Human Rights Without Frontiers Int'l

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EU AGENCY FOR FUNDAMENTAL RIGHTS (FRA):

A REALITY CHECK

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EXECUTIVE SUMMARY

The purpose of the present report is to provide a critical assessment of the work of the European Union Agency for Fundamental Rights (FRA) and to identify some shortfalls in the overall EU system of promotion and protection of EU fundamental rights and values. The work on the report has been guided by the premise that the new fundamental rights dimension of the EU policies, ensuing from the legally binding nature of the EU Charter of Fundamental Rights as incorporated in the Lisbon Treaty, makes it necessary for the European Union to develop and consolidate a genuine culture of fundamental rights at the level of both EU institutions and EU Member States broadly and when applying and implementing the Union Law.

The importance of a EU fundamental rights culture has been widely acknowledged but it is still in its nascent stages and risks to remain rudimentary, unless a proper institutional architecture is installed to support its development and consolidation. Notwithstanding the existing mechanisms and legal provisions in place, the whole system remains fragmented and reactive. In its resolution of 15 December 2010, the European Parliament calls on the EU institutions and Member States to increase coherence among their various bodies responsible for monitoring and implementation of fundamental rights protection and to reinforce a cross-EU monitoring mechanism, as well as an early warning system, similar to the UN Universal Periodic Review. However, the European Union still lacks a comprehensive internal human rights structure to ensure cross-institutional coordination and to allow each institution to build upon other institutions' reports and institutional expertise acquired in the process of their autonomous processes of conducting compatibility checks and impact assessments of legislative proposals and policies.

On its side, the European Union Agency for Fundamental Rights (FRA), which has been in existence since 2007 as a "focused observation and assessment agency on Union policies**"**, falls short of filling the gap of a much-needed early warning mechanism and *ex ante* examination of breaches or risk of breaches of EU fundamental rights. Most importantly, FRA

fails short of fulfilling two important criteria underlying the UN Paris Principles governing the work of National Human Rights Institutions (NHRIs), i.e. a broad mandate and full-fledged independence. Despite these deficiencies, the EU Agency for Fundamental Rights still can carve an important role for itself in the overall EU fundamental rights architecture, if properly resourced, mandated and politically supported. In this respect, the objective of this report is to raise critical questions at a period when the Agency is coming to the end of its first five-year Multiannual Framework (MAF) and starts planning for its second five-year cycle of existence. This should be seen as a critical juncture of the institutional learning process of the EU Agency for Fundamental Rights. It is therefore an opportune time to assess the Agency's position and role within the EU fundamental rights architecture as well as its added value and ability to mobilise resources and expertise to fulfil its mandate within the context of the prescribed broad-based participatory process of consultations within the EU and its Member States.

Report drafted by Nadja Milanova

Brussels, 7 November 2011

CHAPTER I

EU AGENCY FOR FUNDAMENTAL RIGHTS: GENESIS AND OVERVIEW

Fundamental human rights policy in the EU: New architecture

The entry into force of the Lisbon Treaty has ushered in a new period for the human rights dimension of the EU policies. Making the Charter of Fundamental Rights legally binding has transformed the idea of basic values into concrete rights that necessitate proactive promotion and protection. Another observable shift is also the move away from a purely "normative-judicial" approach to human rights to an approach, which "sees the protection of human rights as part of a broader effort to improve governance".[1] This shift calls for a process of institutional learning and clarification of the roles played by different institutions and mechanisms as well as a process of developing and consolidating a genuine culture of fundamental rights in both the EU institutions and the EU Member States broadly and when applying and implementing the Union Law.

The new multi-level EU system of fundamental rights protection is derived from multiple sources: the Charter of Fundamental Rights of the European Union; the rights guaranteed by the European Convention for Human Rights (ECHR) and the ensuing legal obligation for the EU's accession to ECHR under the Lisbon Treaty (Article 6(2) TEU) and Article 59 of the ECHR; and further, the rights guaranteed by Member States within their constitutional remit and their interpretation according to the jurisprudence of the European Court for Human Rights (ECtHR) and the European Court of Justice (ECJ). The forthcoming EU accession to ECHR will introduce a system of external judicial review, which makes it imperative for the EU to ensure the full compliance of its measures and policies with fundamental rights as enshrined in the ECHR and the Charter of Fundamental Rights to avert the risk of being sanctioned by the European Court for Human Rights for violating them or failing to protect them.

[1] Olivier De Schutter, *The New Architecture of Fundamental Rights Policy in the EU*, Université catholique de Louvain

A process of developing a new fundamental rights culture at the level of EU Member States and within EU institutions was set in motion with the adoption of the Charter in 2000. Without prejudice to the principle of subsidiarity, as stipulated in Article 51, the incorporation of the Charter into the EU primary law creates new responsibilities for the EU institutions as well as for EU Member States when implementing EU legislation at a national level. In its *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* issued in 2010, the European Commission has laid out a process of developing and promoting a fundamental rights culture throughout the whole cycle of adoption of legislative proposals and acts to ensure their compliance with the Charter at all stages of the procedure, from the initial drafting of a proposal within the Commission to the impact analysis, and right up to the checks on the legality of the final text. The Commission's fundamental rights "checklist" is as follows:

1. What fundamental rights are affected?

2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?

3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?

4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?

5. Would any limitation of fundamental rights be formulated in a clear and predictable manner?

6. Would any limitation of fundamental rights:

- Be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?
- Be proportionate to the desired aim?
- Preserve the essence of the fundamental rights concerned?[2]

[2] Commission Communication on "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union", COM (2010) 573, final of 19.10.2010.

The Commission Communication spells out a series of specific steps to be undertaken with a view to monitoring and assessing compliance with the Charter and ECHR throughout the legislative process such as, *inter alia,* preparatory consultations, impact assessments, and targeted recitals. Inter-institutional dialogue is envisaged when issues of compatibility arise. The *Inter-Institutional Agreement on Common Approach to Impact Assessment (IA)* provides guidelines for this inter-institutional dialogue on the basis of the understanding that each institution – Commission, Council and Parliament - are responsible for assessing the impact of their own proposals and modifications, while decisions on amendments should be taken at the appropriate level, as for example in the case of the Council they should be brought to the attention of ministers.[3] The European Parliament is expected to verify the compatibility and compliance of its legislative proposals with the Charter. Under Article 36 (2) of the Rules of Procedure of the European Parliament:

> "[w]here the committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter. The opinion of that committee shall be annexed to the report of the committee responsible for the subject-matter".[4]

In 2001, the Commission also announced its intention to verify internally the compatibility of its proposals with the Charter, while the specific methodology was spelled out in a Communication adopted in 2005.[5] In addition, the system of Integrated Impact Assessment was introduced in 2002 as a way to ensure ex-ante examination of potential economic, social and environmental aspects of EC's proposals and major initiatives. Impact assessments are designed to examine the effect of different policy options on fundamental rights, as guaranteed by the Charter.

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[3] *Inter-Institutional Approach to Impact Assessment*, politically endorsed by Council and Commission in November 2005 and by Parliament in July 2006.

[4] Rules of Procedure of the European Parliament, text published at http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC

[5] Commission Communication, Compliance with the Charter of Fundamental Rights in Commission legislative proposals: Methodology for systematic and rigorous monitoring, COM (2005) 172 of 27.4.2005

The impact assessment system aims at helping the Commission to improve the quality and transparency of its proposals and to identify balanced solutions consistent with Community policy objectives through:

- A **coherent analysis** of potential impacts,
- Consideration of **various policy choices** (e.g. to use alternative instruments to 'control and command' regulation or non-intervention),
- **Consultation of stakeholders,** and
- Enhanced **transparency** (IA roadmaps and IA reports published on the Impact Assessment website).
- **Executive summaries** of impact assessments are translated into all EU languages.

In order to strengthen quality control of impact assessment, the Commission created a new internal quality control function in November 2006. The **Impact Assessment Board** (IAB) is an independent body, working under the direct authority of the Commission President.

The board **members** are high-level officials from the Commission departments with the most direct links to the three pillars of the integrated approach to impact assessment – economic, social, and environment.

The board's **task** is to examine the draft impact assessments carried out by individual Commission departments. The board gives opinions on the quality and advice on any further work that may be required. This quality control will be initial task of the board. Later its tasks will be broadened to advice on methodology and approach at the early stages of impact assessment preparation.

The IAB opinions are **published** on the Impact Assessment website once the relevant legislative initiative has been adopted by the Commission.

Box 1: European Commission's integrated approach to Impact Assessment[6]

The system of impact assessment and compatibility checks is becoming an increasingly important policy-development tool. However, several inherent drawbacks prevent the system from ensuring a better incorporation of fundamental rights into the EU legislative process.[7]

- *The reactive nature of impact assessment and compatibility checks*: This aspect affects

[6] European Commission's Better Regulation Programme, *Impact Assessment,* at http://ec.europa.eu/governance/better_regulation/impact_en.htm#_ii_common

[7] Olivier de Schutter, *op.cit.,* pp. 15-18

the ability of the Commission to identify areas where legislative action might be required in order to ensure protection of fundamental rights in contrast to the current system, which is limited to highlighting problematic aspects of proposals already submitted. As a result, the process of mainstreaming fundamental rights in the EU policies is adversely affected.

- *Lack of clear guidance on potential risks of fundamental rights violations:* The impact assessment and compatibility checks do not provide a cross-reference analysis and a guidance to the EU Member States regarding potential risks of violations of fundamental rights when adopting measures to implement instruments of EU law.

- *Internal nature of impact assessment and compatibility checks:* They are exclusive of analysis of legislative proposals made by EU Member States and remain an internal process at the level of individual Union institutions. While both the Union Institutions and Member States are expected to strengthen the "application of the methodology for a systemic and rigorous monitoring of compliance with the European Convention and the rights set out in the Charter of Fundamental Rights" as stipulated under the EU Stockholm Programme[8], the process of monitoring is fragmented and confined to individual and autonomous decision-making procedures within the EU system. Most importantly, the internal nature of compatibility checks and impact assessments deprive the system of the opportunity to benefit from external input and feedback.

