be calculated.

[81] Article 7(1) TEU.

[82] Article 7(1) TEU. Contrary to a widely held assumption, Article 7 TEU does *not* in fact provide for any substantive condition for such recommendations to be adopted, though the emergence of a "systemic threat to the rule of law" is one example of where such recommendations may be warranted (see Communication of the Commission on a new EU Framework to strengthen the Rule of law, COM(2014) 158 final of 1.3.2014). It is incorrect to state, as the Commission does, that "the preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach"" of the values of Article 2 TEU (comp. Comp. Communication of the Commission on a new EU Framework to strengthen the Rule of law, at p. 5.)

obtaining the consent of the European Parliament, may **determine the existence of a "serious and persistent breach"** by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.[83] Once such a determination is made, the Council of the EU, acting by a qualified majority, "may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".[84]

Each of the institutions involved in the mechanism established by Article 7 TEU has established certain procedures in order to discharge its functions under this provision. These efforts have not been coordinated: each of the institutions has established its own mechanisms and sources of information to guide the exercise of the powers it has been attributed under this provision. The following sections describe the various procedures that have been put in place (3.1.) and reflect on the potential role that the FRA could play in improving the implementation of this mechanism (3.2.). Giving a more visible role to the FRA in this process would present a number of advantages, including to respond to the accusation of politicization and selectivity of the use of Article 7 TEU, and to allow the various institutions involved to more clearly exercise their political role (to assess the opportunity of triggering Article 7 TEU) from the role of an independent and non-political agency (to establish certain facts that might threaten the values listed in Article 2 TEU).

3.1. The implementation of Article 7 TEU: state of play

3.1.1. The Commission

While the European Parliament may only trigger the preventive mechanisms stipulated in Article 7(1) TFEU, the Commission may trigger both the preventive and the remedial mechanisms described above. On 11 March 2014, in order to clarify the steps it would take before relying on Article 7 TEU to ensure compliance with the values of Article 2 TEU (although not committing itself to necessarily rely on this procedure prior to exercising its powers under Article 7 TEU), the Commission issued a Communication on a new EU Framework to strengthen the Rule of law.[85] This "Rule of Law Framework" is often presented as a new tool that the Commission has established in order to allow it to answer situations that, while not rising to the level that would justify the use of Article 7 TEU, nevertheless does seem to call for a reaction of the EU institutions[86]: the Commission refers in this regard to "situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law … The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress".[87]

The idea of the Rule of Law Framework has its source in a joint demarche towards Mr Barroso, at the time the President of the European Commission, by the Foreign Affairs Ministers of Denmark, Finland, Germany and The Netherlands.[88] In a letter addressed to Mr Barroso on 6 March 2013,[89] these ministers proposed the establishment of "a new and more effective mechanism to safeguard fundamental values

[83] Article 7(2) TEU.
[84] Article 7(3) TEU.
[85] COM(2014) 158 final.
[86] For an assessment, see D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540.
[87] COM(2014) 158 final, at pp. 6-7.
[88] It is worth noting that Mr Frans Timmermans was, at the time, Foreign Affairs Minister of The Netherlands.
[89] See https://www.rijksoverheid.nl/documenten/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme (last consulted on 5 July 2017).

in Member States". "Such a mechanism", they wrote,

> should be swift and independent of political expediency. We propose that the Commission as the guardian of the Treaties should have a stronger role here. It should be allowed to address deficits in a given country at an early stage and – if sufficiently supported by Member States – require the country in question to remedy the situation.
>
> A variety of options could then be explored to foster compliance, including introducing a structured political dialogue, bringing the issue to the Council at an early stage, or concluding binding agreements between the Commission and the relevant Member State. As a last resort, the suspension of EU funding should be possible.

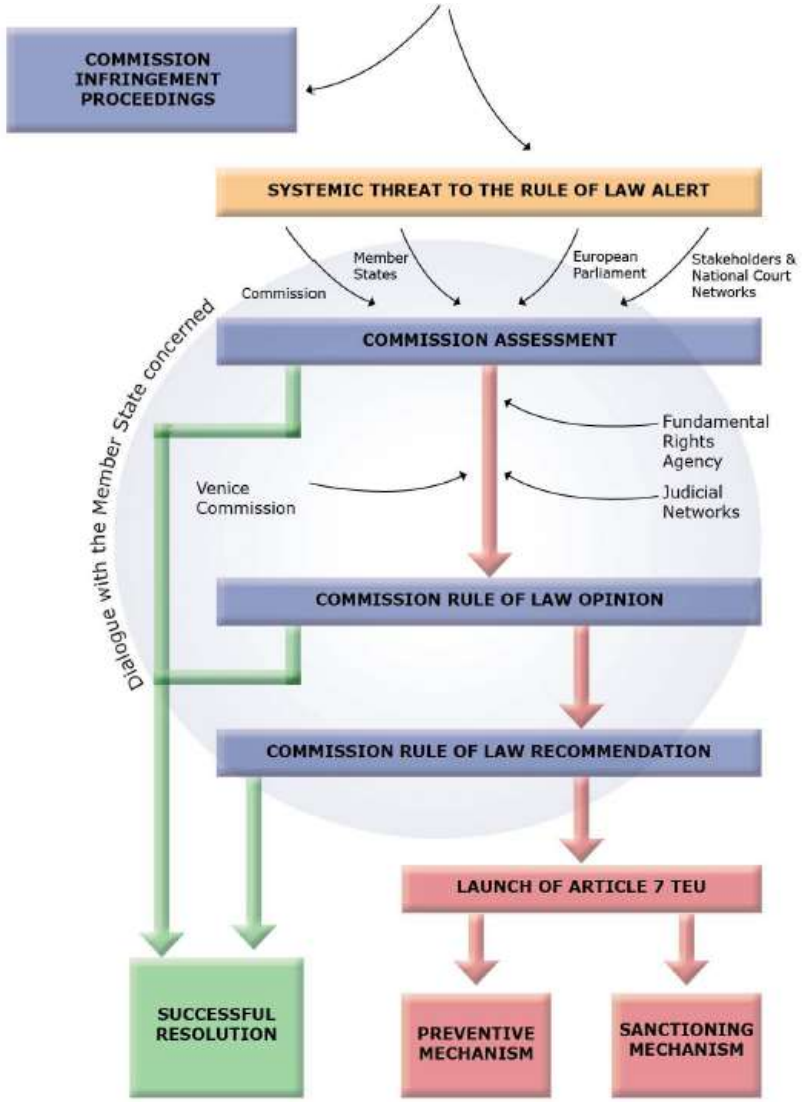
The procedure established one year later under the Rule of Law Framework does not go as far as was initially proposed by these four Member States. It does provide however for such an "early stage" intervention at the initiative of the Commission. The Treaty on the European Union tasks the Commission with "promot[ing] the general interest of the Union" and with "oversee[ing] the application of Union law under the control of the Court of Justice of the European Union".[90] The position of the Commission as guardian of the Treaties, and as dedicated exclusively to the general interest of the Union, is seen as allowing it to use its powers with the required impartiality.

The procedure established by the "Rule of Law Framework" is summarized in figure 1. For the purposes of this in-depth study, it is relevant that the Commission proposes to make an initial assessment of the situation of the rule of law in a Member State based "on the indications received from available sources and recognized institutions, *including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights*".[91] Thus, despite the absence in the Founding Regulation of any explicit reference to the role of the FRA in Article 7 TEU proceedings, the relevance of the expertise of the FRA and of its information-collecting role is acknowledged.

The effectiveness of the procedure proposed by the Commission in the 2014 Rule of Law Framework depends in fact on at least the possibility that the majorities required under either the preventive or the remedial branches of Article 7 TEU may be found. Indeed, even though the initial phase of the procedure described by the Rule of Law Framework presented in the March 2014 communication is partly hidden from the public, insofar as the responses by the Member State and the dialogue with the Commission are in principle confidential, the launching of the assessment by the Commission and the sending of the "Rule of Law Opinion" expressing the conclusions of the Commission, shall be made public.[92] Therefore, there is little incentive for the Member State to whom such an opinion is addressed to re-examine the course of action it has taken, unless there is a realistic possibility that the Commission shall be able to rely on Article 7 TEU at a later stage of the process: the reputation of the Member State shall have been dealt a serious blow simply as the result of the announcement by the Commission that it is assessing a Member State and, later, that it has decided to address a "Rule of Law Opinion" to that State; and the visibility given to these announcements does not offer to that State the easy escape route that confidential proceedings would otherwise have provided. In other terms, as it is currently conceived, the Rule of Law Framework tends to rely more on the public pressure exercised on the State (and the pressure from the peers -- the other governments of the EU Member States), than on the powers of silent diplomacy.[93]

[90] Art. 17(1) TEU.
[91] COM(2014) 158 final, p. 7.
[92] See id., at p. 8 (where the Commission states that whereas "the launching of the Commission assessment and the sending of its opinion will be made public by the Commission, the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution").
[93] This may be one reason why, relying on rather unconvincing legal arguments of its Legal Service, the Council of the EU seems to be distrustful of the Rule of Law Framework as adopted by the Commission. In a legal opinion it adopted at the request of the Council on 27 May 2014, the Council Legal Service has taken the view that "there is no legal basis in the Treaties

Figure 1. The stages of the Rule of Law Framework.
Source: European Commission, Annex 1 to the Communication from the Commission to the European Parliament and the Council. A New EU Framework to strengthen the Rule of Law, COM(2014) 158 final of 11.3.2014.



After this "Rule of Law Framework" procedure was applied in the case of Poland and proved inadequate,[94] building on the lessons learned, further improvements were proposed in a communication presented on 17 July 2019, titled "Strengthening the rule of law within the Union: A

empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU" (Council doc. 10296/14). This is barely plausible as an argument. Since the Commission has powers to trigger the procedure under Article 7 TEU, is obviously may decide that it address various warnings, under whatever form it sees fit, to the Member State concerned, prior to exercising such powers. This is also the view of L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (Oxford Univ. Press, 2017), pp. 128-144, at p. 139 (arguing that the institutions which can initiate Article 7(1) TEU proceedings by submitting a "reasoned proposal" to that effect necessarily should be recognized monitoring powers, since "Without possessing monitoring powers, a proposal could hardly be reasoned. The adjective 'reasoned' is used only in the context of the initiative for triggering the preventive mechanism, and is a decisive argument to conclude that there must be powers of monitoring included in the right to initiative"); or D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540, at p. 529.

[94] See, criticizing the naïve approach of the Commission, D. Kochenov and L. Pech, "Better Late than Never: On the European Commission's Rule of Law Framework and Its First Activation", *Journal of Common Market Studies*, vol. 54(5) (2016), p. 1062.

blueprint for action".[95] The proposal is centred around the preparation by the Commission of an annual *Rule of Law Report*, as part of a *Rule of Law Review Cycle* vaguely inspired by the European Semester for the socio-economic governance of the EU, as well as by the EP resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.

This review cycle would start with the systematic collection of information on the situation of the rule of law in the EU Member States, which the Commission intends to be based on a number of sources of information, "including the bodies of the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development, as well as EU bodies such as the Fundamental Rights Agency".[96] The FRA is therefore again identified as a useful source of information, although in the Polish case the main source relied on by the Commission still was the Venice Commission of the Council of Europe -- a choice which, as noted by academic commentators, may have been wise, since "relying on the expertise of an experienced non-EU body with a well-established reputation in rule of law matters has proved helpful, not only in terms of assessing compliance of Poland's ruling party's 'reforms' with European standards, but also in terms of reinforcing the weight of the Commission's negative findings and counter-criticism in a situation where the Commission's legitimacy, authority and impartiality are defiantly challenged as they repeatedly have been by the Polish government".[97] In the 2019 communication on "Strengthening the rule of law within the Union: A blueprint for action", the Commission adds however that the FRA "has developed the EU Fundamental Rights Information System (EFRIS) to facilitate access to relevant existing information and reports concerning the situation in the Member States",[98] and it suggests that this could be particularly useful to feed into the assessment. The establishment of EFRIS indeed may strengthen the credibility of the FRA to be relied on to provide an impartial and comprehensive information on the situation of fundamental rights in the EU Member States, thus providing a more legitimate ground for the launch of Article 7 TEU proceedings.