It is important for the Union institutions to reinforce their compatibility checks and impact assessments on fundamental rights in relation to legislative proposals and amendments under examination in the legislative process and to make the process more systematic. In the case of the Parliament, this will be possible by applying rigorously the mechanisms foreseen under Rule 36 of the Parliament's Rules of Procedure for verifying the compliance of its legislative proposals with the fundamental rights enshrined in the Charter and by engaging the Legal Service for opinions on legal issues in relation to fundamental rights issues in the

[8] European Council Decision, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens,* 2010/C 115/01, Article 2.1, text published at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF

EU. In the case of the Council, its role in ensuring the effective implementation of fundamental rights is laid down in the Council's conclusions adopted at the 3071st Justice and Home Affairs Council meeting held in Brussels on 24 and 25 February 2011. At the end of 2009, the Council gave the former ad hoc Working Party on Fundamental Rights and Citizenship a permanent status and tasked it with all matters relating to fundamental rights, citizens' rights and free movement of persons. This standing **Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)** started to work in its present form in 2010. This body should have a broad mandate to include issues in relation to fundamental rights in the EU and Member States and to provide a forum for the Council exchange of views on internal human rights matters.

The far-reaching impact of Impact Assessment on policy formation with regard to fundamental rights protection will be however predicated upon the ability and readiness of the Union to ensure enhanced transparency and consultation of multiple stakeholders, as prescribed in the Commission's guidelines. In its 2010 Resolution on the situation of fundamental rights in the EU, the Parliament has suggested that the impact assessments accompanying Commission proposals should clearly indicate whether such proposals comply with the Charter, so that this consideration becomes an integral part of the legislative process. Further, the Parliament resolution underlines that it is the Commission's explicit task to involve different stakeholders in broad consultations in order to ensure coherence and transparency in the Union's actions in conformity with Article 11(3) TEU, emphasizing in this regard the importance of the **Fundamental Rights Platform** as a significant resource for fulfilling this task.[9]

[9] European Parliament resolution of 15 December 2010 on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)), P7_TA-PROV(2010)0483

Monitoring of fundamental rights

The European Parliament has called on the EU institutions and Member States to increase coherence among their various bodies responsible for monitoring and implementation, with a view to effective application of the established comprehensive framework, and to reinforce a cross-EU monitoring mechanism, as well as an early warning system, similar to the Universal Periodic Review.[10]

While there is a clear move away from the *ad hoc* nature of the EU-level fundamental rights protection, a truly functional EU fundamental rights architecture is still far from being complete. It is obvious that the European Institutions act in parallel and independently of each other in the field of fundamental rights monitoring and assessment with a view to ensuring the compliance of their own legislative proposals and acts with the Charter and ECHR. The overall right to democratic scrutiny rests with the European Parliament. However, the European Union still lacks a comprehensive internal human rights structure to ensure cross-institutional coordination and to allow each institution to build upon other institutions' reports and institutional expertise acquired in the process of their autonomous compatibility checks and impact assessments. The European Parliament has underscored the importance of a system that should seek to enhance transparency and access to documents between EU institutions, in order to develop more effective inter-institutional cooperation and accountability on matters related to fundamental rights.[11] In this regard, the role of the specialized EU Agency for Fundamental Rights (FRA) (hereinafter referred to as FRA and Agency interchangeably) warrants a close analysis. Prior to its establishment, hopes were high that FRA "has immense potential to ensure monitoring of fundamental rights in the EU and to ensure a unified strategy for their promotion in EU law and policy".[12] Given its short lifespan, it might be too early to say whether FRA would be able to live up to this promise. From the perspective of institutional learning, however, it is the opportune time to assess the FRA

[10] Paragraph 7, *ibid.*
[11] *Ibid.*
[12] Olivier de Schutter and Philip Alston eds., *Monitoring Human Rights in the European Union: The Contribution of the Fundamental Rights Agency,* Hart Publishing, 2005

position and role within the EU fundamental rights architecture as well as its added value and ability to mobilize resources and expertise to fulfil its mandate within the context of the prescribed broad-based participatory process of consultations within the EU and the Member States.

The genesis of the Fundamental Rights Agency (FRA): Inherent asymmetries

An asymmetry of institutional attention: With the adoption of the Charter of Fundamental Rights and its constitutionalisation in the Treaty of the European Union it is beyond any doubt that human rights are at the core of Union's values and that their protection is guiding the Union's policy-setting and law-making. However, it is worth noting that compared to the EU human rights policies with relation to third countries, the issue of monitoring fundamental rights within the EU and of streamlining fundamental rights into the Union's policies is relatively a new issue that has picked up momentum only in the last decade. The Union's Fundamental Rights Agency (FRA) is still in its first cycle of existence with the first Multi-Annual Framework (MAF) approaching the end of its five-year timeframe in 2012.

An asymmetry of political impetus: It is noteworthy that the genesis of FRA cannot be traced back to any elaborate or concerted political strategy. While the idea of an agency to safeguard human rights was extensively debated in the academic circles in the second half of the 1990s, it managed to gain traction only in the aftermath of the so-called "Austrian crisis" in 2000 and the ensuing report of Wise Men Committee (*Comité des Sages)* drafted by Marthi Artisaari, Jochen Frowein and Marcelino Oreja, who proposed *inter alia* the establishment of a "full EU Agency on Human Rights".[13] This proposal came in the footsteps of an earlier report by the *Comité des Sages* in 1998*,* published under the title "*Leading by Example: A Human Rights Policy for the European Union"*, proposing the extension of the remit of the European Monitoring Centre on Racism and Xenophobia (EUMC) with a view to creating a EU Human Rights Agency. A report prepared as the principal reference document for the *Comité des*

[13] Report by Marthi Artisaari, Jochen Frowein, and Marcelino Oreja, adopted in Paris on 8 September 2000, text accessible at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf

Sages argued in favour of establishing a monitoring centre for human rights within the European Union. "Systematic, reliable and focused information is the starting point for a clear understanding of the nature, extent and location of the problems that exist and for the identification of possible solutions".[14] The "wise men" recommendations on the creation of a Human Rights Agency however did not initially elicit the support of the Council and the Commission, given the multitude of reporting and information sources and in particular, those of the United Nations, Council of Europe, and international NGOs. In a Communication to the Council and the Parliament issued in 2001, the Commission expressed doubts about the relevance of a new body. [15] The Commission argued that:

"[…] the European Union does not lack for sources of advice and information. It can draw on reports from the United Nations, the Council of Europe and a variety of international NGOs. Furthermore there is no monopoly of wisdom when it comes to analyzing human rights and democratization problems, or their implications for the European Union's relations with a country. The real challenge for any institution is to use the information in a productive manner, and to have the political will to take difficult decisions. An additional advisory body would not overcome this challenge. The Commission does not therefore intend to pursue this suggestion, nor the related one which has been occasionally been made that the Commission should produce, or subcontract an organization to produce, a world-wide overview of the human rights situation by country, as is done by the US State Department."[16]

Though the focus of this Communication was the promotion of human rights in third countries, at the time of its issuance it was construed as an argument against the need for an independent human rights agency for the EU and its Member States, given the fact that this was the predominant debate in 2001. In this context, the decision taken by the Heads of State and Government at the Brussels European Council on 13 December 2003 to extend and broaden the mandate of the European Union Monitoring Centre on Racism and Xenophobia (EUMC) in order to establish a Human Rights Agency entrusted with the task of collecting and analysing data to help inform the Union's policy in this regard "took most observers by

[14] Philip Alston and J. H. H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, at http://centers.law.nyu.edu/jeanmonnet/papers/99/990101.html#fn1
[15] Commission Communication, *The European Union's Role in Promoting Human Rights and Democratization in Third Countries,* COM(2001) 252 final of 8 May 2001
[16] *Ibid.,* pp. 19 -20

surprise".[17] De Schutter and Alston have also observed, that "the proposal to build on the existing EUMC, was equally not an obvious one".[18] Thus, generally speaking, the creation of FRA carries the overtones of a surprise, ad hoc decision rather than being the end result of a period of conceptualisation and political impetus. Some observers have defined it as a "regrettable genesis", while others have listed a number of reasons for the rising scepticism towards FRA as "a good example of how EU agencies develop in the grey area of intergovernmental horse trading".[19]

The creation of the EU Agency for Fundamental Rights (FRA)

The EU Fundamental Rights Agency is established on the basis of a Council Regulation 168/2007 of 15 February 2007 with the objective "to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights", as stipulated in Article 2. On its side, Article 4 (1) of the Regulation delineates the concrete tasks entrusted to FRA in fulfilling its mandate as follows:

> (a) collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data, including results from research and monitoring communicated to it by Member States, Union institutions as well as bodies, offices and agencies of the Community and the Union, research centres, national bodies, non-governmental organisations, third countries and international organisations and in particular by the competent bodies of the Council of Europe;
>
> (b) develop methods and standards to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member States;
>
> (c) carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies, including, where appropriate and compatible with its priorities and its annual work programme, at the request of the European Parliament, the Council or the

[17] De Schutter and Alston, *op.cit.,* pp. 2
[18] *Ibid.*
[19] Gabriel Nikolaij Toggenburg, *The EU Fundamental Rights Agency: Satellite or Guiding Star?,* SWP Comments, Stiftung Wissenschaft und Politik, March 2007

Commission;

(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;

(e) publish an annual report on fundamental rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice;

(f) publish thematic reports based on its analysis, research and surveys;

(g) publish an annual report on its activities; and

(h) develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights and actively disseminate information about its work.

In summary, the mandate of FRA is confined to three core functions: data collection and analysis, preparation of opinions for EU institutions and Member States, and development of a communication strategy and dialogue with civil society. The territorial and substantive scope of FRA is strictly limited to: a) Article 2 within the competences of the Community law as laid down in the Treaty establishing the European Community; b) fundamental rights as defined in Article 6(2) of the Treaty on European Union; and c) fundamental rights issues in the European Union and in its Member States when implementing Community law.[20] This in essence represents the least common denominator for the FRA mandate, crafted after eschewing several contentious aspects that were debated and could not garner enough political support. In 2004, the Commission issued a Communication as a basis for public consultation[21] and in 2005 submitted a Proposal for a Council regulation on the establishment of the Agency, "which will play a major role in enhancing the coherence and consistency of the EU human rights policy".[22] In the process of its Impact Assessment, the Commission has identified several gaps concerning the respect of fundamental rights in the Union: 1) a general lack of information on the situation of fundamental rights at the EU level; 2) the available information is fragmented and is derived from a multitude of sources, while information

[20] Article 3 of Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights

[21] Commission Communication, *The Fundamental Rights Agency: Public Consultation Document,* COM (2004) 693 final of 25.10.2004

[22] Commission Proposal for a Council regulation establishing a European Union Agency for Fundamental Rights, COM (2005) 280 final of 30.06.2005

coming from some international organizations may be a product of self-reporting by states; and 3) Member States often have different interpretation of fundamental rights and therefore, different methods of collecting information.

As admitted at the time, the establishment of the Agency has raised several delicate questions related to its legal basis, the delineation of the scope of its activities, concrete tasks and the relations it might develop with the Council of Europe and other international organizations. Four areas have been identified as representing a significant change from the initial proposal by the Commission to the adoption of the final mandate, as codified in the Founding Regulation.[23]

***The Agency's ability to comment on proposals or opinions delivered in the framework of the legislative process at the EU level**:* Article 4(2) of the Commission proposal has not foreseen a role for the Agency with regard to questions of legality of proposals submitted from the Commission under Article 250 of the Treaty, positions taken by the institutions in the course of legislative procedures or the legality of acts within the meaning of Article 230 of the Treaty. In contrast, the Founding Regulation allows for a limited role of the Agency in commenting on concrete legislative developments at the EU level. Article 4(2) of the Regulations stipulates that the Agency's conclusions, opinions and reports may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures, provided that the respective institution has submitted a specific request.

***Third-pillar competences[24]**:* The Commission proposed a Council decision to empower the Agency to pursue its activities also in the area of police and judicial cooperation in criminal matters. The Commission's argument was based on several points: the legally binding nature of the Charter of Fundamental Rights and the suppression of the so-called "pillars" make a

[23] Gabriel N. Toggenburg, *The role of the EU Fundamental Rights Agency: Debating the "sex of the angels" or improving Europe's human rights performance?,* European Law Review, Issue 3, 2008

[24] EU Third Pillar competences relate to Police and Judicial Cooperation in Criminal Matters (PJCC) and is subject to the principles of intergovernmental cooperation.

stronger case for the addition of these areas to the activities of the Agency; the strong opinion expressed by external stakeholders in the process of public consultations on the scope of the Agency's activities; and most importantly, the fact that in this thematic area there are some cases that can raise delicate fundamental rights issues. The Commission was of the opinion that

> "[b]y performing its activities in the areas of judicial cooperation in criminal matters and police cooperation, the Agency will contribute to the Union's goal of ensuring that the measures it adopts, as well as their implementation, comply with the Charter of Fundamental Rights".[25]

The Council adopted the first, and current, Multi-Annual Framework without including the thematic areas of judicial cooperation in criminal matters and police cooperation, leaving the possibility of re-examining the Agency's remit before the end of 2009.[26] However, such extension of competences to the third pillar of the EU Treaty, which is administered on an intergovernmental level, did not find consensus in the Council and was therefore rejected. The Council decided not to adopt the instrument that would have allowed the Agency to pursue its activities in the areas falling under Title VI of the EU Treaty. In a separate move, however, the Council issued a Declaration on the consultation of the Agency within the areas of police and judicial cooperation in criminal matters and admitted that EU institutions and Member States, when implementing Community law,

> "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 such expertise also within the areas of police and judicial cooperation in criminal matters".[27]

[25] European Commission, Proposal for a Council decision amending amending 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

[26] Council Decision 208/203/EC of 28 February 2008

[27] Council of the European Union, Addendum to Draft Minutes, 2781st meeting of the Council of the European Union (Justice and Home Affairs), held in Brussels on 15 February 2007, 6396/07 ADD 1, 27 February 2007, point 4

Though this Declaration allows for sharing of expertise, it does not attribute competences to the Agency on the basis of Title VI of the Treaty on European Union and some countries have submitted a statement to this effect.[28] The third pillar falls within the scope of intergovernmental competences, whereas the Agency's remit is clearly confined to the Community law and Article 6 TEU deals with general principles of Community law, of which the third pillar is no part. In 2008, the French Council Presidency invoked the Council Declaration and entrusted the Agency to provide an opinion on the compliance with the fundamental rights provisions of a draft decision on the use of Passenger Name Records for law enforcement purposes.

***Competences with regard to Member States under Article 7 of TEU**:* As highlighted beforehand, the adoption of the EU Charter for Fundamental Rights represents a significant shift in the understanding of the role of fundamental rights in the European Union. Article 6(1) of the Treaty of Amsterdam (1999) spelled out the values upon which the European Union was founded, namely "*the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*". The second major development to enhance the protection of human rights and fundamental freedoms within the European Union is the introduction of a mechanism provided for by Article 7 of the Treaty of Amsterdam, and then integrated into the Treaty of the European Union, which makes it possible for the EU to adopt sanctions against a Member State in breach of prescribed values and norms. The Treaty of Nice (2003) reinforced the role of the European Union in safeguarding the protection of human rights and fundamental freedoms in its Member States by introducing a prevention mechanism in addition to the penalty mechanism. As a result, two mechanisms now coexist independently of each other, whereby the activation of the first is not required for the second. The prevention mechanism applies to cases where there is **a clear threat of a serious breach** (Article 7(1) TEU), while the second is relevant to cases where there is **a serious and persistent breach of the common values** (Article 7(2) TEU).

[28] *Ibid.*

Article 7[29]
(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after 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.

3. Where a determination under paragraph 2 has been made, the Council, 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. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation, which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Therefore, Article 6 and Article 7 TEU spell out unambiguously a distinct and clearly defined role of the European Union with respect to the performance of its Member States in the area of fundamental rights protection and related policies. Under Article 7 TEU, two separate mechanisms coexist to this end, whose respective activation would depend on the

[29] Consolidated Version of the Treaty of the European Union, Official Journal of the European Union, C 115/20, 9.5.2008

seriousness and gravity of the breach. Article 7 is also quite precise when delineating the respective roles of the European Parliament, the Member States through the Council and the Commission in activating the two mechanisms.

Prevention mechanism: ***Determination of a clear risk of a serious breach by a Member State of the EU values***

A proposal to invoke the procedure can be effected by one third of the Member States, the European Parliament or the Commission. Acting by a majority of four fifths of its members and with the consent of the European Parliament, the Council can act upon the proposal by taking the following steps: a) hear the Member State in question; b) address recommendations to it; and finally c) determine that there is a clear risk of a serious breach of the EU values by the respective Member State.

Sanctioning mechanism: ***Determination of the existence of a serious and persistent breach by a Member State of the EU values***

The procedure can be initiated by a proposal coming from one third of the Member States or by the Commission. Based on this proposal and after obtaining the consent of the European Parliament, the Council can act by unanimity to determine the existence of a serious and persistent breach by a Member State of the EU values, after inviting the respective Member State to submit its observations. The determination allows the Council 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. The Council can take such decision by a qualified majority. Decisions to vary or revoke the sanctioning measures also require qualified majority, provided that there are changes in the situation.

In October 2003, the European Commission adopted a communication with a view to clarifying the scope of application of Article 7 TEU.[30] There are some crucial points that highlight the significance of Article 7 in ensuring the respect for EU values.

> 'The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously.
>
> The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.
>
> Article 7 thus gives the Union a power of action that is very different from its power to ensure that Member States respect fundamental rights when implementing Union law. The courts have always held that Member States are obliged to respect fundamental rights as general principles of Community law. However, this obligation operates only in national situations where Community law applies.3 Unlike the mechanisms of Article 7 of the Union Treaty, compliance with this obligation is enforced by the Court of Justice, for example in infringement proceedings (Articles 226 and 227 of the EC Treaty) or in preliminary rulings (Article 234 of the EC Treaty)."[31]

In view of the legal and political framework set out in Article 7 TEU and the procedures in place that envisage ways to deal with varying levels of breaches by Member States of EU values and fundamental rights, it is obvious that the systematic and effective monitoring of

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

[31] *Ibid.,* paragraph 1.1.

the fundamental rights situation in Member States and the EU competence in this respect constitute a crucial part of the overall system, especially in its prevention part. Hence stems the question as to what are the modalities and practices in place to ensure the permanent monitoring of the situation of fundamental rights in the EU Member States. The European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs (LIBE) has a leading role in this matter through the practice of adopting annual reports on the situation of fundamental rights in the European Union. Moreover, Article 7 TEU confers upon the European Parliament a significant role in both the prevention mechanism and the sanctioning mechanism, i.e. a) an authority to initiate the preventive measure in cases of a clear risk of a serious breach and b) the approving authority as regards the mechanism to determine the existence of a serious and persistent breach. In the operative paragraph 6 of its legislative proposal on the Commission Communication on the Article 7 of the Treaty on European Union, the European Parliament:

> […] Emphasises that the Treaty, by stipulating that Parliament must give its assent prior to any decision by the Council, and by granting Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach, acknowledges Parliament's special role as an advocate for European citizens; takes the view that, when performing that special role, Parliament must exercise its powers in defending common principles, values and fundamental rights in a non-partisan, prudent, responsible and fair manner.[32]

In 2004, the European Parliament used its right to initiate the prevention mechanism under Article 7(1) TEU and adopted a resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article11(2) of the Charter of Fundamental Rights).[33] The EP resolution was based on a motion for a resolution by Sylviane H. Ainardi and 37 other Members of the European Parliament who, pursuant to

[32] European Parliament legislative proposal on the Commission Communication on Article 7 of the Treaty of European Union: Respect for and promotion of the values in which the Union is based, COM (203) 606 - C5-0594/2003-2003/2249(INI) , adopted on 20 April 2004; text retrieved on 22 September 2011 at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:104E:SOM:EN:HTML

[33] European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article11(2) of the Charter of Fundamental Rights) (2003/2237(INI)), P5_TA(2004)0373

Rule 48 of the Rules of Procedure (i.e. own-initiative reports), found that there were adequate grounds for initiating the procedure referred to in Article 7(1) of the EU Treaty and proposed to the Council to take steps to assess whether there was a risk of breach of the fundamental rights of freedom of expression and of information set out in Article 10 of the ECHR and in Article 11 of the Charter of Fundamental Rights of the European Union (on pluralism of information).[34] It is important to note that the EP resolution draws its conclusions, on one side, upon the judgments of the Court of Justice of the European Communities and the European Court of Human Rights, recommendations and resolutions of the Council of Europe in this field and the Commission Communication on the future of European regulatory audiovisual policy and on the other, the report of the European Union Network of Independent Experts on Fundamental Rights (2003) and reports by several European civil society organizations. The role of the EU Network of Independent Experts on Fundamental Rights in this period was of crucial importance due to its mandate to monitor the situation of fundamental rights in both the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report was prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union were evaluated in a separate report, prepared for the Network by the coordinator. On the basis of these twenty-six reports, the members of the Network would prepare a Synthesis Report, which sought to identify the main areas of concern and to make certain recommendations. The conclusions and recommendations were submitted to the institutions of the Union, though the content of the report was not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights was created by the European Commission upon the request of the European Parliament to enable it to conduct its monitoring functions. The network was set up in 2002 and comprised 25 independent experts (one per each Member State at the time) that had the mandate to provide the Parliament and the other EU institutions with an assessment of the implementation of the rights laid down in

[34] Motion for a resolution on the risk of a serious breach of the fundamental rights of freedom of expression and of information in Italy, B5-0363/2003

the Charter in each Member State. In the Communication of 15 October 2003, the European Commission expounded a clear vision of the role of the network of independent experts.