Though important, the collection of information by the Commission is of course only a first step in the *Rule of Law Review Cycle*. Based on the various sources of information listed, including information collected at national level via a network of national contact points to be appointed by the Member States from within the public administration or the judiciary, the Commission intends to publish on that basis an annual *Rule of Law Report* summarising the situation of the rule of law in the Member States and including significant developments at EU level. The objective of this Rule of Law Report would be to "maintain a dynamic debate and to continue improving the tools to strengthen the rule of law. It could constitute an important contribution to the work of the European Parliament and the Council, ideally in the context of a regular and coherent calendar of inter-institutional cooperation".[99]

Whether the expertise of the Fundamental Rights Agency shall be systematically sought in the preparation of the Rule of Law Report remains to be seen. The Commission seems unwilling to commit to this. While the EFRIS database provides a convenient tool since it centralizes information on the situation of fundamental rights in the EU Member States that is otherwise dispersed in many places (and the information from the UN human rights mechanisms is notoriously difficult to retrieve), it is likely that the Commission shall be reluctant to acknowledge any formal role to the FRA in the analysis of such information, and particularly, to seek its view as to whether or a threshold has been crossed

[95] COM(2019) 343 final, of 17.7.2019. The communication was preceded by a consultation document: Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union. State of play and possible next steps, COM(2019) 163 final, of 3.4.2019.
[96] COM(2019) 343 final, p. 10.
[97] L. Pech and J. Grogan, "Upholding the rule of law in the EU. What role for FRA?", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 219-236, at p. 226.
[98] Id.
[99] Id., p. 12.

justifying the launch of Article 7 TEU proceedings. It is perhaps not entirely inappropriate to note that a similar reluctance is apparent in the context of the proposals made by the Commission in 2018 to make the delivery of structural funds conditional upon compliance with the values listed in Article 2 TEU, by allowing the suspension of EU funding in situations of "generalised deficiencies as regards the rule of law", which it defines as "a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law".[100] The Commission refers, for the activation of this mechanism, to "the use of external expertise from the Council of Europe", and although the proposal would allow the Commission to take into account "all relevant information" (article 5(2)),[101] there is no reference whatsoever to any role of the Fundamental Rights Agency, either in the provision of information, nor of course in the assessment of whether there exist "generalized deficiencies as regards the rule of law". Here, as in the context of Article 7 TEU, there is a clear unwillingness of the Commission to create the impression that it would be somehow bound to align itself with the assessment provided by an external body, in areas which are highly sensitive. That the formal involvement of the Fundamental Rights Agency may in fact facilitate the role of the Commission, by allowing it to present its position as based not on sujective considerations but on an objective assessment made by an agency whose statute defines as independent, has apparently not been considered a sufficiently strong counter-argument.

3.1.2. The Council

Within the Council, a new "dialogue on the rule of law in the Union" was launched in 2014, on an annual basis. In establishing this new practice, the Council expressed its intention "to encourage the culture of "respect for rule of law" through a constructive dialogue among the Member States … by promoting the political dialogue within the Council in respect of the principles of objectivity, non discrimination, equal treatment, on a non-partisan and evidence-based approach"; such dialogue, in addition, is conceived as having to be "developed in a synergic way, taking into account existing instruments and expertise in this field".[102] Partly in reaction to the approach developed by the Commission in its Rule of Law Framework, which it appears to find excessively judgmental, the Council thus appears to have opted for a peer review process, focused on the exchange of good practices rather than on a punitive approach.[103]

The dialogues are prepared by expert seminars generally brining together representatives of the EU Member States, EU institutions, the Fundamental Rights Agency, and civil society groups ; representatives of the Council of Europe have also occasionally taken part. Apart from that however, the role of external bodies remains minimal in the dialogues on the rule of law in the Union organized by the Council.

Some attempts have been made to improve on this. In September 2016, the Slovak presidency decided to send out a questionnaire to the EU Member States in order to assess their expectations concerning the future developments of the political rule of law dialogue. The questionnaire sought in particular the views of governments on the proposal to transform the dialogues into a form of peer review process, leading to an evaluation of each Member State based on a set of indicators related to the rule of law. The questionnaire included among its questions the following: "Are you in favour of involving

[100] Article 2, b) of the proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final of 2.5.2018.
[101] Article 5(2) of the draft Regulation provides that the Commission, in making its initial assessment, "may take into account all relevant information, including decisions of the Court of Justice of the European Union, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations".
[102] Council doc. 15206/14, para. 16.
[103] The second "rule of law dialogue" was organized on 24 May 2016 by the Dutch Presidency of the EU as part of the EU's General Affairs Council. The dialogue was dedicated to migrant integration and EU fundamental values. The 2017 dialogue was "Media pluralism and the rule of law in the digital age" (Council doc. 13609/17), and the fourth dialogue, organised in 208, was on trust in public institutions (Council doc. 14098/18).

in the preparation of the Council dialogue representatives of other EU bodies (in particular FRA), relevant international organisations (e.g. the Council of Europe, the UN) and/or NGOs? If yes, how could this involvement look like in practical terms". The answers demonstrated that there was a wide support for a stronger involvement of the FRA at least in the preparatory phase of the Council's rule of law dialogues, both among Member States in favour of strengthening the dialogue into a peer review process examining individual States (a EU-level version of the Universal Periodic Review process established within the United Nations Human Rights Council, as it were), and even among the Member States more reluctant towards such an evolution: among the first category of States were Austria, Belgium, Finland, Ireland, Croatia, Italy, Luxembourg, Netherlands, Slovenia and Sweden; among the second category, the Czech Republic, Cyprus, Estonia, France, Greece, Latvia, Lithuania and Spain.[104] However, apart from the invitation to the Director of the FRA, Mr Michael O'Flaherty, to deliver the opening statement at the dialogue that took place on 12 November 2018 (an important but symbolic gesture towards the FRA), no follow-up was given to the proposals put forward as a response to the questionnaire sent out by the Slovak presidency, presumably due to the strong opposition of certain EU Member States who feared that they might be particularly targeted should the dialogues develop into a more robust review process.[105]

3.1.3. The European Parliament

After the Treaty of Amsterdam introduced in the Treaty on the European Union a provision introducing a form of political monitoring of compliance with the values on which the Union is founded, the European Parliament gradually decided to explicitly strengthen its monitoring role. This practice was justified by the consideration that, "following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)", and that "it is the particular responsibility of the European Parliament (by virtue of the role conferred upon it under the new Article 7(1) of the Treaty of Nice [now Article 7(2) TEU]) and of its appropriate committee [the LIBE Committee] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter".[106] Its practice since has not been entirely consistent, however. It adopted annual reports on the situation of fundamental rights in the European Union between 1993 and 2004, drafted by its Committee on Civil Liberties, Justice and Home Affairs. The deeply politicized and nationalized debate that accompanied the presentation of the report prepared by A. Boumediene-Thiery on the situation as regards fundamental rights in the European Union in 2003, however, leading to the rejection in plenary of the resolution based on the report[107], led

[104] See Council of the EU doc. 13230/1/16 REV 1 (3 November 2016). This document was made public following a successful request for access to documents submitted to the Council in December 2016. The answers submitted by Romania were deleted from the version made public. For the position of Cyprus, see Council of the EU doc. 13230/1/16 REV 1 ADD 1.

[105] For more details, see L. Pech and J. Grogan, "Upholding the rule of law in the EU. What role for FRA?", in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2020), pp. 219-236, at pp. 227-230.

[106] Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), paras. 2-3. The Cornillet Report was the first to use the EU Charter of Fundamental Rights as its template. However, the practice of preparing an annual report on the situation of fundamental rights of the Union predated the adoption of the Charter: see Resolution on the annual report on human rights in the EU (1998-1999), (rapp. Haarder) of 16 March 2000 (EP doc. A5-0050/2000).

[107] Report on the situation as regards fundamental rights in the European Union (2003) (rapp. A. Boumediene-Thiery), PE 329.936/DEF, EP doc. A5-0207/2004 (2003/2006(INI)). No majority could be found in the European Parliament to adopt the resolution based on the report and its unexpected rejection in plenary caught everybody by surprise. It thus appeared that the monitoring of fundamental rights by the Parliament had become a politically sensitive exercise, escaping the control of political groups and depending on national delegations and the position of the respective parties at national level (government or opposition), making it difficult for the Parliament to profile itself as an impartial guardian of fundamental rights in the EU, as would be fitting in the role provided for it by Article 7 TEU. Political groups consequently chose a strategy

the Parliament to suspend this practice for a few years, although it did continue during this period to monitor developments related to fundamental rights, regularly adopting positions and calling on Member States to address specific situations raising fundamental rights concerns.[108]

Only at the very end of the 2004-2009 legislature did the Parliament revert to its practice of adopting regular reports on the situation of fundamental rights in the Union.[109] In the resolution it adopted on 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, the Parliament explained its role by stressing that "as the directly elected representative of the citizens of the Union and guarantor of their rights, [it] believes that it has a clear responsibility to uphold [the principles listed in Article 6 of the EU Treaty, which states that the European Union is based on a community of values and on respect for fundamental rights], in particular as the Treaties in their current form greatly restrict the individual's right to bring actions before the Community courts and the European Ombudsman".[110]

In the same resolution, in contrast to the position it had taken in April 2004, the European Parliament also recommended a permanent and systematic monitoring of the EU Member States' compliance with the shared values listed in Article 2 TEU. It "deplore[d] the fact that the Member States continue to refuse EU scrutiny of their own human rights policies and practices and endeavour to keep protection of those rights on a purely national basis, thereby undermining the active role played by the European Union in the world as a defender of human rights and damaging the credibility of the EU's external policy in the area of the protection of fundamental rights". Noting that Article 7 of the EU Treaty "provides for an EU procedure to make sure that systematic and serious violations of human rights and of fundamental freedoms do not take place in the EU, but that such a procedure has never been used notwithstanding the fact that violations do take place in the Member States, as proven by the judgments of the [European Court of Human Rights]", the Parliament requested the EU institutions to "establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty".[111] Since then, the European Parliament has also presented its own proposals for a new procedure to be established to ensure respect for the shared values of democracy, the rule of law and fundamental rights. These proposals are explored below (3.3.).

Outside the Committee on Civil Liberties, Justice and Home Affairs, the lead committee on this issue, diverging views have been expressed within the European Parliament concerning the opportunity of establishing a permanent monitoring of the situation of fundamental rights in the EU, and concerning the respective roles in this regard of the Parliament and independent mechanisms. After the European Commission established the EU Network of Independent Experts on Fundamental Rights -- set up in September 2002 at the request of the European Parliament --, it proposed in a communication published on 15 October 2003 in which it set out its intentions about the implementation of Article 7 TEU[112] that this network of independent experts be set up as a permanent mechanism to ensure

of resorting to committee reports for more consensual issues and to plenary resolutions tabled by political groups for more divisive issues and in any case by addressing specific themes, so to better control the process and ensure approval in plenary.

108 For instance, resolution of 26 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency; resolution of 8 June 2005 on the protection of minorities and anti-discrimination policies in an enlarged Europe. The EP also resorted to plenary resolutions tabled and negotiated by political groups and approved in plenary, for instance on homophobia: resolution of 26 April 2007 on homophobia in Europe; resolution of 15 June 2006 on the increase in racist and homophobic violence in Europe; resolution of 18 January 2006 on homophobia in Europe.

109 See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, rapporteur appointed in LIBE on 11.6.2007, report adopted in plenary on 5.12.2008); and the Resolution of the European Parliament of 14 January 2009 on the situation of fundamental rights in the Union 2004-2008 (2007/2145(INI)).

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

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

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

monitoring of compliance with the values on which the Union is founded. The European Parliament however feared that this would be sending the wrong message to the new Member States joining the European Union on 1 May 2004. While deploring, in other respects, the timidity of the reading proposed by the European Commission of Article 7 TEU, the Parliament insisted in a resolution of 20 April 2004 that the use of Article 7 TEU should be based on four principles, including the principle of confidence, which it explained thus:

> The Union looks to its Member States to take active steps to safeguard the Union's shared values and states, on this basis, that as a matter of principle it has confidence in:
> - the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles,
> - the authority of the European Court of Justice and of the European Court of Human Rights.
> Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and *may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union*. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.[113]

In effect, the insistence of the European Parliament on the "principle of confidence" seemed to exclude the establishment of a mechanism for the permanent monitoring of fundamental rights within the EU Member States, which by its very nature might instead be interpreted as a sign of distrust. As regards the Network of Independent Experts' role in particular, by the time the communication of the Commission of October 2003 was discussed within the EP's Committee on constitutional affairs, it was in any case understood that its monitoring function would be absorbed by the new "Human Rights Agency", the establishment of which has been agreed at the European Council of December 2003: in effect, the proposal of the Commission to establish the Network as permanent mechanism in support of the EP's monitoring had therefore become moot. However, the doubts expressed in some resolutions of the European Parliament concerning a permanent monitoring of the EU Member States shows the need to clarify the respective roles of a political institution, composed of elected representatives, and of independent expert mechanisms, whether the Network of Independent Experts or the Fundamental Rights Agency: it is also this question that is raised by the proposal for the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights ("DRF"), presented by the European Parliament in October 2016, to which this study refers below.

3.2. Strengthening the implementation of Article 7 TEU

3.2.1. Introduction

Various proposals have been made to improve the architecture for the protection of fundamental rights and the values of democracy and the rule of law. Some of these proposals suggest amending the European Treaties in order to strengthen the ability of the EU institutions to protect democracy, the rule of law and fundamental rights. They include, for instance: allowing for the expulsion from the Union of a Member State found to have systematically breached the values on which the Union is founded (a possibility that exists within the Council of Europe); the deletion of Article 51(1) of the

[113] European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12 (emphasis added). The resolution had been drafted and proposed by the Committee on Constitutional Affairs with an opinion of the Legal Affairs Committee, while the Civil Liberties committee (which is the main committee responsible for the matter) was not involved in the process.

Charter of Fundamental Rights, in order to allow the Union to supervise compliance with the rights and freedoms of the Charter not only in the field of application of Union law, but under the jurisdiction of the EU member States in whatever field they intervene -- thus transforming the EU into a human rights organisation; or the establishment of a new body, called a "Copenhagen Commission" (by reference to the "Copenhagen criteria" set out in 1993 as conditions that candidate countries should fulfil in order to acccede to the EU[114]), in charge of ensuring compliance with Article 2 TEU. The most widely discussed of these proposals, however, would not require an amendment of the treaties. It would consist in the establishment of a new mechanism to monitor compliance with the values of Article 2 EU, built through an interinstitutional agreement between the European Parliament, the Commission and the Council of the EU. The next section describes this proposal (3.2.2.). The following sections then assess the proposal, considering its advantages as well as the reactions it led to, with a focus on the legal issues that arise (3.2.3.). Section 3.3. then makes a recommendation as to the future role the Fundamental Rights Agency could play in the strengthening of the implementation of Article 7 TEU.