> The information should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty.
>
> Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches.
>
> Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.[35]

In the words of the former member of the Network of Independent Experts, Olivier De Schutter, the early 2000s saw the establishment of a fundamental rights culture within the EU institutions, albeit slowly. He has posited that "the role performed on the basis of Article 7 EU by the European Parliament and by the Network of Independent Experts on fundamental rights, although the two acted as a relatively disharmonious tandem, gave birth to the idea that the EU might progressively develop a monitoring role, in order to identify at an early stage whether certain member States might be adopting a conduct which would threaten the mutual trust on which the area of freedom, security and justice, was to be built".[36] The Network defined its role mainly as contributing to the identification of situations, where there was an emerging clear risk of a serious breach of fundamental rights by a Member State. On the basis of its examination, the EU Network of Independent Experts on Fundamental Rights essentially had the right to express its concern with respect to situations which create a clear risk of serious breaches of fundamental rights in the meaning of Article 7(1) TEU, including where such situations would not constitute, strictly speaking, a violation of the Charter of

[35] *Ibid.,* paragraph 2.1.
[36] Olivier De Schutter, *op.cit.,* pp. 8

Fundamental Rights, even if the risk were to materialize.[37] With regard to the other two tasks entrusted upon the Network, i.e. to encourage, by the comparison of experiences, mutual learning between the Member States in the field of fundamental rights and that of advising the institutions of the Union on proposals which could have an impact on the rights listed in the Charter of Fundamental Rights, the Network foresaw close cooperation with an EU Human Rights Agency, which was under consideration at that time, expecting to be one of its important tools.[38]

The Network of Independent Experts was disbanded in 2006, a year before the establishment of the EU Agency for Fundamental Rights. The 2005 Commission proposal has explicitly stipulated a role for the Agency in the framework of the sanctioning procedure with regard to Member States as spelled out in Article 7 TEU.[39] The Commission's proposal stated that the Agency could:

> "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".[40]

Extending competences to Article 7 TEU could be interpreted as entrusting the Agency with the task of permanent monitoring of the fundamental rights performance of Member States outside the scope of EU law, since this article is not limited entirely to the EU law. This reference was therefore deleted from the final Regulation, limiting the scope of the Agency's activities to Article 6 TEU.

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[37] *EU Network of Independent Experts,* Report on Fundamental Rights Situation in the European Union (2003), January 2004, accessed on 26 September 2011, at http://www.biblioteca.porto.ucp.pt/docbweb/multimedia/associa/pdf/rappd.pdf

[38] *Ibid.,* pp. 9

[39] Article 7 of TEU provides for a procedure of political sanctions, which was introduced in 1997 by the Amsterdam Treaty

[40] Article 4 (e) of Commission Proposal, *op.cit.*

In a separate move, however, the **Council made a Declaration on the proceedings under Article 7** of the Treaty on European Union to the effect that:

> "The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights precludes 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."[41]

Albeit the broad-based recognition of the importance of conducting a systematic and structured monitoring by an independent body of the fundamental rights situation in EU Member States in order to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights as provided for within Article 7 of the Union Treaty, the current system essentially lacks such mechanism. Some leeway is being provided by the separate Council Declaration cited above, which opens the space for a Council's request for FRA's assistance, when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU. This provision however renders the Agency highly dependent on a decision by the Council, and respectively by the EU Member States, to seek independent advice, thus compromising the notion of independence embodied in the spirit and letter of the Paris Principles as the overriding framework for the mission of FRA. Therefore, on this point of critical importance, there is an observable regression as regards the mandate and the scope of action of the EU Fundamental Rights Agency when compared to the mandate and work of the EU Network of Independent Experts that was in place for a period of four years from 2002 until 2006.

[41] Council of the European Union, Addendum to Draft Minutes, 2781st meeting of the Council of the European Union (Justice and Home Affairs), held in Brussels on 15 February 2007, 6396/07 ADD 1, 27 February 2007, point 1

***Competences with regard to third countries**:* In the process of public discussions, there was some support for extending the competences of the Agency to third countries. Article 28 of the Regulation however provides only for some limited participation and role with regard to candidate countries and countries with which a Stabilization and Association Agreement has been concluded.

Observers have posited that the first two of the four aspects discussed above can be considered "home-grown". The conditional and limited competences of the Agency to comment on proposals as part of the legislative process stem from the Commission's scepticism about a stronger role for the Agency in this area, while the lack of third-pillar competences is a result of the opposition by some Member States towards extending the Agency's ambit to this domain. With regard to the other two aspects, i.e. competences under Article 7 TEU and vis-à-vis third countries, "these are directly linked to the remarkable external influence which the Council of Europe was able to exercise during the Agency's genesis".[42] The exclusion of the Agency from these two areas helped resolve the debate on the parallel competences and duplication between the Council of Europe and the Agency. The 2008 Agreement on cooperation between the Agency and the Council of Europe clearly delineates the areas of competence for the two organizations, whereby:

> …[th]e Agency is to refer in carrying out its tasks to fundamental rights within the meaning of Article 6(2) of the Treaty on European Union, including the rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,
>
> whereas the Council of Europe has acquired extensive experience and expertise in intergovernmental cooperation and assistance activities in the field of human rights, having also established several human rights monitoring and control mechanisms, as well as the Council of Europe Commissioner for Human Rights".[43]

[42] Toggeburg, *op.cit.,* pp. 388

[43] Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, *Official Journal of the European Union*, I.186/7 of 15.07.2008

CHAPTER II

EU AGENCY FOR FUNDAMENTAL RIGHTS: INSTITUTIONAL MODEL

The specific nature of the EU Fundamental Rights Agency warrants analysis from two distinct perspectives: 1) as a EU specialized agency and 2) as an institution for protection and promotion of human rights conforming to the UN Paris Principles, analogous to the existing "national human rights institutions".

FRA as a specialized EU Agency

In the EU administrative landscape which consists of executive and regulatory specialized agencies, FRA falls into the category of regulatory agencies, which are established in response to the need to cope with new tasks of legal, technical and/or scientific nature.[44] Regulatory agencies are further categorized into policy agencies, Common Security and Defence Policy agencies, and agencies related to police and judicial cooperation in criminal matters. In the EU administrative parlance, FRA is therefore classified as a **regulatory policy agency** established on the basis of Article 308 of the EC Treaty, which stipulates:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.[45]

Thus Article 308 of the EC Treaty forms the legal basis of the Agency, which endows it with a legal personality, while the Council Regulation is an act of secondary legislation to outline its specific tasks.

[44] Full list of categories of EU specialized agencies is published at http://europa.eu/agencies/index_en.htm
[45] Consolidated Version of the Treaty establishing the European Community, OJ 2006 C321 E/179.

With regard to its mandate, FRA is to be classified as an information agency with some advisory functions. Information agencies differ from other types of EU specialized agencies, as their main task is related to information and communication as well as network management. In the process of its Impact Assessment with a view to proposing an institutional model for the new Agency, the Commission studied five policy options. One was the "*status quo*" option, which would have failed to give the due importance to the Charter. Two of the options included only observation functions: a "*focused observation agency"* with a "technical assistance" remit to collect information on fundamental rights in a limited number of thematic areas having strongest links to EU policies and a *"general observation agency***"** with a broader ambit of thematic areas. The Commission made a frank assessment to the effect that these two options would address the problems in the current situation only to a limited extent. In the first one, the impact on improving data quality would be marginal. The second would be inefficient and face the risk of spreading resources too thinly. It would duplicate the work of other international, European and national organizations. The opinions expressed in the public consultation were divided on the effectiveness of these options. It was felt that the focus on racism and xenophobia could be diluted in the second case. The final option, defined by the Commission as the *"widest possible observation and assessment agency"* option, would empower the Agency to observe fundamental rights both within and outside the Union policy framework, also for the purposes of Article 7 TEU. This was considered to be the most effective option as a means of achieving policy objectives and simultaneously, the most politically unrealistic one for several reasons: the legal limits of Community powers, the debate of duplication of work with other international organizations, the negative repercussions of a broad remit, not least risking diluting focus on racism and xenophobia, and the expected heavy financial commitment. Finally, it had transpired that such a mandate could cause friction between the EU and the Member States and international organizations.

In line with these considerations, the Commission proposed **the creation of Fundamental Rights Agency as a *"focused observation and assessment agency on Union policies*",** the idea being to entrust it with the task of collecting data in the context of observing and

assessing fundamental rights issues within the Union, while at the same time preventing duplication of the work done by the Council of Europe and confining the remit only to the EU and not the Member States. In a sobering assessment the Commission pointed out that this is "an effective option as a means of achieving the objectives but it entails only a medium financial cost and has a considerable degree of political acceptability".[46] Under this option, the Agency's mandate would be open to collecting and analyzing data on fundamental rights with reference to, in principle, all rights listed in the Charter, but the thematic areas within the scope of Union law would periodically be defined for the Agency's actions.

It has to be noted that agencies are generally provided with a limited mandate with defined tasks that are technical, scientific and managerial in nature. The limited mandate of EU agencies reflects a general tendency of restricting the delegation of power, though there is considerable asymmetry in the decision-making power attributed to different agencies. The majority of agencies play only a supportive role in the overall EU institutional architecture as well as towards Member States and therefore lack real power. Very few of them can take decisions that are legally binding towards third parties or have quasi decision-making power. The delegation of power to agencies is broadly guided by the 1958 ruling of the European Court of Justice on the Meroni case, which has stipulated the need for observance of strict set of conditions, when establishing specialized agencies and bodies under European Community law. In 2008, the Commission unambiguously reaffirmed the thrust of the ECJ ruling by stating in its report on *European Agencies – The Way Forward*. [47]

> There are clear and strict limits to the autonomous power of regulatory agencies in the current Community legal order. Agencies cannot be given the power to adopt general regulatory measures. They are limited to taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power. In addition, the agencies cannot be entrusted with powers, which may affect the responsibilities, which the Treaty has explicitly conferred on the Commission.

[46] Commission Proposal 2005, *op.cit.*
[47] COM (2008) 135 final

In line with this reasoning FRA has no legislative or regulatory power as well as no quasi-judicial competence. The option of a EU Agency responsible for individual human rights violations or for enactment of legally binding decisions was never considered.

FRA and the Paris Principles

In parallel to its place among the multitude of EU specialized agencies, FRA has a very unique status given the idiosyncrasies of its thematic and substantive focus. By force of its mission and goals, it is therefore closer to the UN standardized model of national human rights institutions (NHRIs), which are defined in the General Assembly Resolution 48/134 of 20 December 1993. Along the broad spectrum of human rights institutions that exist at a national level, FRA was created along the informational model with a mandate in data collection and analysis and as such represents a mixture of the committee model (e.g. as in Great Britain and Ireland) and the institute model (e.g. as in Denmark and Germany). While it is true that other models, such as the advisory commissions and Ombudsman institutions, with a stronger decision-making and executive mandate represent a more powerful version of an institutional construction, "a well-designed body with a clear data-gathering, information providing, mainstreaming, advisory, and network-coordinating role can, if sufficiently resourced and politically supported, play a powerful role in governing by information, advice, persuasion, and learning".[48]

The 48/134 Resolution of the UN General Assembly underscores the "importance of developing, in accordance with national legislation effective national institutions for the promotion and protection of human rights and of ensuring the pluralism of their membership and their independence".[49] The adopted principles relating to the status of national institutions (known as the Paris Principles) provide a solid guidance for the work of human

[48] Grainne de Burca, New Modes of Governance and the Protection of Human Rights, in de Schutter and Alston, *op.cit.,* pp. 36

[49] UN General Assembly Resolution, *National Institutions for Promotion and Protection of Human Rights,* A/RES/48/134 of 20 December 1993, Para. 2, http://www.un.org/documents/ga/res/48/a48r134.htm

rights institutions. While the Paris Principles are defined with respect to human rights institutions at a national level, they represent an important normative source and serve as a benchmark for the effectiveness of human rights bodies in terms of their scope of mandate, independence and methods of operation. Therefore, the same criteria have to be applied to the appraisal of FRA in order to assess its effectiveness and its place within the new EU fundamental rights architecture.

Scope of FRA's mandate

The Paris Principles prescribe a broad mandate with competences to both promote and protect human rights. Human rights institutions should be vested with the power "on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights". Furthermore, under the Paris Principles human rights institutions should be entrusted with the task to "examine the legislation and administrative provisions in force, as well as bills and proposals" and "to make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights".

FRA has no legislative or regulatory power and no quasi-judicial competence. In accordance with article 3(3) of the Regulation, the Agency "shall only deal with fundamental rights issues in the European Union and its Member States when implementing Community law." This is even more restrictive than the Charter, which refers in article 51(1) to the entire field of EU law. Thus, the Regulation was not intended to enable any review of activities in the areas of police and judicial cooperation in criminal matters under the TEU under the third pillar, a field that is particularly sensitive when it comes to the protection of fundamental rights. The exclusive focus on Community law is also narrower than that of the EUMC as FRA's predecessor, which could also monitor Member States outside the remit of Community law, though with a limited thematic focus on some forms of discrimination.

FRA's mandate is further limited on two other counts. Firstly, the work of FRA is confined to a list of topics under the Multiannual Framework. The 2007-2012 Multiannual Framework covers the following areas:

a) racism, xenophobia and related intolerance;

b) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination);

c) compensation of victims;

d) the rights of the child, including the protection of children;

e) asylum, immigration and integration of migrants;

f) visa and border control;

g) participation of the EU citizens in the Union's democratic functioning;

h) information society and, in particular, respect for private life and protection of personal data; and

i) access to efficient and independent justice.

Secondly, the Founding Regulation does not envisage any role for the EU Agency for Fundamental Rights in examining the conformity of EU legal acts to fundamental human rights. The mandate of FRA in streamlining human rights into EU policies is also limited through the existence of separate directives, such as for example the Gender Equality Directive and the separate agency established to ensure its implementation generally contravenes the principle of indivisibility and interdependence of fundamental rights, as enshrined in the Charter.

The official website of the Fundamental Rights Agency lists the tasks remaining beyond the purview of its mandate. FRA is therefore not empowered to:

- Examine individual complaints;
- Have regulatory decision-making powers;
- Monitor the situation of fundamental rights in the Member States for the purposes of Article 7 of the EU Treaty (which refers to the Council's power to apply penalties in case of a serious breach of fundamental rights in a Member State);

- Deal with the legality of Community acts or question whether a Member State has failed to fulfil a legal obligation under the Treaty.[50]

Therefore, the greatest limitation stems from the rather narrowly defined and restrictive framework for the Agency's tasks, confining them, *inter alia*, to providing information on applicable human rights standards, data gathering, the development of methods to improve the comparability and objectivity of such data at the European level, as well as analysis and reporting. It is worth reiterating that the Agency does not have a mandate to monitor compliance with human rights standards and to respectively report on cases of breaches and violations. As stated in a report by the Council of Europe, "monitoring within the meaning of the Agency's competences comprises merely information gathering and the preparation of comparative reports", distinguishing it from the type of monitoring as practiced by the Council of Europe, with a view to avoiding the duplication of their work.[51] Olivier de Schutter draws a distinction between: a) "advisory monitoring" which is limited to collecting and analyzing information in order to offer technical assistance and b) "normative monitoring" which implies an evaluation of the degree of compliance with fundamental rights on the basis of a pre-existing normative grid.[52] Although the EU Fundamental Rights Agency is not mandated to conduct a "normative monitoring", it still can play an important role in setting out normative trends within the remit of its mandate. Moreover, the production of annual reports on fundamental rights with a part dealing with examples of good practice is based on a process of a horizontal monitoring across Member States, which in a way represents some sort of monitoring, though not in the sense applied by the Council of Europe's process of monitoring of the compliance of states with their international obligations. In this regard, one of the most important aspects of the mandate of the Agency is to develop common indicators and analytical standards with a view to improving the coherence and comparability of data.

[50] From FRA's official website, at http://fra.europa.eu/fraWebsite/faq/faq_en.htm

[51] Council of Europe, *The need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights*, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Boriss Cilevic (Latvia, Socialist Group), Doc. 12272, 31 May 2010

[52] Olivier de Schutter, The two Europe's of human rights: the emerging division of tasks between the Council of Europe and the European Union in promoting human rights in Europe", in *The Columbia Journal of European Law* (2008), vol. 14, No. 3, pp. 509-661, pp. 253.

As argued by von Bogdandy and von Bernstorff, "the political power of the Agency is to a great extent based on the possibility to develop these standards, thereby contributing to the emergence of a common European perception of fundamental rights issues".[53] Olivier de Schutter has also convincingly stated that "even mere fact-finding, after all, necessarily consists in highlighting certain situations, and thus putting pressure on the actors concerned to remedy any deficiencies found to exist".[54] This would be possible, provided that the Agency is endowed with a sufficient level of independence and operational flexibility to enable it to function as a truly human rights institution, as prescribed by the UN Paris Principles. This however does not seem to be case.

FRA's independence

The Founding Regulation refers explicitly to the Paris Principles with regard to the "Agency's independence from both Community institutions and Member State governments" through the composition of the FRA Management Board and the process of collecting the broadest possible expertise in the field of fundamental rights.[55] The existence of guarantees for independence and pluralism, as encoded in the FRA Founding Regulation, is a crucial indicator for the effectiveness of a human rights institution. However, two aspects need to be specifically highlighted. Firstly, the FRA Management Board is composed of one independent person appointed by each of the 27 Member States of the EU, one independent person appointed by the Council of Europe, and two representatives of the Commission. In addition, one of the two EC representatives sits on the Executive Board. Given the fact that the Management Board adopts the Agency's annual work programme in accordance with the Multiannual Framework and adopts the Agency's annual reports, the presence of two representatives of the European Commission contravenes the principle of independence. Secondly, the adoption of the Multiannual Framework by the Council is another important

[53] Armin von Bogdandy and Rochen von Bernstorff, The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law, *Common Market law Review,* 46: 1035-1068, 2009, pp. 1053-1054

[54] *Ibid.*

[55] Para. 20 of the Council's Founding Regulation, 168/2007

channel through which the FRA independence is compromised. Article 5(1) of the Founding Regulation confers upon the Council the competence to adopt the "Multiannual Framework" for the Agency, while the Commission is entrusted with proposing the Framework, after consulting the FRA Management Board. Therefore, while pluralistic representation may not be a problem in view of the diverse participation in the various bodies managing the Agency, its operational independence seems to be seriously restricted. It is worth noting that in a resolution adopted in 2006 the European Parliament spelled out its ideas about the Agency, emphasizing the need for its "special standing among EU agencies", its independence and credibility being a prerequisite for proper interaction between it and the European institutions. Most importantly, the European Parliament had envisioned an Agency with "enhanced legitimacy", provided that its management bodies were appointed by, and respectively answerable to, the European Parliament, thereby reporting to the competent parliamentary committees.[56] However, the proposal for subordinating the Agency to the European Parliament has not been taken forward for further consideration, while the Commission managed to carve "a particularly strong role for itself in the management of the Agency"[57], respectively through its involvement in the work on the Multiannual Framework Program under Article 5(1) of the Regulation and its representation on the Management Board under Article 11 of the Regulation.

FRA and National Human Rights Institutes (NHRIs) in EU Member States

Article 8(2)(a) of the Founding Regulation stipulates the need for institutionalized cooperation of FRA with NHRIs as a prerequisite for the effectiveness of its activities. As noted in the FRA Report on *National Human Rights Institutions in the EU Member States,* NHRIs operate as hubs on a national level with a view to ensuring the implementation of international human rights standards and fundamental rights obligations under the EU treaties and their

[56] Motion for EP Resolution A6-0144(2005), adopted in 2006, O.J. 2006, C 117 E/242
[57] Armin von Bogdandy and Rochen von Bernstorff, *op.cit.*, pp. 1045

internalization into domestic practices.[58] NHRIs are therefore an important part of the EU fundamental rights architecture.