3.2.2. The proposal for an EU Pact on democracy, the rule of law and fundamental rights

It has been mentioned that, already in a resolution adopted in 2009, the European Parliament called for the establishment of a mechanism to strengthen the monitoring of compliance with the values on which the Union is founded. This call was reiterated in a resolution adopted on 10 June 2015 on the situation in Hungary, in which the European Parliament called on the Commission to present a proposal for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, "as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States, relying on common and objective indicators, and to carry out an impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States, indiscriminately and on an equal basis". The European Parliament anticipated that such a mechanism should involve "an evaluation by the EU Agency for Fundamental Rights, together with appropriate binding and corrective mechanisms, in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level".[115]

The idea seems to be favored by at least a significant group of EU Member States. Indeed, already at an informal meeting of Justice and Home Affairs (JHA) Ministers held in January 2013, it was agreed that "the idea of setting up a mechanism to better support protection of fundamental rights and the rule of law in the Member States could be considered further. Such a mechanism would provide a holistic framework for effective responses to these issues. It could cover sharing of best practices, benchmarking, evaluating outcomes in an objective and non-discriminatory way and formulating appropriate recommendations and guidelines for action".[116]

A detailed proposal for such a mechanism is contained in the resolution adopted by the European Parliament on 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.[117] The resolution requested the Commission to submit – by September 2017 – a proposal for the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental

[114] The European Council that met in Copenhagen in 1993 listed political and economic criteria for accession of new Member States, as well as conditions related to administrative and institutional capacity. The political criteria are "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".
[115] European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP))
[116] Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Note from the COREPER to the Council, Council of the EU doc. 10168/13 (Brussels, 29 May 2013), para. 4.
[117] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV (2016) 0409. The resolution was adopted on the basis of a report from MEP Sophie in't Veld, who was closely involved in the work of the EU Network of Independent Experts on Fundamental Rights between 2002 and 2007. That experience may have influencing some of the proposals adopted by the European Parliament.

Rights ("DRF"). According to the resolution, this proposal should take the form of an inter-institutional agreement adopted on the basis of Article 295 TFEU, which allows the European Parliament, the Council and the Commission, "by common agreement", to "make arrangements for their cooperation", to whuch end "they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature".

Such a "EU Pact for DRF", according to the Parliament, should result in a monitoring mechanism that should "be evidence based … objective and not subject to outside influence, in particular political influence, non-discriminatory and assessing on an equal footing"; it should respect "the principle of subsidiarity, necessity and proportionality"; it should address "both Member States and institutions of the Union"; and it should be "based on a graduated approach, including both a preventative and corrective arm".[118] The "primary objective" of the EU Pact for DRF, the annex to the resolution states, "should be to prevent violations and non-compliance with democracy, rule of law and fundamental rights, while at the same time providing the tools needed to render both the preventative and corrective arms of Article 7 TEU, as well as the other instruments provided for in the Treaties, operational in practice".[119] In other terms, rather than to establish a new mechanism separate from the existing procedures, the Pact is intended to improve the effectiveness of the existing tools, particularly of Article 7 TEU (but also, in particular, the use of infringement proceedings filed by the Commission in accordance with Article 258 TFEU where a Member States fails to comply with its obligations). It is also intended to bring about greater coherence across the existing mechanisms, since (in the proposals of the Parliament) it should "incorporate the Commission's Rule of Law Framework and the Council's Rule of Law Dialogue into a single Union instrument".[120]

The resolution of the Parliament includes an Annex that sets out in detail what could be the content of the Inter-institutional Agreement establishing the EU Pact for DRF. The Draft EU Pact for DRF is premised on the idea that "the Union's democratic and legal governance does not have as solid a legislative basis as its economic governance, as the Union does not display the same intransigence and firmness in demanding respect for its core values as it does when making sure its economic and fiscal rules are implemented properly".[121] This explains why the Pact includes certain ideas (such as regular cycles of control and the adoption of country specific recommendations) that are directly imported from the new tools for socio-economic governance of the EU, particularly the European Semester. The European Parliament proposes that the Commission preparean annual report on democracy, the rule of law and fundamental rights (European DRF Report), including both a general part and "country-specific recommendations".[122] The report should be prepared based on reporting done by the Fundamental Rights Agency and the Council of Europe, but also on other sources, including "contributions from the Member States authorities", information provided by the European Data Protection Supervisor (EDPS), the European Institute for Gender Equality (EIGE), the European Foundation for the Improvement of Living and Working Conditions (Eurofound), and Eurostat, input from civil society and academic experts, "all resolutions or other relevant contributions by the European Parliament, including its annual report on the human rights situation in the Union", and "the case-law of the Court of Justice and of the European Court of Human Rights and of other international courts, tribunals and treaty bodies".[123] In preparing the annual European DRF Report, the Commission should work "in consultation with"[124] a panel of independent experts (DRF Expert Panel) composed of 38 independent experts (37 following the leave of the United Kingdom): the panel would be composed of

[118] Preamble, para. AJ.
[119] Annex to the resolution, Detailed recommendations for a draft Inter-institutional Agreement on arrangements concerning monitoring and follow up procedures on the situation of Democracy, the Rule of Law and Fundamental Rights in the Member States and EU institutions, op. para. 2.
[120] Draft EU Pact for DRF, Art. 3.
[121] Preamble, para. Q.
[122] Draft EU Pact for DRF, Art. 2.
[123] Draft EU Pact for DRF, Art. 6.
[124] Draft EU Pact for DRF, Art. 4.

one independent expert designated by the national parliament of each Member State, who is "a qualified constitutional court or supreme court judge not currently in active service"; ten further experts would be "appointed by the European Parliament, with a two-thirds majority", chosen from a list of experts nominated by various international organisations or bodies.[125]

The annual European DRF Report should provide the basis for "a multi-annual structured dialogue between the European Parliament, the Council, the Commission and national parliaments and it shall also involve civil society, the FRA and the Council of Europe". Specifically, this multi-annual structured dialogue shall include an interparliamentary debate convened by the European Parliament and involving national parliaments on the basis of the European DRF Report, leading to the adoption of a resolution setting benchmarks and goals to be attained from one year to another, allowing effective monitoring of annual changes. An annual debate should be held within the Council, building upon its Rule of Law Dialogue, on the basis of the European DRF Report and shall adopt Council conclusions, inviting national parliaments to provide a response to the European DRF Report, proposals or reforms. Finally, again on the basis of the European DRF Report, the Commission may decide to launch a "systemic infringement" action under Article 2 TEU and Article 258 TFEU, bundling several infringement cases together[126]; it may also, after consulting the European Parliament and the Council, decide to submit a proposal for an evaluation of the implementation by Member States of Union policies in the area of freedom, security and justice under Article 70 TFEU: this article provides that, acting on the basis of such a proposal of the Commission, "the Council may … adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition".

The annual report, finally, may trigger the procedures provided for under Article 7 TEU. The European Parliament resolution anticipates in this regard that, "if a Member State falls short on one or more of the aspects listed in Article 7, the Commission shall start a dialogue with that Member State without delay, taking into account the country-specific recommendations". Where the country-specific recommendation on a Member State includes an assessment by the DRF Expert Panel that there is a clear risk of a serious breach of the values referred to in Article 2 TEU and that there are sufficient grounds for invoking Article 7(1) TEU, "the European Parliament, the Council and the Commission, shall each discuss the matter without delay and take a reasoned decision, which shall be made public"; if the country-specific recommendations on a Member State include the assessment by the Panel that there is a serious and persistent breach (which the European Parliament resolution describes as a breach "increasing or remaining unchanged over a period of at least two years, of the values referred to in Article 2 TEU") and that there are sufficient grounds for invoking Article 7(2) TEU, "the European Parliament, the Council and the Commission shall each discuss the matter without delay and each institution shall take a reasoned decision which shall be made public".

[125] Draft EU Pact for DRF, Art. 8.

[126] It has been suggested that, in the future, the Commission could file infringement proceedings against a Member State for failure to comply with EU law (Article 258 TFEU) to address situations of "systemic infringement", based on Article 2 TFEU: see K.L. Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures", in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge Univ. Press, 2016). Doubts have been expressed, however, as to whether such a proposal would be legally viable. Article 2 TEU is subject to the political monitoring provided for in Article 7 TEU, and it is likely that the setting up of such a procedure, deliberately designed to avoid the Court of Justice being involved in assessing compliance with the values listed in Article 2 TEU, would be seen as precluding judicial control in the context of infringement proceedings (see D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540, at p. 520). In addition, it has sometimes been argued that notions such as "democracy" and "the rule of law" may not be sufficiently well defined to be justiciable (L. Gormley, "Infringement Proceedings", in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford Univ. Press, 2017), pp. 65-78, at p. 78). See however on this point below, section 4.2.4.

3.2.3. The advantages of the EU Pact on democracy, the rule of law and fundamental rights

The proposal of the European Parliament for an interinstitutional agreement establishing the EU Pact for democracy, the rule of law and fundamental rights clearly acknowledges the need for such a monitoring to be more objective and systematic -- rather than *ad hoc* and thus potentially discriminatory, if only some Member States are subject to scrutiny --. It also presents the advantage that the three key institutions involved in the procedures defined in Article 7 TEU -- the European Parliament, but also the Council and the Commission -- shall be taking the same report as the basis for their monitoring, which should ensure greater coherence and reduce the risk of politicization of the process. This is particularly important where different political majorities exist in the European Parliament and across the Member States' governments, or where the political sensitivities within those institutions diverge from those of the College of Commissioners. In such a constellation, initiatives taken by one institutional actor may be obstructed by other actors, whether this obstruction is built into the procedure of Article 7 TEU or whether it is of a political nature (though the national governments within the Council of the EU or the European Council appear to have the final word in the scheme of Article 7 TEU). This may undermine the credibility of the actor (or group of actors, in the case of a group of States) taking the initiative of triggering this provision, and thus have a chilling effect on its use, even in the situations where the threat to Article 2 TEU values is clearest.

Ensuring that the institutional actors involved in Article 7 TEU procedures take as a departure point a single, common document, also offers a second advantage, of a strictly legal nature. The preventive component of Article 7 TEU (in its paragraph 1) refers to a "reasoned proposal" from a third of the Member States, the European Parliament, or the Commission, for the mechanism to be launched. It cannot be excluded that, if a decision to trigger Article 7 TEU is challenged by the Member State concerned (to which a recommendation is addressed, or which is found to present a "clear risk of a serious breach" of the values of Article 2 TEU), the Court of Justice of the European Union shall have to assess whether the proposal is, indeed, sufficiently "reasoned", in other terms, backed by sufficient evidence rather than based on considerations of a primarily (or exclusively) political nature.

Of course, the Court of Justice in principle plays no role in the decision to address recommendations to a Member State or to conclude that there exists a "clear risk of a serious breach" of the values on which the Union is founded. Yet, should the Council of the EU decide to take such measures, they could be challenged before the Court by the Member State concerned, in the form of an action for annulment as provided for in Article 263 TFEU.[127] The role of the Court is strictly limited: Article 269 TFEU provides that "The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and *in respect solely of the procedural stipulations contained in that Article*" (emphasis added).[128] As noted by the European Commission, "despite the repeated suggestions made by the Commission in the run-up to the Amsterdam and Nice Treaties, the Union Treaty does not give the European Court of Justice the power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach".[129] However, it cannot be excluded that, consistent

[127] Such an action must be filed within one month following the adoption of the measure challenged.
[128] This corresponds to the former Article 46(e) of the TEU (prior to the entry into force of the Lisbon Treaty).
[129] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based (COM(2003)606 final, of 15.10.2003), p. 6). For the same reasons, the General Court (formerly the Court of First Instance) considered it had no jurisdiction to assess whether the Commission acted unlawfully in deciding to refrain from initiating the procedure under Article 7 EU against Spain following a complaint alleging breaches by this country's courts of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law: see Case T-337/03, *Bertelli Gálvez v Commission* [2004] (EU:T:2004:106) ECR II-1041, para. 15 ("The EU Treaty ... gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under

with the role of the Court of Justice in this context (which is essentially to protect the rights of defence of the Member State concerned), the Court shall consider that it has the competence to examine whether the proposal from one third of the Member States, the European Parliament or the Commission is sufficiently well documented to qualify as a "*reasoned* proposal".

The approach recommended by the European Parliament in putting forward the idea of a EU Pact for DRF would be more principled, better informed, and more consistent across time and across Member States, than the current arrangements allow. The potential of such a new approach to the strengthening of the "Rule of Law Dialogue" held annually within the Council is particularly important to underline. This is a third advantage of the proposal: in the same way that the Universal Periodic Review process within the Human Rights Council is informed by three reports (one submitted by the State under consideration, and two reports compiled by the Office of the High Commissioner for Human Rights, respectively on the basis of findings of UN mechanisms, and on the basis of contributions from external sources, in particular reports from non-governmental organisations), a "Rule of Law Dialogue" informed by a report compiled by the European Commission on the basis of findings made authoritatively by human rights mechanisms could force the governments, within the General Affairs Council, to address certain more sensitive issues, and to do so on the basis of information that shall not be easily dismissed as unreliable or selective.