Given its advisory role on fundamental rights to EU Institutions and Member States, FRA should be seen as a hub, a "network of networks', which provides the link between the national and the European levels. This presupposes a high degree of coordination and coherence. The current system however is characterized by a great deal of fragmentation and inconsistency, mainly due to the varying levels of compliance of NHRIs with the Paris Principles or the lack of NHRIs in some of the member states.[59] This is an important aspect for the credibility of the fundamental rights architecture in the EU. The legally binding Charter of Fundamental Rights, the accession of the EU to the European Convention on Human Rights and the requirements of the Lisbon Treaty demand a proactive national approach for the promotion of human rights. Equally, a joined-up, comprehensive approach for the protection of human rights on a national and EU level necessitates full compliance with the Paris Principles both at the level of NHRIs and FRA equally.

CHAPTER III

EU AGENCY FOR FUNDAMENTAL RIGHTS: ORGANIZATIONAL STRUCTURE

Based in Vienna with a budget of over EUR 20 million and personnel of close to 100 employees[60], the internal structure of the Agency includes five departments altogether:

- Two thematic departments:
    - Freedoms and Justice Department
    - Equality and Citizens' Rights Department

[58] Report by the Fundamental Rights Agency, *National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Architecture in the EU,* 2010

[59] According to the FRA report, out of 27 EU Member States 16 have a recognized NHRI. Of these 16 Member States, only 10 have NHRI currently accredited as fully compliant with the Paris Principles; *ibid,* pp. 24. The accreditation is granted by the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights (ICC) on the basis of the level of compliance with the Paris Principles.

[60] As of 20 October 2011, the total number of FRA employees stands at 92, excluding trainees and interim staff.

- Communication and Awareness-Raising Department dedicated to the external relations activities of the Agency; and
- Two departments dealing with internal matters: Administration Department and Human Resources and Planning Department.

As regards political oversight and administrative control, the Agency is composed of four bodies: A Management Board, an Executive Board, a Scientific Committee and a Director.

Pursuant to Article 12 of the Founding Regulation, the **Management Board** holds the overriding power in the implementation of the Agency's mandate. In essence, it is the "Agency's planning and monitoring body".[61] It has the authority to elect the members of the Executive Board, to appoint the members of the Scientific Committee and to appoint the Director and dismiss the Director before the end of his/her term on the basis of a proposal of a third of its members or of the Commission.[62] In addition, the Management Board is entrusted with the tasks to: a) adopt the Agency's Annual Work Programme in accordance with the Multiannual Framework, on the basis of the draft submitted by the Agency's Director after the Commission and the Scientific Committee have delivered an opinion; b) to adopt FRA's annual reports; c) adopt the Agency's annual draft and final budgets; d) exercise disciplinary authority over the Director; and e) adopt necessary rules of procedure, financial rules and measures for the implementation of the Staff Regulations. The Management Board is composed of one independent person appointed by each of the 27 Member States of the EU, one independent person appointed by the Council of Europe and two representatives of the Commission. Though the "independent persons" are appointed by each Member State, they are not considered to be their representatives. The idea is for Member States to appoint experts with "high level responsibilities in an independent national human rights institution or other public or private sector organization".[63] Each member may be assisted by an alternate member selected according to the same procedure. The Management Board elects its

[61] Article 12 of the Founding Regulation
[62] Article 15 (7) of the Founding Regulation
[63] Article 12(1) of the Founding Regulation; the names of FRA Management Members are published at http://fra.europa.eu/fraWebsite/about_fra/who_we_are/management_board/members/members_en.htm

Chairperson and Vice-Chairperson and two other members of the Executive board for a two-and-a-half year term, renewable once. In spring 2011, an observer and an alternate observer to the Management Board (without the right to vote) were appointed by Croatia as well. The Commission appoints two representatives to the Management Board, while the European Parliament is not allotted a seat, though it is involved in the selection of the members of the Scientific Committee on the basis of consultation with the competent committee[64] and the FRA Director on the basis of a hearing session of prospective candidates with the competent Parliamentary Committee, followed by an opinion and a list with an order of preference.[65]

The Council of Europe also appoints an independent person as member of the Management Board. The person appointed by the Council of Europe has voting rights concerning decisions related to the Annual Work Program, the annual reports and the appointment of members of the Scientific Committee.[66] The Council of Europe participation in the management of the Agency is a result of the debate leading up to its creation as regards the need to avoid duplication of efforts between the Agency and the Council of Europe, being the main European human rights institution. The 2008 Agreement on cooperation between FRA and the Council of Europe has the specific objective "to avoid duplication and to ensure complementarity and added value". [67] On the basis of this agreement, the cooperation between the two institutions is firmly institutionalized through the representation of the Council of Europe within the organizational structure of the Agency.

Pursuant to Article 12 (8) of the Founding Regulation, the Management Board can take decisions by a simple majority of the votes cast. Two-thirds majority of all members is however required for decisions concerning: 1) the election of a Chairperson and Vice-Chairperson; 2) the adoption of the Annual Work Programme in accordance with the Multiannual Framework; 3) the adoption of annual reports; 4) appointment and dismissal of

[64] Article 14 (1) of the Founding Regulation
[65] Article 15 (2a) and 2 (b) of the Founding Regulation
[66] Article 12(8) of the Founding Regulation
[67] Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, Official Journal of the European Union L 186/7 of 15.7.2008

the Agency's Director; 5) adoption of the Agency's rules of procedure; 6) appointment and revocation of members of the Scientific Committee; and 7) cases when it has to establish that a member or an alternate member of the Management Board no longer meets the criteria of independence. The Management Board has to act by unanimity as regards the decisions referred to in Article 25(2) of the Founding Regulation, i.e. the internal language arrangements for the Agency. The Chairperson has the casting vote. The person appointed by the Council of Europe has voting rights as regards decisions concerning the adoption of the Annual Work Programme and of the annual reports as well as the appointment and revocation of members of the Scientific Committee.

The **Executive Board** plays only a supporting role with respect to the Management Board. It is composed of the Chairperson and the Vice Chairperson of the Management Board, two other members of the Management Board elected by the Management Board, and one of the two representatives of the Commission sitting on the Management Board. The person appointed by the Council of Europe in the Management Board may participate in the meetings of the Executive Board. Meetings of the Executive Board are convened by the Chairperson whenever necessary to prepare the decisions of the Management Board and to assist and advise the Director. The Executive Board adopts its decisions by simple majority. The Director is entitled to take part in the meetings of the Executive Board but has no voting rights.[68]

The Scientific Committee is composed of eleven independent and highly qualified experts in the field of fundamental rights, appointed for a non-renewable five-year term of office by the Management Board after consultations with the European Parliament. In appointing the Scientific Committee members, the Management Board is expected to meet two main criteria: an even geographical representation and members' independence.

The Scientific Committee is entrusted with the task to be "the guarantor of the scientific quality of the Agency's work, guiding the work to that affect", as stipulated in Article 14 (5) of the Founding Regulation. As such, it is expected to be involved "as early as appropriate in the

[68] Article 13 of the Founding Regulation

preparation of all documents". There is no explicit reference to the powers of the Scientific Committee in having a decisive say on the preparation of the Agency's documents. Some members of the Scientific Committee however construe its mandate of "a guarantor of the scientific quality of the Agency's work" as "indicating the authoritative nature of its decisions".[69] Furthermore, a formal procedure has been established for pronouncements of the Scientific Committee under Article 14(6) of the Founding Regulation, whereby a two-third majority is required. Meetings of the Scientific Committee are convened by its Chairperson four times per year. The Chairperson is also entitled to launch a written procedure or to convene extraordinary meetings on his/her own initiative or at the request of at least four members of the Scientific Committee. Some of the members posit that the explicit establishment of formal procedures confirm the interpretation "according to which the pronouncements on scientific issues are binding upon other organs of the Agency".[70] It is further argued that the Scientific Committee can fulfil its legally mandated role of a "guarantor of scientific quality", provided that other organs of the Agency respect the scientific standards stipulated on a case-by-case basis by the Committee.

The creation of the Scientific Committee has initially caused concern with the Council of Europe, given the fact that it is not represented in it. However, these concerns have been addressed by the procedure for adoption of the Agency's Annual Work Programme and annual reports, for which the main prerogative lies with the Management Board, where the Council of Europe is represented. In addition, the Council of Europe representative sitting on the Management Board has voting rights with respect to decisions concerning the appointment or revocation of members of the Scientific Committee.

The **Director** is responsible for the implementation of the decisions of the Management Board and is therefore accountable to it. The Director is administratively under the political control and oversight of the Management Board, which has the overriding power as regards a decision on the dismissal of the Director before his or her term has expired, on the basis of a

[69] Armin Von Bogdandy and Jochen Von Bernstorff, *op.cit.,* pp. 1050
[70] *Ibid.*

proposal of a third of its members or of the Commission. The Director is entitled to take part in the meetings of the Management Board and the Executive Board but has no voting rights. The Director may be called upon at any time by the European Parliament or by the Council to attend a hearing on any matter linked to the Agency's activities.

Experts' networks: The Agency resorts to the expertise of two networks of experts. The legal experts group, known as **FRALEX** (Fundamental Rights Agency Legal Experts), is commissioned to produce a variety of reports and studies, as well as a bulletin and other deliverables at national and comparative level that FRA will either publish autonomously or use as background material for its comparative analyses.[71]

The second network is **RAXEN National Focal Points** (NFPs], functioning since 2000, which covers all EU Member States on issues of racism, xenophobia and related intolerances. NFPs are organisations selected by the Agency through an open call for tender and contracted to provide through different reporting tools, background material on phenomena of racism, xenophobia and related intolerance, as well as policies and initiatives promoting equality and diversity.[72]

Overall control of the EU Agency for Fundamental Rights

The analysis of the accountability of the EU specialized agencies can be generally subdivided into five components: political, judicial, financial, administrative and public accountability.