Indeed, beyond the Council "Rule of Law Dialogue", a fourth advantage is the insistance on taking into account the monitoring performed by Council of Europe and United Nations bodies and mechanisms. This should not only further reduce the risks of politicization. It also shall lead to greater coherence in the overall protection of fundamental rights and the interpretation of applicable human rights instruments.

A fifth advantage, finally, is to involve national parliaments, through the annual interparliamentary dialogue, in the debate on the reforms that should be implemented at country level in order to ensure that the values of Article 2 TEU are upheld.

3.2.4. The reactions to the proposal for the EU Pact on democracy, the rule of law and fundamental rights

The elements recalled in the previous paragraph, and the various advantages associated with each, should and can be preserved in any future mechanism as may be set up on the basis of the proposals included in the resolution adopted by the European Parliament on 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights. Whether these proposals shall be successful in their current formulation is doubtful, however. The Commission answered swiftly to the resolution of the European Parliament, probably signaling thereby the firmness of its assessment. In the response, which it released on 17 January 2017,[130] it expressed its "serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of "experts" and about the need for, feasibility and added value of an inter-institutional agreement on this matter". From the legal point of view, two questions arise.

1. Would the Pact on DRF threaten the exclusive competence of the Court of Justice of the European Union to interpret EU law?

Article 6(1) EU or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned")

[130] Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017 (SP(2017)16-0).

The Commission took the view in its response that some elements of the EU Pact for DRF, "for instance, the central role attributed to an independent expert panel in the proposed pact, … raise serious questions of legality, institutional legitimacy and accountability. Moreover, there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned."[131]

What the Commission seems to have in mind when questioning the compatibility with the Treaties of some of the elements contained in the Draft EU Pact for DRF is that certain aspects of the Pact might constitute a threat to the role the Treaties attribute to the Court of Justice of the European Union. It should be recalled in this regard that, according to Article 344 TFEU, Member States have undertaken not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.[132] Indeed, the EU Member States are obligated to have recourse to the procedures for settling disputes established by EU law, to the exclusion of any other method of addressing disputes. In particular, they may not derogate from the jurisdiction of the Court of Justice as established by the Treaties. This obligation is described by the Court of Justice as "a fundamental feature of the EU system" which also must be understood as "a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU".[133] It may appear in violation of this rule that a mechanism be established to assess the compatibility of measures adopted by the EU Member States and by the Union institutions with the values on which the Union is founded. In particular, the Court of Justice already ensures compliance with fundamental rights (both as listed in the Charter of Fundamental Rights and as included among the general principles of EU law) within the scope of application of Union law, and it may seem inconsistent with the jurisdiction of the Court as defined in the Treaties to establish a separate procedure to provide such an assessment.

This initial impression must be nuanced, however. A distinction should be made, in particular, between (a) assessments that might compete with those which the Court of Justice may be led to make in the exercise of its powers, and (b) assessments that do not create any risk of overlap. In particular, whereas to Court of Justice is competent, under Articles 6(1) and (3) TEU and the provisions of the Treaties that define its jurisdiction, to ensure compliance with fundamental rights *in the scope of application of Union law* -- whether by assessing measures taken by the institutions that are of a binding nature or whether by assessing measures adopted by the EU Member States when they implement Union law --, the Court has no competence to exercise such a control in situations that fall *outside* Union law. Although, as the Court of Justice itself has emphasized, the legal structure of the EU "is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU", and although it is that premiss which "implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected",[134] this "fundamental premiss" is not one that, with the exception of compliance with fundamental rights in the scope of application of Union law, the Court of Justice is in a position to control.

Moreover, where an overlap may exist between the competences attributed to the Court of Justice in the Treaties and a new mechanism on democracy, the rule of law and fundamental rights, it should in principle suffice to state that any assessment issued by such a mechanism shall be without prejudice of the role of the Court of Justice, as the final authority competent to "ensure that in the interpretation

[131] Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017 (SP(2017)16-0).
[132] On this provision, see Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission* v *Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraph 282.
[133] Opinion 2/13, paras. 201-202.
[134] Opinion 2/13, para. 168.

and application of the Treaties the law is observed".[135] Indeed, when the same question arose with the establishment of the Fundamental Rights Agency, the solution was to include the following provision in the Regulation establishing the Agency:

> The conclusions, opinions and reports [formulated and published by the Fundamental Rights Agency] may concern [legislative] proposals from the Commission [...] or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d) [of the Regulation]. They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty [now Article 263 TFEU] or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty [now Article 258 TFEU].[136]

This "no prejudice clause" was intended to preserve the exclusive jurisdiction of the Court of Justice to ensure respect for the principle of legality within Union law and to assess the compatibility with their Treaty obligations of measures adopted by the EU Member States. A similar provision could be inserted into an inter-institutional agreement as envisaged by the European Parliament, to ensure, as required by Article 295 TFEU, that the agreement is not in violation of the Treaties.

2. Can democracy and the rule of law be objectively assessed?

A second question raised by the proposal for a new mechanism on democracy, the rule of law and fundamental rights, is whether "democracy" and the "rule of law" can be defined in ways that allow compliance with these requirements to be objectively monitored. One advantage of an improved coordination between the Commission, the Member States and the European Parliament, in the screening of the situation of fundamental rights in the European Union, is that they shall have to converge as to what "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", refer to, and which should be the corresponding indicators.

Indeed, whereas "respect for human rights" can be assessed taking into account the Charter of Fundamental Rights, the definitions of "democracy" and of "rule of law" remain to a certain extent contested. Attempts have been made in recent years, however, to overcome the ambiguities behind these requirements.

The preferred approach, around which a consensus is now emerging, is to relate these notions to specific fundamental rights, allowing them to be assessed with the same tools that address fundamental rights more generally, and for such an assessment to be performed by the same human rights monitoring bodies, relying on the same attributes of human rights and indicators as for other human rights. The Fundamental Rights Agency itself contributed to this effort in adopting opinion 2/2016 of 8 April 2016 on the development of a integrated tool of objective fundamental rights indicators to measure compliance with the shared values of Article 2 TEU: the opinion provides a strong argument for grounding the values listed in Article 2 TEU in fundamental rights, with associated indicators, thus also implying that the FRA could play a more systematic and visible role in monitoring compliance with such values, based on its expertise and ability to collect and process comparable information across the EU Member States.[137]

---

[135] Article 19(1) TEU.

[136] Article 4(2) of Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1.

[137] This was, in essence, the argument made by two staff members of the FRA, writing in their academic capacity: G.N. Toggenburg and J. Grimheden, "Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?", *Journal of Common Market Studies*, vol. 54(5) (2016), p. 1093.

The requirement of "democracy", thus, can be seen as the result of compliance with fundamental rights recognized in both international and European human rights law and in the Charter of Fundamental Rights, which contribute to a healthy democratic society. These rights include, in particular: freedom of expression and information and pluralism of the media (Article 11 of the Charter), all of which contribute to creating a public sphere in which citizens, the media and opposition political parties may flourish; freedom of assembly and association (Article 12), through which discontent with governmental policies may be expressed; the right to education and respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions (Article 14), which contributes to pluralism in a democratic society and equips citizens to take part in public deliberation; the right of access to document held by public institutions (Article 42); and of course, the right to vote and to stand as a candidate at elections held at regular intervals. It is perhaps on this last point that the Charter of Fundamental Rights is least well equipped, however, to serve as a benchmark to assess developments within the Member States with a view to ensuring that they continue to comply with the values set forth in Article 2 TEU: like most of the other rights of Title V of the Charter,[138] the right to vote and to stand as a candidate at elections is only stipulated with respect to the right of citizens of the Union, in whichever Member State they may be residing, as regards elections to the European Parliament (Article 39) and municipal elections (Article 40). With that proviso, however, the content of the value of "democracy" can be assessed, relatively uncontroversially, based on the existing catalogues of fundamental rights.

As to the "rule of law", the Luxembourg presidency of the Union proposed in 2015 to define it as

> a principle of governance by which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards. Moreover, the rule of law entails adherence to a number of principles: be it supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness or procedural and legal transparency.[139]

This attempt to put forward a definition of the requirement of the rule of law followed debates that took place in 2013 concerning the strengthening of the supervision of compliance with the values listed in Article 2 TEU, including by the establishment of a new mechanism to that effect, as proposed by the Foreign Affairs of Denmark, Finland, Germany and The Netherlands in the letter to the President of the Commission referred to above.[140] One of the obstacles to the proposals considered at the time was that "there is not yet a clearly agreed common understanding of the concept of the rule of law and of the extent of its coverage within the systems of governance in Member States", although "the development of such a common understanding is a prerequisite to the development in the future of effective responses and of systems of measurement in this area".[141]

More recently, the requirements of the rule of law have been further clarified on the basis of the benchmarks and standards put forward by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe. The Venice Commission adopted an initial report on the

[138] Though the right of access to documents, already mentioned, is an exception in this regard, as it is guaranteed not only to citizens of the Union, but also to "any natural or legal person residing or having its registered office in a Member State" (Article 42 of the Charter of Fundamental Rights).
[139] Note from the Presidency, Ensuring the respect of the rule of law, Council of the EU doc. 13744/15 (Brussels, 9 November 2015).
[140] See above, para. 3.1.1.
[141] Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Note from the COREPER to the Council, Council of the EU doc. 10168/13 (Brussels, 29 May 2013), para. 9.

topic in April 2011.[142] That report was an important inspiration for the identification by the European Commission, in its 2014 communication presenting a new EU framework to strengthen the rule of law, of six criteria of the Rule of law.[143] The Venice Commission subsequently adopted the "Rule of Law checklist" it adopted at its 106th plenary session of 11-12 March 2016.[144] The checklist, which the European Parliament has endorsed,[145] includes references to six benchmarks, including five key criteria (legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, and access to justice) and specific challenges linked to corruption and data collection and surveillance. This document seeks to improve the understanding of the "Rule of Law", as referred to both in Article 2 TEU (to which reference is made) and in the Preamble of the Statute of the Council of Europe, beyond the conflicting interpretations that this notion has been given in different legal systems ("Rule of Law", "Rechtsstaat", "Etat de droit", "prééminence du droit"), a problem also highlighted in a study prepared for the European Parliament.[146]

According to the Venice Commission, "the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".[147] The definition provided seeks to move beyond a purely formalistic concept of the Rule of Law, which, properly understood, cannot simply mean that authorities should act in accordance with certain procedures, but should also include a reference to certain substantive values. It is in this spirit that the Venice Commission includes among the core elements of the "Rule of Law" not only procedural requirements ((1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts), but also substantive components ((5) Respect for human rights; and (6) Non-discrimination and equality before the law).

In sum, whereas notions such as "democracy" and "rule of law" have been given competing definitions in the past, and therefore were not seen as providing an adequate basis for the establishment of an objective and impartial (i.e., non-politicized) form of monitoring, they are now more consensual, and have been provided definitions in line with the requirements of fundamental rights.

3.3. The role of the Fundamental Rights Agency in Article 7 TEU proceedings

3.3.1. The role of independent expertise

The Draft Pact for DRF includes setting up a body of independent experts, comprised of one expert designated by the parliament of each Member State and ten other experts appointed by the European

[142] European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, Study No. 512/2009, 4 April 2011, paras. 41 and ff.
[143] European Commission Communication, *A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158 final of 11.3.2014, p. 4 (listing six core principes defining the Rule of Law: 1. legality, including a transparent, accountable, democratic and pluralistic process for the adoption of laws; 2. legal certainty; 3. prohibition of arbitrariness in the exercise of executive powers; 4. independent and impartial courts; 5. effective judicial review including respect for fundamental rights; 6. equality before the law).
[144] Council of Europe doc. CDL-AD(2016)007, Study No. 711/2013 (Strasbourg, 18 March 2016).
[145] The Preamble to the European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, cited above, cites the checklist of the Venice Commission.
[146] See *The triangular relationship between fundamental rights, democracy and rule of law in the EU. Towards an EU Copenhagen mechanism*, study supervised by the Policy Department Citizens' Rights and Constitutional Affairs and prepared at the request of European Parliament's Committee on Civil Liberties, Justice and Home Affairs (PE 493.03, October 2013).
[147] European Commission for Democracy through Law (Venice Commission), Rule of Law checklist, cited above, para. 15.

Parliament. The proposal is inspired by the former EU Network of Independent Experts on Fundamental Rights, which provided regular reports on the situation of fundamental rights in the European Union between 2002 and 2007.[148] It shall be recalled that in the communication it presented in October 2003 on the values on which the Union is founded, the Commission proposed that the group of experts be made into a permanent mechanism to support monitoring of compliance with the Charter of Fundamental Rights,[149] both in order to contribute to the mutual trust in the establishment of an area of freedom, security and justice, and in order, where necessary, to provide the institutions of the Union with the information they require in order to fulfil the tasks entrusted to them by Article 7 TEU.

The current position of the Commission is much less favourable to the establishment of such an expert body, however. In its communication of 17 July 2019 on Strengthening the rule of law within the European Union, the Commission states that, "as guardian of the Treaties", it "needs to maintain its autonomy in terms of both the content and timing of its own assessments".[150] Alluding to the proposed Pact for DRF, the Commission continues:

> A recurring idea that came in the context of the rule of law debate has been to have a panel of independent experts set up outside the Commission or EU institutions, with the goal of providing expert and objective assessments on rule of law challenges, while other proposals relate to the creation of a dedicated new agency. However, such approaches raise a number of problems in terms of legitimacy, the balance of inputs and the accountability for the results. Whilst the Commission already draws on all legitimate sources of information and expertise and cross-checks the different sources of information – and will continue to do so –, external expertise cannot take the place of an assessment made by the Commission itself, particularly when the Commission's conclusions could be the basis for acts that come with legal and financial consequences and which could be challenged at the Court of Justice. Nor can the European Parliament or the Council delegate decision-making to outside bodies. The authority and accountability of the institutions, as set in the institutional balance established by the Treaties, need to be maintained.

This is hardly in line with the position adopted by the Commission in 2003, and it is not convincing. While the Treaties acknowledge the role of the Commission as guardian of the Treaties, this does not imply that no consultative body may be set up to provide expert advice, to the Commission as well as to other institutions, in matters that relate to the exercise of their powers. The pool of experts that the European Parliament proposes to establish would not be responsible for making the political judgment as to whether or not Article 7 TEU proceedings should be commenced. It would merely have a consultative function -- to collect information and prepare the assessment to be made by the EU institutions under this mechanism. The "autonomy" of the Commission, whether in defining the content of its assessment or in deciding which timing to follow, would be preserved entirely. Indeed, its role may be performed more effectively, not less, if it can appear to be based on the findings of a body of highly respected, independent jurists from the different Member States.

Whether the establishment of a new body of independent experts would have a true added value is more doubtful, however. Indeed, the Fundamental Rights Agency was established in part in order to fulfil some of the functions that the Network of Independent Experts on Fundamental Rights had been

[148] Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), para. 9. The EU Network of Independent Experts on Fundamental Rights was composed initially of 16 experts (later to become 26 experts, in order to include experts from the 10 acceding EU member States), covering the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart publ., Oxford and Portland Oregon, 2005.

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

[150] COM(2019) 343 final of 17.7.2019, p. 12.

performing. And despite the relatively restrictive definition of its mandate under its Founding Regulation, the Agency is fully equipped to provide the institutions with reports -- annual or, for instance, trimestriel -- that might allow them to exercise their powers under Article 7 TEU in a matter that is more consistent and better informed, thus ensuring the impartiality and non-discriminatory nature of the monitoring of compliance with the values on which the Union is founded. In particular, the Agency has access to a network of experts covering all the EU Member States, who are familiar with the respective legal systems and can provide a multidisciplinary assessment of the situation of democracy, the rule of law and fundamental rights (the FRANET network); it has developed links with an impressive network of non-governmental organisations covering the full range of the rights listed in the Charter and all the Member States; and it has accumulated a strong experience in ensuring the comparability of data collected across the Member States.

The Draft EU Pact for DRF itself refers to the proposal made by the Agency in December 2013, for a 'European fundamental rights information system' (EFRIS), that would provide the institutions of the Union with a reliable tool to assess the situation of fundamental rights in the EU. This database is now functional, and provides in particular an efficient way to identify the main concerns and recommendations addressed to each EU Member States by Council of Europe and United Nations human rights mechanisms. it also ensures a non-discriminatory monitoring of the EU Member States, since all States are subject to the same treatment, based on the same authoritative sources.

Against this background, it may be questioned whether the establishment of a new group of independent experts truly presents an added value. Perhaps a more efficient solution, and one that could be more realistic politically, would be to request that the Fundamental Rights Agency contribute periodic reports on the situation of fundamental rights in the EU, providing the European Parliament, the Commission and the Council with the information they need in order to exercise their powers under Article 7 TEU. This alternative proposal is discussed in the following section.

3.3.2. The potential role of the Fundamental Rights Agency

In order to overcome the scepticism expressed following the adoption of its resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, the European Parliament could instead consider requesting from the Fundamental Rights Agency, on an annual or trimestrial basis, that it submit a report on the situation of fundamental rights in the EU. In the proposal presented here, such a report would provide an overview of the situation of fundamental rights in the EU examining the full range of the rights, freedoms and principles listed in the Charter of Fundamental Rights, following a methodology that allows to assess whether in certain Member States, the threats to rights contributing to democracy and the rule of law are such that there is a risk that the values of the Union shall be breached. This final assessment should be left to the institutions or actors which, under Article 7 TEU, may launch the procedures provided for by this provision by making a "reasoned proposal" for its preventive branch to be triggered (European Parliament, Commission or nine Member States), or, in the remedial branch of Article 7 TEU, by making a "proposal" for a determination that a Member State is in "serious and persistent breach" of the values of the Union (Commission or nine Member States). The report, however, would support these institutions and actors exercising their functions under Article 7 TEU.

The Fundamental Rights Agency is equipped to prepare the comparative study allowing to identify threats to the values of Article 2 TEU because, for the reasons recalled above, such values can be translated into indicators based on fundamental rights. The rights contributing to democracy should be defined as the rights listed in Articles 11 (freedom of expression and information and pluralism of the media), 12 (freedom of assembly and association), 14 (right to education and respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions), 42 (right of access to document held by public

institutions), 39 (right to vote and to stand as a candidate at elections for the European Parliament) and 40 (right to vote and to stand as a candidate at municipal elections) of the Charter of Fundamental Rights. In addition, reference should be made to Article 2 of the First Additional Protocol to the European Convention on Human Rights, which recognizes the right to regular and free elections, as this is a key component of democracy.

For the purposes of assessing the situation of the rule of law, similarly, the rights listed in the Charter in Articles 21 (Non-discrimination), 47 (Right to an effective remedy and to a fair trial) and 49(1) (Principle of legality), should be taken into account. As seen above, the criteria listed by the Venice Commission of the Council of Europe in its definition of the Rule of Law also include a broader requirement of legality, understood as "a transparent, accountable and democratic process for enacting law". This criterion overlaps in part with the criteria constitutive of "democracy"; they also relate to "quality of the law" as defined by the European Court of Human Rights in its examination of the acceptability of restrictions to the rights and freedoms guaranteed under the European Convention on Human Rights. Indeed, the link between the "quality of the law" as defined by the Court and the notion of the "rule of law" is explicit in its recent judgments,[151] and the Court of Justice of the European Union has established the same connection.[152] This is not the place where to provide a detailed comment of such requirements. The point is merely that, relying on the definition provided by the Venice Commission, it is possible to assess the situation of the rule of law using the classic tools from fundamental rights analysis, thus making such an assessment objective and based on well-established criteria.

The assessment provided by the Fundamental Rights Agency should systematically take into account findings made by monitoring bodies established within the United Nations and within the Council of Europe.[153] This would contribute to the overall coherence of human rights protection in Europe, and it

[151] See, e.g., Eur. Ct. HR (GC), *Roman Zakharov v. Russia*, Appl. No. 47143/06, judgment of 4 December 2015, paras. 227-231 ("the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects […]"). The Court of Justice of the European Union in turn has referred to this requirement, which is particularly important where secret surveillance measures or the processing of personal data are concerned, due to the risk of arbitrariness in the absence of a sufficiently protective legal framework. See, e.g., , Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson v. Home Secretary*, judgment of 21 December 2016, para. 109 ("In order to satisfy the requirements set out in the preceding paragraph of the present judgment, that national legislation must, first, lay down clear and precise rules governing the scope and application of such a data retention measure and imposing minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. That legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary […].")

[152] See *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, judgment of 8 April 2014, EU:C:2014:238 (in the context of a preliminary ruling concerning the validity of Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, the Court recalls in para. 54 that: "the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data"; see also paras. 60-62, on the characteristics that legislation restricting the right to respect for private life and the protection of personal data, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights, should present); see also *Maximillian Schrems v Data Protection Commissioner and Digital Rights Ireland Ltd*, C-362/14, judgment of 6 October 2015, EU:C:2015:650, esp. paras. 91 and, on the right to judicial protection, 95: "legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. … The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in Les Verts v Parliament, 294/83, EU:C:1986:166, paragraph 23; Johnston, 222/84, EU:C:1986:206, paragraphs 18 and 19; Heylens and Others, 222/86, EU:C:1987:442, paragraph 14; and UGT-Rioja and Others, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80)."

[153] As regards the Council of Europe, this would in any case follow from the Memorandum of Understanding between the Council of Europe and the EU: see Memorandum of Understanding between the Council of Europe and the European Union,

would strengthen the credibility of the assessment; it would also ensure that the findings and recommendations from the human rights monitoring bodies are given more 'teeth', by being provided a follow-up in this form.

3.3.3. The legal feasibility

The Regulation establishing the Fundamental Rights Agency states that "the Agency should act only within the scope of application of Community law [now Union law]".[154] Contrary to a widely held assumption, this does not prohibit any involvement of the Agency in support of the institutions' assessment of the situation of democracy, the rule of law and human rights in the context of Article 7 TEU. Quite to the contrary in fact: the circumstances in which it was decided not to make a reference to Article 7 TEU in the Founding Regulation confirm that despite the formulation used in its Founding Regulation, it was initially understood that the Agency could play a role in Article 7 TEU proceedings, by assisting the institutions involved in performing their functions.

While the original proposals of the Commission on the the establishment of a Fundamental Rights Agency[155] anticipated that the Agency would be established on the basis of the "implicit powers" provision of the EC Treaty (article 308 EC, at the time), they also provided that the new Agency could be invited to provide its "technical expertise" in the context of Article 7 TEU.[156] The initial reaction of the Legal Service of the Council of the Union[157] was that such a possibility would "go beyond Community competence", and that, moreover, it would be incompatible with Article 7 TEU itself insofar as this provision would not allow for the adoption of implementation measures and was, in that sense, self-sufficient. The Commission answered that the draft Article 4(1)(e) it proposed "should be seen not as an autonomous exercise of Community competence needing a proper legal basis in the EC Treaty, but rather as a largely declaratory opening clause, [providing for] a possibility that the Council would arguably have anyway, while clarifying modalities and limits".[158] Indeed, drawing upon the lessons from the Austrian crisis of 1999-2000, Article 7(1) TEU itself referred at the time to the possibility of "call[ing] on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question" in order to determine whether there exists a "clear risk of a serious breach by a Member State of principles mentioned in Article 6(1) [now the values listed in Article 2 TEU]".[159] The implicit view of the Commission was that the Agency could either be an "independent person" for the purposes of this provision, or could contribute to identifying such independent persons, in accordance with the broad flexibility that Article 7(1) EU intended to leave to the Council. In the view of the Commission, therefore, including Article 4(1)(e) in the proposed Regulation added nothing to

adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007).

[154] Founding Regulation, Preamble, Recital 8.

[155] Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM(2005) 280 final of 30.06.05.

[156] See Article 4(1) (e) of the Draft Regulation, presented in COM (2005) 280 final of 30.06.05 (listing among the tasks of the Agency that it shall "make its technical expertise available to the Council, where the Council, pursuant to Article 7(1) of the Treaty on European Union, calls on independent persons to submit a report on the situation in a Member State or where it receives a proposal pursuant to Article 7(2), and where the Council, acting in accordance with the procedure set out in these respective paragraphs of Article 7 of the Treaty on European Union, has requested such technical expertise from the Agency").

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

[158] Note from the Commission to the Council *Ad hoc* Working Party on Fundamental Rights and Citizenship, Council doc. 14702/05, JAI 437, CATS 75, COHOM 38 COEST 202 (18 November 2005), paras. 46-52.

[159] The Treaty of Lisbon removed any explicit reference, in Article 7 TEU, to the possibility of calling on independent persons to provide a report on the situation of fundamental rights in a country subject to an Article 7(1) TEU, in order to assess whether there is a "clear risk of a serious breach" of the values on which the Union is founded. This removal may be seen as a further confirmation of the desire to preserve the purely political dimension of the mechanism established in Article 7 TEU.

Article 7 EU itself.[160] In particular, the Commission insisted that a mere reference to the possibility of the Agency contributing its technical expertise upon request of the Council "should be distinguished from any further reaching provision that would enable other institutions to seize the . . . Agency or even an own initiative power of the latter to analyse possible Article 7 EU situations. Any such provision might indeed exceed Community competence and conflict with the exhaustive institutional setting in Article 7 EU".

When the question reached the Council's *Ad hoc* Working Party on Fundamental Rights and Citizenship (in charge of examining the Commission's proposal on the Fundamental Rights Agency), a number of delegations expressed doubts as to the need to include a reference to Article 7 EU in the text of the Regulation establishing the Agency. These delegations noted that such a reference would, according to the Commission's own admission, serve no useful purpose. They also expressed a concern that, going beyond Community law, it could lack a legal basis since the Regulation was to be adopted on the basis of the implicit powers clause of the EC Treaty. The compromise solution consisted therefore in appending to the Regulation establishing the Agency a Declaration of the Council confirming this possibility, without any reference being made to Article 7 TEU in the text of the Regulation itself. This declaration states:

> The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met.

This solution preserved the purely political character of Article 7 TEU: the mechanisms it provided allowed for a political evaluation by the Council of the EU and the European Parliament (as well as by the Commission, in the initial phases of the procedure),[161] but did not allow the European Court of Justice or any other independent body—such as the Fundamental Rights Agency—to decide whether a State is in serious and persistent breach of the values (listed at the time in Article 6(1) EU) or whether there exists a clear risk of a serious breach. It is clear however from the declaration adopted by the Council that the terms of the Founding Regulation should not be seen as creating an insuperable obstacle to the Fundamental Rights Agency playing a certain role (if not that of making a final assessment) under the procedures provided for in Article 7 TEU.