In general terms, the EU specialized agencies have only a limited **political accountability**, due to the limited role attributed to the European Parliament in exercising political oversight of the their activities.[73] However, in the case of FRA the level of political accountability can be defined as higher than the majority of EU specialized agencies, since the Founding Regulation provides the European Parliament with the possibility to play some role in the process of the

[71] Information available at http://fra.europa.eu/fraWebsite/networks/research/fralex/fralex_en.htm
[72] Information available at http://fra.europa.eu/fraWebsite/networks/research/raxen/raxen_en.htm
[73] Sami Andoura & Peter Timmerman, Governance of the EU: The Reform Debate on European Agencies Reignited, European Policy Institutes Network (EPIN), Working Paper No. 19, October 2008

Director's selection, contrary to the case of other EU agencies, as well as with the possibility to invite the Director at any time "to attend a hearing on any matter linked to the Agency's activities".[74] Though it has become a normal practice for the FRA's Director Morten Kjaerum to present the Agency's Annual Reports to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), a more systematic parliamentary scrutiny would be crucial for increasing the transparency of the working methods of the Agency.

With regard to the FRA's **financial accountability**, the European Parliament and the Council (as budgetary authority) have a significant power over its budgetary issues. Similar to the majority of EU specialized agencies FRA depends on Community funding. The European Parliament also has authority over the budgetary discharge procedure on a recommendation from the Council acting by a qualified majority.

With regard to its **administrative accountability,** the operations of the Agency are subject to the supervision of the Ombudsman in accordance with the provisions of Article 195 of the Treaty, as stipulated in Article 19 of the Founding Regulation. The European Ombudsman has the power to investigate complaints of maladministration in agencies. Some agencies have institutionalized the practice of direct public control by stakeholders as part of networks that have been established to assist them or by providing a seat for stakeholders in the administrative boards.[75] In the case of FRA, the composition of the Management Board and the Scientific Committee with independence of its members being a main criterion for their appointment provides an important channel for ensuring direct public control over the Agency's activities. The ability to exercise this public control would however depend on the institutional practices as exercised by the Agency itself and this is closely linked to the aspect of **transparency,** which is an important component of the accountability of the EU agencies. It is generally concluded that "[t]he degree of transparency of European agencies is not always ideal".[76]

[74] Article 15 (6) of the Founding Regulation
[75] Sami Andoura & Peter Timmerman*, op.cit.*
[76] *Ibid.*

Relations with EU Institutions and Member States

From the perspective of the EU institutional landscape, EU agencies essentially tend to occupy a very specific place in the triangular relationship between the Council, the Commission and the European Parliament. As observed by Andoura and Timmerman, "the position of European agencies towards the institutions reflects the institutional equilibrium between the Community interests (Commission and Parliament) and the national interest (Council), but neither has direct influence on the day-to-day functioning of an agency".[77] FRA is not an exception to this ambiguity, which is idiosyncratic of EU agencies in general. In parallel, however, FRA displays some divergent characteristics, given the very specific nature of the Agency in substance and working methods.

Relations with the Council: The Council influence over the Agency's work is most salient as it comes to the adoption of the Multiannual Framework, which takes place every five years. Unlike other EU agencies, the Multiannual Framework has to be adopted by the Council. This divergence from the common practice attests to the political sensitivity of the substance and subject matter of the FRA's mandate and scope of activities.

It is specific for the EU Agency for Fundamental Rights that the members sitting on its Management Board are not official representatives of EU Member States *per se.* Appointed by Member States, they have to meet the criteria of independence with a proven record of holding high-level responsibilities in an independent national human rights institution or other public or private sector organization. This feature sets aside FRA from other EU agencies, where the Council's influence is mainly channelled through their administrative structures and the official representation of Member States therein. Thus, in contrast to other agencies, FRA is not a venue for "a close networking of the ministerial bureaucracies at the

[77] *Ibid.*, pp. 16

European level", as it rather seeks to operate independently from the ministerial bureaucracies.[78]

At FRA, the national ministerial bureaucracies are involved only through the external network of **"National Liaison Officers",** who are government officials serving as a contact point of the Agency in the Member States. The National Liaison Officers may, *inter alia*, submit opinions on the draft Annual Work Programme to the Director prior to its submission to the Management Board, while the Agency is obliged to communicate to the National Liaison Officers the documents drawn up in accordance with its mandate.[79] In the FRA organizational diagram, FRA's Director is entrusted with maintaining contacts with the National Liaison Officers and keeping them informed of the ongoing work of the Agency.

Relations with the Commission: The influence of the Commission is embodied in its two-member representation on the Management Board with full voting rights. Unlike other Agencies, where the Commission is generally underrepresented and holding only some advisory functions with regard to their work program, in the case of FRA the Commission has both a solid representation in its administrative bodies and a strong role in the conceptualisation of its Multiannual Framework and annual work programs, to the detriment of the concept of independence that has to be endowed upon the Agency from the perspective of the UN Paris Principles.

Relations with the Parliament: The influence of the Parliament is most tangible through its participation in the selection procedure of the FRA's Director, contrary to the practices in place at other EU agencies. Also, the European Parliament holds the authority to exercise some degree of political control and scrutiny over the work of the Agency by inviting its director to present annual reports or to participate in hearings dedicated to specific topics.

[78] Armin Von Bogdandy and Jochen Von Bernstorff, *op.cit.,* pp. 1050. It has to be noted that at other information agencies the national ministries are represented in the management level, often at the level of Deputy Minister. This allows the Council to keep an oversight over the agencies, given that the appointment of Director, the approval of the work program, and the adoption of the final program go through the administrative level.
[79] Article 8 of the Founding Regulation

The role of civil society in the work of the EU Agency for Fundamental Rights

One of the core tasks of the EU Agency for Fundamental Rights as defined in the Founding Regulation is "to develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights and actively disseminate information about its work."[80] The dialogue is institutionalized through the Fundamental Rights Platform (FRP), which is under the authority of the FRA Director and functions as a cooperation network composed of a wide range of civil society organizations: "non-governmental organisations dealing with human rights, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations".[81] The FRP Advisory Panel was established with the intention of facilitating a transparent and well-functioning communication between the FRP, the FRA Director and FRA on one side and on the other, amongst the participants of the FRP itself.

The Advisory Panel (AP) consists of nine members. Six of them are elected by the participants of the FRP and three are appointed by the Director. Members of the AP are appointed in their own independent capacity and in order to be nominated as a member of the AP, candidates have to fulfil all conditions listed in the Code of Conduct for the FRP participants, which are listed as follows:

- All participants of the FRP commit themselves to respecting all Fundamental Rights as they are reflected in the Charter;
- All participants of the FRP refrain from any conduct going against the fundamental rights of any person or group of persons, as are recognized by the Charter and the subsequent interpretations by the authoritative bodies;

[80] Article 4(1) (d) of the Founding Regulation; the list of FRP participants is published at http://fra.europa.eu/fraWebsite/networks/frp/members/members_en.htm
[81] Article 10(1) of the Founding Regulation

- All participants of the FRP refrain from any kind of conduct endangering the 'structured and fruitful dialogue' within the FRP as called for in the Founding Regulation;
- All participants of the FRP refrain from any kind of illegal activity.[82]

In addition to the strict compliance with the Code of Conduct, nominee for membership in the Advisory Panel have to: a) be able to refer to at least two years of prior FRP-participation of the NGO he or she has a high level of responsibility for; b) have a knowledge of the functioning of the FRA; c) have a solid background and track record of working with civil society organisations and/or participating in civil dialogue processes with international networks and/or with grassroots organisations.[83] Nominations for membership in the Advisory Panel are examined by the FRA's internal services and as a result of it, the Director may reject certain candidates if he comes to the conclusion that the conditions mentioned above are not met and after having consulted the current Advisory Panel.

Three main tasks are defined for the cooperation of the Agency with the Platform. These are to: (a) make suggestions to the Management Board on the Annual Work Programme; (b) give feedback and suggest follow-up to the Management Board on the annual report; and (c) communicate outcomes and recommendations of conferences, seminars and meetings relevant to the work of the Agency to the Director and the Scientific Committee.[84] In the Forward to the Report from the Fourth annual meeting of the Fundamental Rights Platform held in April 2011, the FRA Director has defined the FRP "triangular purpose" as follows: 1) allow the Agency to address civil society directly; 2) provide a forum where the FRA can listen to civil society; and 3) provide an opportunity for organisations to share experiences and inspire one another.[85]

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[82] *Code of Conduct for the Participants of the Fundamental Rights Platform*
[83] *Terms of Reference of the FRP Advisory Panel*
[84] Article 10 (4) of the Founding Regulation
[85] Report, *Fourth annual meeting of the Fundamental Rights Platform: highlights of discussions and work sessions*, 14 – 15 April 2011

The important role of civil society in the protection of fundamental rights is acknowledged in the Founding Regulation of the EU Agency for Fundamental Rights and the creation and functioning of the Fundamental Rights Platform attests to the Agency's active endeavours to work closely with civil society and non-governmental organisations. As per the tasks delineated for the FRP in the Founding Regulation, the civil society contribution to the work of the Agency falls into three distinct categories: firstly*, input for planning purposes* with respect to the contents and substance of the annual work programme; second, *feedback input* which should be an important part of the process of internal evaluation of the Agency and how it performs the tasks entrusted upon it; and third, *information input* which should be seen as an important part of the accumulation of expertise at the Agency. These tasks are defined in an ambitious manner. Their effectiveness however will depend on the working practices and the capacity of FRA to cooperate with the Fundamental Rights Platform as an "input provider" and not simply as part of the FRA's communication with civil society. The institutionalisation of a EU fundamental rights culture will require greater participation of civil society in policy-making. While FRA relies on the expertise of its experts' networks, the civil society is in the best position to evaluate the impact of policies amongst their constituencies and to stimulate debates that are crucial for the process of mainstreaming of fundamental rights in EU policies.