Indeed, the argument that the Agency may play a role in Article 7 TEU proceedings is even more compelling in a post-Lisbon framework. The restriction to the mandate of the Fundamental Rights Agency, as it appears in the founding Regulation, is premised on the tripartite division in "pillars" of the pre-Lisbon structure of the European Union. The Lisbon Treaty however has abolished the distinction between Community law and Union law, and it substituted a single legal entity (the European Union) to the pre-existing Communities and Union. Whereas the legal basis on which the Fundamental Rights Agency was established (then Article 308 EC, now Article 352 TFEU) made it legally impossible to extend its mandate beyond Community law, this mandate has now been in effect expanded to cover all areas of Union law. This could be seen as including Article 7 TEU. Indeed, if it were to support the

[160] Already in a Communication where it clarified its understanding of Article 7 EU, the Commission has mentioned the possibility that the Council draw up a list of independent personalities which could be called upon the assist the Council in exercising its functions under Article 7(1) EU (see COM(2003) 606 final, of 15.10.2003, at para. 1.3.).

[161] The Council declaration appended to the Regulation explicitly provides for the possibility of the Council of the EU requesting the assistance of the Agency in performing its functions under Article 7 TEU. The same possibility is not provided for the other institutions involved in Article 7 TEU proceedings. However, although the Council of the EU is sole competent to determine the existence of a "clear risk of a serious breach" of the values on which the Union is founded, under the preventive branch of Article 7 TEU, the other institutions (the European Parliament and the Commission), as well as Member States acting individually, may decide present a "reasoned proposal" to trigger this provision; there is no reason why they should not be allowed to seek the assistance of the Fundamental Rights Agency in exercising this function.

institutions of the EU involved in Article 7 TEU proceedings, the Agency would not be monitoring the EU Member States for purposes other than those prescribed in the Treaties: its role would still be very different, for instance, from the role performed by United Nations or Council of Europe monitoring bodies.

Moreover, in human rights monitoring, maintaining a watertight distinction between situations that fall under the scope of application of Union law and situations that fall outside that scope of application is in any case highly artificial, in part because any violation of fundamental rights, under certain circumstances, might be relevant to the application of Union law -- for instance, because the victim is a citizen of the EU exercising a free movement right. Of course, the Charter of Fundamental Rights -- and fundamental rights as general principles of Union law -- applies only to the actions or omissions of the institutions, agencies and bodies of the Union, and to situations in which the EU Member States act within the scope of application of Union law (Article 51 of the Charter). Although the range of situations that are relevant for the purposes of Article 7 TEU is broader, the boundary that separates situations that fall within the scope of application of Union law (in the meaning of Article 51 of the Charter) and situations that fall outside that scope of application has been notoriously difficult to define, and it is shifting: any initiative by the Union that leads it to exercise new competences (that is to say, to exercise competences it shares with the Member States, provided the conditions of subsidiarity and proportionality are complied with), by definition, extends the range of situations that present a link to EU law that is sufficiently close to justify the Court of Justice of the European Union ensuring compliance with fundamental rights. In other terms, in may be impractical to restrict the role of the Agency only to situations in which the EU Member States clearly act within the scope of application of EU law: defininig with precision what such situations are, and define on that basis the mandate of the Agency, appears increasingly artificial.

Seeking from the Fundamental Rights Agency an analysis of the situation of democracy, the rule of law and fundamental rights in the Member States does not lead to derogate from the exclusively political nature of the monitoring procedure established under Article 7 TEU. If it were to be asked to provide a report on the situation of fundamental rights in the EU in order to guide the assessment by the institutions involved in Article 7 TEU proceedings, the Agency still would not be making a decision as to whether or not a "reasoned proposal" should be presented to trigger this procedure, as this would have to be decided by the institutions (or the Member States) under their sole responsibility; nor of course, would it be to the Agency to determine whether there exists a "clear risk of a serious breach" to the values of the Union: this is not a task the Council of the EU could delegate to the Agency.

Finally, if an interinstitutional agreement proves impossible to reach on the basis of on the basis of Article 295 TFEU, the European Parliament acting unilaterally could request from the FRA such periodic reports on the situation of democracy, the rule of law and fundamental rights in the EU, in order for such reports to inform the assessments made by the institutions involved in Article 7 TEU proceedings. Such a request could be made in accordance with Article 4(1)(d) of the Founding Regulation, without the limitations imposed by the identification of thematic areas in the MAF applying to such a request.

4. THE FOCUS ON THE CHARTER OF FUNDAMENTAL RIGHTS

KEY FINDINGS

It has been suggested that the Regulation establishing the Fundamental Rights Agency should be revised in order to enhance the visibility and the centrality of the Charter of Fundamental Rights in its mandate.

While the objective to enhance the visibility of the Charter of Fundamental Rights in the legislative and policy framework of the European Union is understandable, there is a risk that strengthening the reference to the Charter shall lead to obfuscate other sources of fundamental rights in the EU, increasing the wedge between the content of fundamental rights guiding the work of the Agency on the one hand, and the full range of human rights that the institutions of the EU and the EU Member States acting in the scope of application of EU law should take into account. The Charter is only a partial and provisional codification of the fundamental rights acquis, at one point in time, of the European Union. Indeed, in addition to the Charter, the EU institutions, bodies and agencies are duty-bound to act in compliance with the fundamental rights included among the general principles of Union law, and both Council of Europe and UN human rights instruments may provide a source of inspiration in this regard to the extent that all the EU Member States are parties to these treaties or have taken part in their elaboration.

Rather than to further strengthen the centrality of the Charter of Fundamental Rights in the mandate of the Agency -- which would simply recognize the existing practice --, a more urgent task would be to clarify which instruments beyond the Charter of Fundamental Rights should be taken into account, as well as to encourage the Agency to take into account the interpretation of such instruments by the monitoring bodies established to supervise them, particularly within the Council of Europe and the United Nations human rights system, but also within the International Labour Organisation as regards relevant ILO conventions.

In its resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017, which dedicates a number of paragraphs to the role and mandate of the Fundamental Rights Agency, the European Parliament does not refer to the human rights instruments that should guide the Agency's work. This however is an issue that other actors have drawn the attention to, and that therefore deserves a comment in this in-depth study. The following sections recall how the Founding Regulation approaches the question of the sources of fundamental rights relevant to the work of the Fundamental Rights Agency (4.1.), and whether that approach should be revised in order to enhance the visibility and the centrality of the Charter of Fundamental Rights in its mandate (4.2.).

4.1. The status of the Charter of Fundamental Rights and of other sources of fundamental rights in the Founding Regulation

At the time when the Regulation was adopted, the Charter of Fundamental Rights was still a non-binding document: its status was that of a political declaration, published in the "C" pages of the *Official Journal*.[162] Therefore, whereas the Preamble of the Founding Regulation refers to the Charter of

[162] OJ C 364 of 18.12.2000, p. 1.

Fundamental Rights, "bearing in mind its status and scope" (Preamble, para. 2), and whereas the very name of the Fundamental Rights Agency is intended as a reference to the Charter,[163] the Preamble also provides that the Agency "should refer in its work to fundamental rights within the meaning of Article 6(2) of the Treaty on European Union [now Article 6(3) TEU], including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations" (Preamble, para. 9). And Article 3(2) of the Regulation explicitly refers the FRA to what, at the time, was the only binding source of fundamental rights recognized in the Treaties, stating that:

> The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union [now Article 6(3) TEU].

The question is whether the entry into force of the Treaty of Lisbon, incorporating the Charter of Fundamental Rights in the Treaties and thus giving it a binding character as part of the EU's constitutional framework, should lead to redefine the role of the Agency vis-à-vis the Charter. In the opinion it published on 12 February 2016 on the future MAF (2018-2022), the FRA's Management Board expressed the view that greater visibility should be given to the EU Charter of Fundamental Rights in the work of the Agency. According to the Management Board:

> The Charter entered into force at the end of 2009 and forms the legal backbone of the EU's human rights obligations. The MAF should therefore prominently and explicitly refer to the Charter. Moreover, the MAF should make explicit that the agency carries out data collection and analysis that serve to raise awareness regarding all relevant fundamental rights of the Charter when conducting work in the thematic areas defined by the MAF. Finally, the MAF should clearly indicate that raising awareness of fundamental rights issues and especially the Charter of Fundamental Rights is a permanent task of the agency, thereby contributing to the development of a European culture of fundamental rights. These references could be made in the preamble and build on Articles 3(2) and 4(1) as well as on the considerations 2 and 9 of the founding regulation. At the same time, the preamble should stress that the European Convention on Human Rights, the constitutional traditions common to the Member States and relevant international agreements are also relevant sources.[164]

Although it was also a strong recommendation of the second independent evaluation of the FRA to ensure "a revised wording of the regulation" would "stress the importance of the Charter as a now legally binding standard",[165] the Commission did not consider these recommendations from the independent evaluator and from the Agency's Management Board in its response of July 2019.[166]

4.2. An assessment

The opportunity in the proposal of the Management Board is to further enhance the visibility of the Charter of Fundamental Rights in the legislative and policy framework of the European Union. The risk however, is that the reference to the Charter gradually leads to obfuscate other sources of fundamental rights in the EU, leading in time to a create a gap between the content of fundamental rights guiding

[163] The terminology initially used by the European Council was that of a "Human Rights Agency". It was the Commission that decided to propose instead to refer to an "Agency for Fundamental Rights", explicitly justifying this denomination by the reference to the Charter of Fundamental Rights (see also Founding Regulation, Preamble, para. 9).
[164] See https://fra.europa.eu/sites/default/files/fra_uploads/mb-opinion-maf-2018-2022_en.pdf.
[165] Second independent evaluation, cited above, p. 6.
[166] See Commission Staff Working Document. Analysis of the Recommendations to the Commisison following the Second External Evaluation of the EU Agency for Fundamental Rights, SWD(2019) 313 final, of 26.7.2019. The Commission acknowledges that both the second independent evaluation and the Management Board make this recommendation (p. 12), but otherwise ignores it entirely.

the work of the Agency on the one hand, and the full range of human rights that the institutions of the EU and the EU Member States acting in the scope of application of EU law should take into account.

At the time when the Charter of Fundamental Rights was drafted (between October 1999 and July 2000), it was conceived as an attempt to bring together in a single document the fundamental rights *acquis* of EU law, as it resulted from essentially three sources: the case-law of the European Court of Justice (as it then was), which itself incorporated fundamental rights as part of the general principles of EU law by seeking inspiration in the international human rights instruments which the EU Member States had acceded to or in which they participated and in the constitutional traditions common to the Member States; the provisions in the EC Treaty related to the citizenship of the Union; and the European Convention on Human Rights. In addition, certain social rights were also included in the Charter, to the extent they do not constitute merely "objectives for action by the Union", in accordance with the Conclusions adopted at the 3-4 June 1999 Cologne European Council which established the body tasked with preparing the Charter of Fundamental Rights.[167]

The Charter itself is inspired, in part, by international human rights instruments adopted within the Council of Europe or within the United Nations framework: its fifth preambular paragraph recalls that the Charter reaffirms rights which "result", *inter alia*, not only from the European Convention on Human Rights (ECHR), the main human rights instrument adopted within the framework of the Council of Europe, but also from the Community Charter of Fundamental Social Rights of Workers (a political document proclaimed in 1989 by 11 of the then 12 Member States of the European Economic Community, the United Kingdom having chosen to opt out) and the Council of Europe's Social Charter, as well as from the "international obligations common to the Member States". And the Explanations to the Charter,[168] which (in accordance with both article 6(1) TEU and article 52(3) of the Charter[169]) are to be taken into account in its interpretation, refer on a number of occasions to Council of Europe or United Nations human rights instruments.

It does not follow from these references and from the fact that these international human rights treaties were a source of inspiration for the drafting of the Charter of Fundamental Rights, that the Charter can become a sort of substitute for the reference to those other sources of human rights law. The Charter is only a *partial* and *provisional* codification of the fundamental rights *acquis*, at one point in time, of the European Union. Indeed, in addition to the Charter, the EU institutions, bodies and agencies are duty-bound to act in compliance with the fundamental rights included among the general principles of Union law, and both Council of Europe and UN human rights instruments may provide a source of inspiration in this regard to the extent that all the EU Member States are parties to these treaties or have taken part in their elaboration. The EU Treaty clearly reaffirms that it is the duty of the Court of Justice to develop fundamental rights beyond the Charter, as part of the general principles of Union law which it ensures respect for. Article 6(3) of the EU Treaty states:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human

[167] Conclusions of the Cologne European Council, 3-4 June 1999, Annex IV.

[168] These Explanations were drawn up by the Presidium of the conventions which prepared the Charter (1999-2000) and the Treaty establishing a Constitution for Europe (2002-2004). For the updated text of the Explanations, see OJ C 303 of 14.12.2007, p. 17.

[169] Article 52(3) of the Charter provides that: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". As stated by Advocate General Trstenjakin it his opinion of 22 September 2011 delivered in the Case C-411/10, *N.S.*: "under Article 52(3) of the Charter of Fundamental Rights it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR. Because the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice" (para. 148).

> 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.

Article 6(3) TEU refers only the European Convention on Human Rights and to the constitutional traditions common to the EU Member States as sources of inspiration for the development of fundamental rights as part of general principles of Union law, omitting other international human rights instruments. Despite this restrictive formulation however, other international human rights instruments to which the EU Member States have acceded or in the elaboration of which they have cooperated have routinely been referred to in the development of fundamental rights as general principles of Union law: this has been the consistent position of the Court of Justice of the European Union, which it has not deviated from since the early 1970s.[170]

While this in-depth study cannot provide a detailed analysis of the lacunae in the Charter of Fundamental Rights, as compared either to the European Social Charter and other Council of Europe instruments or to United Nations instruments,[171] it is important to note that practical consequences follow from the gap that exists between the Charter of Fundamental Rights and the broader range of international human rights that can be taken into account in the gradual development of fundamental rights in the EU legal order.

This gap is a source of legal insecurity, both because the criteria relied on by the Court of Justice of the European Union to develop fundamental rights as general principles remain to a certain extent opaque (for instance, it is unclear why more weight is given to the International Covenant on Civil and Political Rights than to the International Covenant on Economic, Social and Cultural Rights, and it is unclear under which conditions the provisions of the European Social Charter can be invoked as a source of fundamental rights in the EU legal order), and because the weight to be recognized to the views expressed by the independent expert bodies established by the various Council of Europe or United Nations human rights instruments remains disputed. It is in order to facilitate the understanding by the EU institutions of their human rights duties that, in another study commissioned by the European Parliament, this author recommended that in the guidelines on the impact assessments accompanying the legislative proposals submitted by the Commission, references to fundamental rights should go beyond the partial codification achieved by the Charter of Fundamental Rights and become standard practice, an objective which could be achieved by clarifying "(i) which instruments beyond the Charter of Fundamental Rights should be taken into account; (ii) the weight that should be given to the interpretation of such instruments by the monitoring bodies established to supervise them, particularly within the Council of Europe and the United Nations human rights system, including within the International Labour Organisation as regards relevant ILO conventions; and (iii) especially as regards fundamental rights impact assessments, which indicators should be used to assess the contribution a particular regulatory or policy initiatives makes to the fulfilment of human rights, or the negative impacts such initiatives may result in."[172]

It is against that background that the recommendation of the Fundamental Rights Agency's Management Board should be assessed. While that recommendation is careful to note that, in future

---

[170] See Case 4/73**,** *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, para. 13 ("In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, *international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law*") (emphasis added)**.**

[171] For a detailed analysis, see the two studies prepared by this author in 2016 at the request of the European Parliament's Committee on Constitutional Affairs (AFCO), The European Social Charter in the context of the implementation of the Charter of Fundamental Rights of the EU ; and The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework (see especially, in this second study, pages 18-20).

[172] The Implementation of the Charter of Fundamental Rights in the EU institutional framework (2016), p. 20.

revision of the Founding Regulation, "the preamble should stress that the European Convention on Human Rights, the constitutional traditions common to the Member States and relevant international agreements are also relevant sources", the proposal to strengthen the references to the Charter of Fundamental Rights in the future MAFs and in the Founding Regulation itself presents unclear benefits and it not without risks: that the reference to the Charter in the work of the Agency widens the wedge with the larger body of European and international human rights with which the development of fundamental rights in the EU legal should remain aligned.

5. CONCLUSIONS AND RECOMMENDATIONS

More than twelve years after the effective launch of the activities of the Fundamental Rights Agency, the time has come to examine which amendments could be made to Regulation (EC) No. 168/2007 establishing the Agency and defining its mandate. The revisions to the Founding Regulation should build on the impressive achievements of the Agency to date, and ensure that the regulatory framework under which the Agency operates allows it to fully discharge its mandate.

In discussing the potential changes to be made to the Founding Regulation, the context in which that instrument was negotiated should be kept in mind. When the Heads of States and governments agreed within the European Council convened in Brussels on 13 December 2003 that a "Human Rights Agency" should be established in Vienna, tasked with the mission to collect and analyse data in order to help to define the policy of the Union in this area, their primary intention was to find an acceptable solution to the concerns raised about the effectiveness of the work of the EU Monitoring Centre on Racism and Xenophobia in an independent external evaluation of the EUMC that examined its activities between 1998 and 2001. One solution would have been to downsize the EUMC and, as recommended by the evaluation, to refocus its efforts on its core task of combating racism. The choice was made instead to build on the EUMC to expand it into an agency tasked with the full range of fundamental rights was by no means an obvious one. However, the EUMC's legacy, including in particular the definition of its mandate in Regulation (EC) No. 1035/97 and its working methods -- focused on improving the comparability of data across the EU -- did weigh significantly on the discussions that took place, between December 2003 and the end of 2006, to define the mandate and the structure of the Fundamental Rights Agency.[173]

These discussions took place, moreover, at a time when the Council of Europe was particularly concerned that its role as the primary standard-setter in the fields of democracy and human rights in Europe, was under threat following the decision of the EU to adopt a Charter of Fundamental Rights of its own.[174] During the debate on the establishment of the Fundamental Rights Agency, such concerns were expressed in particular by the Secretary-General of the Council of Europe and by its Parliamentary Assembly. It is only following the Third Summit of Heads of State and Government of the Council of Europe, convened in Warsaw on 16-17 May 2005, and the subsequent presentation by Jean-Claude Juncker, then the Prime Minister of Luxembourg (but acting in his personal capacity at the request of the Warsaw Summit), of a report on the future relations of the Council of Europe and the European Union, that these fears were alleviated: the Juncker report, presented in April 2006[175] and immediately endorsed by the Parliamentary Assembly of the Council of Europe,[176] proposed that a working rule be established, according to which "the decisions, reports, conclusions, recommendations and opinions of [the Council of Europe] monitoring bodies: 1. will be systematically taken as the first Europe-wide reference source for human rights; 2. will be expressly cited as a reference in documents which they

[173] For a detailed discussion, see O. De Schutter and Ph. Alston, "Introduction : Addressing the Challenges Confronting the EU Fundamental Rights Agency", in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, pp. 1-24.

[174] On this dimension, see in particular O. De Schutter, "The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe", *Columbia Journal of European Law*, vol. 14, No. 3 (Summer 2008), pp. 509-561.

[175] *Council of Europe – European Union; a sole ambition for the European continent*, report by Jean-Claude Juncker to the Heads of State and government of the Member States of the Council of Europe, 11 April 2006.

[176] See PACE, Recommendation 1743 (2006), *Memorandum of understanding between the Council of Europe and the European Union*, in which the PACE recommends to the Committee of Ministers to propose to the European Union to formally acknowledge in the memorandum of understanding between the two organizations that that 'the Council of Europe must remain the benchmark for human rights, the rule of law and democracy in Europe, in particular ensuring that the European Union bodies recognise the Council of Europe as the Europe-wide reference in terms of human rights and that they systematically act in accordance with the findings of the relevant monitoring structures'. This Recommendation was adopted on 13 April 2006, immediately following the presentation by Mr Juncker of his report before the Parliamentary Assembly of the Council of Europe. It was based on a report prepared within the Political Affairs Committee by Mr Kosachev (rapp.).

produce." It is this rule that the 2007 Memorandum of Understanding between the Council of Europe and the European Union confirmed a year later.[177] The Memorandum of Understanding specifies that, when developing its standards in the field of human rights, the EU will refer to the relevant Council of Europe norms and will take into account the decisions and conclusions of its monitoring bodies, although this should not prevent the Union from providing a higher level of protection.[178]

The institutional landscape also has significantly changed since the time the Founding Regulation was adopted. With the Treaty of Lisbon, the European Communities and the European Union have become a single organisation, and the "third pillar" of Title VI of the Treaty on European Union, still following a predominantly intergovernmental logic until then, has now been subjected to the standard "Community method": the European Union may have outlived and succeeded to the European Communities, it is the mode of achieving European integration of the latter that has now become the norm across almost all areas of the activities of the Union. While of course, the agencies in the European Union each have a specific mandate, this evolution renders suspicious any limitation to the activities of an agency based, not on a consideration of the best fit between the objectives it should contribute to and its remit, but on a defunct distinction between what were the former "pillars" of the European Union's structure.

Finally, there is now a sense of urgency that was not present fifteen years ago. The emergence of self-proclaimed "illiberal democracies" in the European Union, based on what has been called "constitutional capture",[179] as well as the overall retrenchment of human rights in Europe following, in particular, the adoption of measures to combat terrorism or to address the financial and economic crisis,[180] provide a strong encouragement to rethink the tools the EU has at its disposal to protect democracy, the rule of law, and fundamental rights. It begs belief that, having established an independent agency tasked with providing expert advice on fundamental rights to the EU institutions and to the EU Member States in the implementation of EU law, the institutions are not allowing this very agency to address the three most burning issues of the time -- the threats to the rule of law in some EU Member States, the fundamental rights challenges raised in the fields of police cooperation and judicial cooperation in criminal matters, and the role of fundamental rights, social rights in particular, in guiding the socio-economic governance of the EU.

This in-depth study makes a small number of recommendations to ensure that the revision of the Founding Regulation is seized as an opportunity to ensure an adequate fit between the regulatory framework under which the Fundamental Rights Agency operates, defining the tools it may rely on, and the mandate it is given. These recommendations are limited in number, both because they relate only to the changes essential to allow the Agency to fulfil its mandate, and because they take into account the legal and political conditions under which the revision of the Founding Regulation takes place :

1. It follows from Article 5(3) of the Founding Regulation that the FRA may only work under the thematic areas covered by the Multiannual Framework adopted every five years by the Council, unless it receives a request from the EU institutions that goes beyond those thematic areas. This reduces the relevance

[177] Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007).
[178] See Memorandum of Understanding, paras. 17-19.
[179] 'Constitutional capture' strategies, it has been written, are pursued by political parties victorious at parliamentary elections which then "aim to systematically weaken national checks and balances in order to entrench their power" (*An EU mechanism on democracy, the rule of law and fundamental rights*. Study prepared by Laurent Pech, Erik Wennerström, Vanessa Leigh, Agniezska Markowska, Linda De Keyser, Ana Gomez Rojo and Hana Spanikova at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS of the General Secretariat of the European Parliament, March 2016, p. 7)).
[180] See O. De Schutter and P. Dermine, "The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union", *European Journal of Human Rights*, n° 2 (2017), pp. 108-156.

of the Agency to fast-developing fundamental rights issues, and makes it difficult for the Agency to respond to the expectations of its stakeholders. The requirement to adopt a MAF itself is a heavy bureaucratic requirement, entailing an important investment in time and energy from the three EU institutions involved, with little added value : multiyear strategic planning of its work is already required under the 2012 Common Approach on EU decentralized agencies and under the 2013 Financial Framework Regulation. While the reference to the MAF in the Founding Regulation does allow the EU Member States' governments to exercise some degree of political control on the work of the FRA, this is a liability, not a benefit, since it creates the impression that the Agency is not independent from the EU Member States. **Article 5 of the Founding Regulation should be removed in its entirety, and the requirement concerning the adoption of a MAF restricting the thematic areas on which the FRA can work abandoned.**

2. The single most important consequence of the current requirement according to which the Agency may only work in the thematic areas covered by the MAF unless seized of a request from the EU institutions, is that police cooperation and judicial cooperation in criminal matters have not been systematically covered in the work of the Agency. A proper understanding of the legal consequences that follow from the substitution of the Union to the European Communities suggests that this is the result of a political choice made by the Council, rather than the result of a legal obstacle imposed by the Founding Regulation. However, to remove any remaining doubts on this point, **the expression "Union law" could be substituted to the expression "Community law" in para. 8 of the Preamble of the Regulation, as well as in Article 2 (Objective) and in Article 3(3) (Scope).**

Article 3(1) of the Founding Regulation could either be removed, or if it is maintained, replaced with a formulation clarifying that there is no obstacle to allowing the Agency to play a role in assisting the EU institutions in discharging their functions under Article 7 TEU. This formulation could be:

> The Agency shall carry out its tasks for the purpose of meeting the objective set in Article 2 within the scope of application of Union law, without prejudice to the role it may play in assisting the European Parliament, the Council of the Commission in discharging their functions under Article 7 of the Treaty on European Union.

3. Under Article 4(2) of the Founding Regulation, the FRA may adopt opinions which concern legislative proposals filed by the Commission in accordance with Article 293 TFEU or positions adopted by the institutions in the legislative process only at the request of one of the institutions. This is an obstacle to the ability for the Agency to effectively discharge its mandate. Removing this limitation would enhance the efficiency and impact of the FRA. It also would align the mandate of the FRA with the requirements of the Paris Principles on national institutions for the promotion and protection of human rights. **Article 4(2) could be repealed, in order to remove that limitation.** Alternatively, the EU institutions should consider **ensuring in a revised version of the inter-institutional agreement on better lawmaking that the Agency is systematically consulted in legislative files that raise sensitive issues related to fundamental rights**. If that too cannot be achieved, **each institution separately should consider whether it could not develop a standard practice of providing an opportunity for the Agency to adopt an opinion on legislative proposals, leaving it to the Agency to decide, taking into consideration also the available financial and human resources, whether or not to adopt an opinion**. The European Parliament can choose to implement this latter recommendation immediately.

4. **Article 4(1)(d) of the Founding Regulation should be amended to allow a group of at least one quarter of the EU Member States (currently 7 Member States) to request an opinion from the FRA.** This would allow a group of States who have doubts as to the compatibility with fundamental rights of a legislative proposal to seek the views of the Agency, without it being necessary to find a unanimity within the Council, and it would allow a group of States proposing the adoption of an act in

the establishment of the area of freedom, security and justice to be fully informed about the fundamental rights issues raised by their proposal.

5. Consideration should be given to the possibility of **amending Article 4(1) of the Founding Regulation, ideally by adding an indent ((d)*bis*) to this paragraph, in order to allow an individual Member State to seek an opinion of the FRA when that State is faced with fundamental rights issues in the implementation of EU law.**

6. In order to improve the coordination between the EU institutions involved in the implementation of Article 7 TEU, and to strengthen the credibility of these proceedings so that they are perceived as impartial and non-discriminatory across the EU Member States, **the Agency could be tasked with the preparation of regular reports, ideally trimestrial or otherwise annual, on the situation of democracy, the rule of law and fundamental rights in the EU Member States**. Such reports could be structured on the basis of the indicators identified in opinion 2/2016 of 8 April 2016 of the Fundamental Rights Agency on the development of a integrated tool of objective fundamental rights indicators to measure compliance with the shared values of Article 2 TEU, or on the "Rule of Law checklist" presented by the Council of Europe's Venice Commission, or on a template combining the two. The EFRIS database, which is functional since 2019, may be a particularly useful tool to the effect of discharging this new role.

Article 4(1) of the Founding Regulation could be amended to the effect of formalizing this new role. If a revision of the Founding Regulation on that point could not be achieved, an inter-institutional agreement could be sought on the basis of Article 295 TFEU, in order to request that the Fundamental Rights Agency contributes with periodic reports on the situation of democracy, the rule of law and fundamental rights in the EU, providing the European Parliament, the Commission and the Council with the information they need in order to exercise their powers under Article 7 TEU. Finally, if that were not possible to achieve, such reports could be requested from the FRA by any of the institutions involved in Article 7 TEU proceedings, including the European Parliament.

Table 2: Possible amendments to the Fundamental Rights Agency Regulation (EC) No. 168/2007

FRA Founding Regulation Article	FRA Founding Regulation text	Possible Amendments and Justifications
Article 5 Multiannual Framework	***Article 5*** ***Areas of activity*** ***1. The Council shall, acting on a proposal from the Commission and after consulting the European Parliament, adopt a Multiannual Framework for the Agency. When preparing its proposal, the Commission shall consult the Management Board.*** ***2. The Framework shall:*** ***(a) cover five years;*** ***(b) determine the thematic areas of the Agency's activity, which must include the fight against racism, xenophobia and related intolerance;*** ***(c) be in line with the Union's priorities, taking due account of the orientations resulting from European Parliament***	*Amendment:* ***Deleted*** *Justification:* *The Founding Regulation foresees that FRA may only work under the thematic areas covered by the Multiannual Framework adopted every five years by the Council, unless it receives a request from the EU institutions that goes beyond those thematic areas. This unreasonably limits the activities of the Agency, its relevance and role, including in relation to the most important areas of activity and the related expectations of stakeholders. It has become a merely complicated, time-consuming and bureaucratic requirement for the three EU institutions involved, with little added value: multiyear strategic planning is already required under the*

	resolutions and Council conclusions in the field of fundamental rights; ***(d) have due regard to the Agency's financial and human resources; and*** ***(e) include provisions with a view to ensuring complementarity with the remit of other Community and Union bodies, offices and agencies, as well as with the Council of Europe and other international organisations active in the field of fundamental rights.*** ***3. The Agency shall carry out its tasks within the thematic areas determined by the Multiannual Framework. This shall be without prejudice to the responses of the Agency to requests from the European Parliament, the Council or the Commission under Article 4(1)(c) and (d) outside these thematic areas, provided its financial and human resources so permit.*** ***4. The Agency shall carry out its tasks in the light of its Annual Work Programme and with due regard to the available financial and human resources.***	*2012 Common Approach on EU decentralized agencies and under the 2013 Financial Framework Regulation. The MAF furthermore creates the impression that the Agency is not fully independent from the EU Member States. Consequently, Article 5 of the Founding Regulation should be removed in its entirety, and the requirement concerning the adoption of a MAF restricting the thematic areas on which the FRA can work abandoned.*
Preamble, para. 8 Article 2 (Objective) Article 3(3) (Scope)	***...Community law...***	*Amendment:* ***Substitute the words "Union law" with the words "Community law"*** *Justification* *Police cooperation and judicial cooperation in criminal matters have not been systematically covered in the work of the Agency, although they are key areas for fundamental rights. Following the entry into force of the Lisbon Treaty, the Union has substituted the European Communities, but the Council refused to include in the MAF police cooperation and judicial cooperation in criminal matters, playing on alleged legal ambiguities. To remove any remaining doubts or excuses on this point, the expression "Union law" could be substituted to the expression "Community law" in para. 8 of the Preamble of the Regulation, as well as in Article 2 (Objective) and in Article 3(3) (Scope).*
Article 3(1) Scope	Article 3 Scope 1. The Agency shall carry out its tasks for the purpose of meeting the objective set in Article 2 within the ***competencies of the Community as laid down in the Treaty establishing the European Community.***	*Amendment:* ***Delete*** or *Amend as follows:* The Agency shall carry out its tasks for the purpose of meeting the objective set in Article 2 within the ***scope of application of Union law, without prejudice to the role it may play in assisting the European Parliament, the***

		Council of the Commission in discharging their functions under Articles 2 and 7 of the Treaty on European Union. *Justification* *As for the amendments on the substitution of "Community law" with "Union law".* *The proposed formulation clarifyies that there is no obstacle to allowing the Agency to play a role in assisting the EU institutions in discharging their functions under Articles 2 and 7 TEU.*
Article 4(2)	***2. The conclusions, opinions and reports referred to in paragraph 1 may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d). They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty.***	*Amendment:* ***Delete*** *Justification* *The provision in Article 4(2) is an obstacle to the ability for the Agency to effectively discharge its mandate. Removing this limitation would enhance the efficiency and impact of the FRA. It also would align the mandate of the FRA with the requirements of the Paris Principles on national institutions for the promotion and protection of human rights.* - Alternatively, EU institutions should consider ensuring in a revised version of the **inter-institutional agreement on better lawmaking** that the Agency is systematically consulted in legislative files that raise sensitive issues related to fundamental rights. - If that too cannot be achieved, each institution separately should consider whether it could develop a **standard practice** of providing an opportunity for the Agency to adopt an opinion on legislative proposals, leaving it to the Agency to decide, taking into consideration also the available financial and human resources, whether or not to adopt an opinion. - **The European Parliament can choose to implement this recommendation immediately**.
Article 4(1)(d)	Article 4 Tasks 1. To meet the objective set in Article 2 and within its competences laid down in Article 3, the Agency shall: ... (d) formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, ***the Council or*** the Commission;	*Amendment*: Article 4 Tasks 1. To meet the objective set in Article 2 and within its competences laid down in Article 3, the Agency shall: ... (d) formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Commission, ***the***

		Council or a group of at least one quarter of Member States; *Justification:* *This amendment allows a group of States who have doubts as to the compatibility with fundamental rights of a legislative proposal to seek the views of the Agency, without it being necessary to find a unanimity within the Council, and it allows a group of States proposing the adoption of an act in the establishment of the area of freedom, security and justice to be fully informed about the fundamental rights issues raised by their proposal.*
Article 4(1)(d) bis (new)		*Amendment:* *Article 4(1)(d) bis (new)* ***formulate an opinion on national legislation implementing EU law, at the request of the Member State;*** *Justification:* *This possibility allows a Member State having doubts on the best or correct way to implement EU law so that it is compatible with fundamental rights to get advice from the FRA.*
Article 4(1)(f) bis (new)		*Amendment:* *Article 4(1) (f) bis (new)* ***prepare regular reports on the situation of democracy, the rule of law and fundamental rights in the EU and in its Member States (Articles 2 and 7 TEU)***. - Alternatively, an **inter-institutional agreement** could be sought on the basis of Article 295 TFEU, in order to request that the Fundamental Rights Agency contributes with periodic reports on the situation of democracy, the rule of law and fundamental rights in the EU, providing the European Parliament, the Commission and the Council with the information they need in order to exercise their powers under Article 7 TEU. - Finally, if that were not possible to achieve, **such reports could be requested from the FRA by any of the institutions involved in Article 7 TEU proceedings, including the European Parliament, on the basis of Article 4(1)(d)**. *Justification:* *In order to improve the coordination between the EU institutions involved in the implementation of Articles 2 and 7 TEU, and to strengthen the credibility of these proceedings so that they are perceived as impartial and non-discriminatory across the EU Member States, the*

		Agency could be tasked with the preparation of regular reports, at least annual, on the situation of democracy, the rule of law and fundamental rights in the EU and in its Member States. Such reports could be based on the indicators identified in opinion 2/2016 of 8 April 2016 of the Fundamental Rights Agency on the development of a integrated tool of objective fundamental rights indicators to measure compliance with the shared values of Article 2 TEU, on the "Rule of Law checklist" presented by the Council of Europe's Venice Commission. The EFRIS database, which is functional since 2019, may be a particularly useful tool to the effect of discharging this role.

ANNEX 1

Chronology of the Fundamental Rights Agency: *main steps and documents exemplifying FRA's work and development*

Date	Event
1997 June 2	Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia
2003 October 15	Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final
2003 December 13	European Council in Brussels: decision to build upon the EMCDDA and establish a "Human Rights Agency" in Vienna.
2004 October 25	Commission Communication on the Fundamental Rights Agency, followed by public consultation.
2005 May 16-17	Third Summit of Heads of State and Government of the Council of Europe, Warsaw: request for a report on the future EU-CoE relationships.
2005 June 30	Commission Proposals for a Council Regulation establishing a European Union Agency for Fundamental Rights, and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union
2006 April	"Council of Europe – European Union; a sole ambition for the European continent", report on the future relations of the Council of Europe and the European Union by Jean-Claude Juncker to the Heads of State and government of the Member States of the Council of Europe, 11 April 2006. The report is endorsed by the Parliamentary Assembly of the Council of Europe: PACE, Recommendation 1743 (2006), *Memorandum of understanding between the Council of Europe and the European Union*, adopted on 13 April 2006.
2006 October 12 and November 30	EP votes in plenary on the establishment of FRA, and votes on empowering the FRA to pursue its activities in areas referred to in Title VI TEU (consultation)
2007 February 15	Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights (FRA Founding Regulation)
2007 May	Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007).
2008	FRA takes over from the LIBE Committee the maintenance of the Charterpedia – an online one stop shop on the EU Charter of Fundamental Rights. Since then the data base was further developed and expanded. It contains over 1000 of Charter relevant judicial decisions and other information. Other products as the 'Charter handbook' were developed that sharpened the agency's profile in the context of the Charter.
2008 February 28	First Multiannual Framework 2007-2012 adopted by the Council in its Decision 2008/203/EC
2009 December 9	FRA publishes its first EU-MIDIS survey report. The 'European Union Minorities and Discrimination Survey' interviewed 23,500 people with an ethnic minority or immigrant background across the EU's 27 Member States about their experiences and perceptions. It was reiterated in 2018. Other large scale surveys looked into the experiences of particular groups such as Roma, Jews, Muslims or LGTBI persons.
2011 February 14	FRA issues an Opinion on the draft Directive regarding the European Investigation Order. In the following years around 20 opinions concerning the fundamental rights dimension of legislative drafts at the request of the EU legislator. Legislative files concerning asylum and migration and the cooperation in the area of criminal law played an especially relevant role in this regard.
21 March 2011	FRA publishes the first of its "Handbook" Series. These handbooks are produced in partnership with the Council of Europe and the European Court of Human Rights and cover areas such antidiscrimination law, asylum law, data protection law etc.
2012 November	First independent evaluation
2013 March 11	Second Multiannual Framework 2013 - 2018 adopted by the Council in Decision 252/2013/EU.

3 March 2014	FRA publishes its report on the general population: the results of the large scale survey on violence against women based on interviews carried out with 42.000 women. In 2020 the first results of its Fundamental Rights Surveys will be published – a survey that interviewed 35.000 persons on their experiences and perceptions in the area of fundamental rights.
2014 August 29	After regulation (EU) No. 1053/2013 introduces a new evaluation and monitoring mechanism to verify the application of the Schengen acquis, FRA submits an analysis to assist all actors involved in the evaluation and monitoring mechanism.
2015 June 20-23	FRA organizes first Fundamental Rights Forum, a bi-annual come together of hundreds of stakeholders across the EU active in the area of fundamental rights.
2015 September 28	FRA publishes its first regular update on the migration situation in the EU. These periodic updates were continued since then.
2016 November 29	A FRA opinion assesses the fundamental situation rights in the 'hotspots' in Greece and Italy. FRA upholds a small field presence to advise authorities in the area of fundamental rights.
2017 October 31	Second independent evaluation
2017 December 7	Third Multiannual Framework 2018–2022 adopted by the Council Decision (EU) 2017/2269
2018 November	Franet is set up
2020 May 8	FRA submits data to the European Commission for the preparation of its first rule of law report. Part of the data stems from EFRIS, the European Fundamental Rights Information System that FRA has developed in cooperation with the Council of Europe and the United Nations.
2020 May 25	FRA publishes its first of its "Bulletin" Series on the Coronavirus Pandemic in the EU.

Since it was set up in 2007, the EU Agency for Fundamental Rights has demonstrated its ability produce high-quality research, and to provide the EU institutions and the EU Member States implementing Union law with expert advice on fundamental rights issues. The regulatory framework under which the Agency operates, however, is not fully appropriate to discharge its mandate effectively. This in-depth study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Civil Liberties, Justice and Home Affairs identifies how it could be improved.

PE 653.056
IP/C/LIBE/IC/2020-008

Print ISBN 978-92-846-6730-7 | doi: 10.2861/241020 | QA-02-20-375-EN-C
PDF ISBN 978-92-846-6731-4 | doi: 10.2861/709201 | QA-02-20-375-EN-N