CHAPTER IV

EU FUNDAMENTAL RIGHTS CULTURE: AN ILLUSION OR A REALITY? THE CASE OF HUNGARY

Monitoring of the EU Member States' compliance with fundamental rights

Can the emerging EU fundamental rights architecture truly contribute to transforming the approach to human rights as part of a broader effort to improve governance on the European level? Should the national systems for protection of human rights be extricated from the EU norms and standards, stipulated in the European Convention on Human Rights and the EU Charter for Fundamental Rights and as a result, be allowed to remain detached from the imperatives of the much-needed, though only nascent, human rights culture within the EU. What is the linkage between the national level for protection and promotion of human rights on one side and the EU level, on the other? While the role of the Council of Europe as the primary European human rights institution is fully recognised, the complex architecture currently in place at the EU level begs the question as to what are the true and easily accessible mechanisms to seek recourse in cases of digression by EU Member States from the commonly accepted standards and norms for protection and promotion of human rights. While efforts to streamline human rights in EU policies have been gaining momentum recently, it is still not clear whether the European Union has the capacity and the political will to seek alignment of national policies, especially with regard to the most obvious breaches of EU norms and principles in national law making and practices. Therefore, the monitoring of the EU Member States' compliance with fundamental rights has to be fully developed and duly utilised. Otherwise, the emerging EU fundamental rights architecture will not be sustainable and the idea of instituting a proper EU culture for protection and promotion of human rights and fundamental freedoms will remain illusory, as the national and supranational levels interact and influence each other and cannot therefore be regarded as isolated and detached from each other.

This leads to the sensitive question as to what can provide justification for the EU institutions in general and the Fundamental Rights Agency in particular to challenge a Member State for its fundamental rights situation and performance. On one side, the EU system of fundamental rights protection is derived from, *inter alia,* the constitutional traditions common to the Member States. The constitutional autonomy of the Member States, which is protected by Article 6(3) TEU, has to be aligned with the EU standards and norms of fundamental rights protection and the main premise that the "EU has evolved into a guarantor of common constitutional principles".[86] How does it work in practice, if at all? How could the EU reconcile Article 6(3) TEU protecting the constitutional autonomy of its Member States with Article 7 TEU, which provides for the active role of the European Union and its institutions vis-à-vis its Member States in cases of breaches, or risk of breach, of EU value and fundamental rights?

The deterioration of the fundamental rights protection in Hungary as a result of the adoption of a sequence of new legislative acts – a media law, a new constitution, and a religion law – at a period when the country was holding the 6-month rotating presidency of the European Union, and the wobbly reaction of the European Union institutions to it, proved to be a serious test of the inherent limitations of the EU system of fundamental rights protection, as regards both its preventive and remedial capacity.

Timeline of Hungary's adoption of media law and international reaction to it

It is notable that Hungary's draft legislation on media and telecommunications failed to gain traction with the European Union institutions, while it was still in the process of preparation and adoption. Despite persistent calls by civil society organizations in the second half of 2010 for a preventive action, the new Media Services and Mass Media Act came to the spotlight only in January 2011, when the law's entry into force happened to coincide with the start of the Hungarian presidency of the European Union.

[86] Von Bogdandy and von Bernstorff, *op.cit.,* pp. 1065

By the time the media law came into force, it had already drawn criticism from international organisations, some members of the European Parliament as well as some EU governments that had expressed concerns about the law. However, there was no consolidated analysis or reaction by the EU institutions as regards the implications of one of its Member States adopting and enforcing a restrictive media law. By comparison, in September 2010 the OSCE released an analysis of the draft legislation specifically commissioned by the Office of the OSCE Representative on Freedom of the Media. The report was unambiguous in its assessment:

> "Few of the new measures and changes of the existing framework can be described without reservation as serving the cause freedom of expression and media freedom. **They will introduce a highly centralized governance and regulatory system, with many new and unnecessary bodies of oversight and supervision and with many decision-making processes involving a succession of inputs by disparate bodies – probably breeding conflicts and inefficiencies, but also multiplying opportunities for political control. The whole system may have a serious chilling effect on media freedom and independence ((by encouraging self-censorship) and on the exercise of freedom of expression."**[87]

The Council of Europe Commissioner for Human Rights also stated officially "the wide range of problematic provisions in Hungary's media legislation coupled with their mutually reinforcing nature result in an unfortunate narrowing of the space in which the media can operate freely in Hungary – a comprehensive revision of the media law package as a whole is therefore highly recommended."[88]

The European Commissioner responsible for the media, Neelie Kroes, and the Commission President, José Manuel Barroso, met with the Hungarian Prime Minister Viktor Orbán on January 7, after the law had come into force. They sought clarification on the law and demanded changes. Subsequent amendments to the law were seen as cosmetic by civil

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[87] *Analysis and assessment of a package Hungarian legislation and draft legislation on media and telecommunications*, prepared by Dr Karol Jakubowicz, commissioned by the Office of the OSCE Representative on Freedom of the Media, September 2010, at http://www.osce.org/fom/71218

[88] https://wcd.coe.int/wcd/ViewDoc.jsp?id=1751289

society organizations and international organizations such as the Council of Europe and the OSCE. Criticism was also directed towards the Commission, whose "favourable" report was deemed "premature as the law remains both open to criticism and severely criticized".[89] The European Parliament however reacted quickly by adopting a resolution on 10 March 2011.[90] The motion for the resolution was tabled by four of the political groups at the European Parliament. i.e. the Socialists and Democrats (S&D), the Liberals and Democrats (ALDE), the Greens/EFA and the European United Left (GUE/NGL), and was adopted by 316 votes to 264, with 33 abstentions. It is noteworthy that an alternative draft resolution was tabled by the European People's Party (Christian Democrats) to welcome the amendments made to the media law, but was withdrawn just before the vote.

It has been commonly acknowledged that the public statements by the OSCE and the Council of Europe have been stronger and more vocal in their criticism towards the media law. Several deficiencies of the EU fundamental rights architecture have become obvious in this process and need to be highlighted.

FRA's role in ex ante assessment of situations of breaches of fundamental rights by EU Member States: In essence, the Agency has no right of own initiative and is in no position to provide an independent expert advice on such cases, unless the Council decides to invoke its Declaration of 15 February 2007 in order to seek the assistance of the Agency "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."[91] Therefore, any decision to engage FRA in providing an independent expert opinion within the meaning of Article 7 TEU would be susceptible to the specific political context of any given period. On a positive note, it should be noted that the European Parliament Resolution of 10 March 2011 notes the decision by the LIBE Committee to request the Fundamental Rights Agency to issue an annual comparative report on the situation with

[89] *Reporters Without Borders,* Hungary's media law unacceptable despite amendments, 9 March 2011
[90] European Parliament Resolution of 10 March 2011 on the media law in Hungary, P7_TA(2011)0094
[91] Council Declaration, *op.cit.*

regard to media freedom, pluralism and independent governance in the EU Member States, including indicators.

***Limited scope of action**:* The European Parliament resolution of 10 March 2011 makes it explicit that the Commission has limited its scope of action by targeting only three points in connection with the implementation of the *acquis communautaire* by Hungary, i.e. the Media Act's "balanced broadcast" requirement, which permits potentially restrictive regulation of media that takes one side of an issue; the "country of origin" principle that allows for censorship of foreign broadcasts; and the registration requirement for all media, which would create an "unjustified restriction" on the fundamental right of "freedom of expression." Further concern is raised with regard to the omission of any reference to Article 30 of the Audiovisual Media Services Directive (AVMSD). This article recognizes both the existence and the role of national independent regulators that are obliged to cooperate with the Commission, notably on issues of jurisdiction. The lack of reference to Article 30 has the effect of limiting the Commission's own competence to scrutinize Hungary's compliance with the Charter of Fundamental Rights when implementing EU law.

***Article 7 TEU**:* In contrast to the situation in 2004 when the European Parliament used its right to initiate the prevention mechanism under Article 7(1) TEU and adopted a resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article11(2) of the Charter of Fundamental Rights)[92], the final resolution on the media law in Hungary does not make any reference to the right of the European Parliament to initiate the procedure. For instance, the motion for a resolution tabled by the political group of the Greens/EFA (European Free Alliance) contains a paragraph recalling "the possibility of the European Parliament to initiate the procedure under Article 7(1) TEU in view of determining whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU, such as respect for freedom, democracy and human rights".[93] This reference was however omitted from the final resolution adopted by the European Parliament on 10 March 2011.

[92] European Parliament Resolution (2004), *op.cit.*

[93] Motion for a Resolution on Media Law in Hungary, tabled by Daniel Cohn-Bendit, Rebecca Harms, Judith Sargentini, Helga Trüpel on behalf of the Greens/EFA Group, paragraph 9, B7-0103/2011 of 9.2.2011

Timeline of Hungary's adoption of its new Constitution and reaction to it

Observers have alerted: "the media legislation is part of a troubling trend in human rights in Hungary".[94] The failure of the European Parliament to bring forth its authority under Article 7(1) TEU in its resolution on the media law ruled out the possibility to exercise its right of initiative in cases of a clear risk of a serious breach by a Member State of the EU values and fundamental rights. Equally critical is the lack of reference to Article 7(1) TEU for the second time within a period of few months, when on 5 July 2011 the European Parliament adopted a Resolution on the Revised Hungarian Constitution.[95] The New Hungarian Constitution, adopted by the Hungarian Parliament on 18 April 2011 with the votes of the ruling coalition majority and signed by the President of Hungary on 25 April 2011, will enter into force on 1 January 2012.

The European Parliament resolution expressed great concern about the Hungarian Constitution on numerous and serious issues. Among the criticisms are the lack of "explicit safeguards" for "civil and social rights in line with international obligations" and the European Parliament called on the Hungarian government to "guarantee equal protection of the rights of every citizen, no matter which religious, sexual, ethnic or other societal group they belong to, in accordance with Article 21 of the Charter of Fundamental Rights". The process of adopting the resolution followed the European Parliament party lines, as was the case with the resolution on the media law. Four political groups, i.e. the Socialists and Democrats (S&D), the Liberals and Democrats (ALDE), the Greens/EFA and the European United Left (GUE/NGL), tabled a joint motion for a resolution and the final resolution was passed by 331 votes to 274 with 54 abstentions.

The European Parliament resolution draws upon the conclusions of the legal opinion issued by the Council of Europe's European Commission for Democracy through Law (Venice

[94] Amanda McRae, Pulling Punches on Hungary Media Law, 25 March 2011, at http://euobserver.com/7/32065

[95] European Parliament Resolution of 5 July 2011 on the Revised Hungarian Constitution, P7_TA(2011)0315

Commission).[96] With regard to the constitutional protection of fundamental rights, the Venice Commission stated that more precise indications should be provided by the Constitution as to their content and stronger guarantees for their effective protection and enjoyment by individuals, in line with the international human rights instruments to which Hungary is a Contracting Party. The Venice Commission also referred to its earlier opinion in March 2011, stating that the most important guarantees for the protection of the individual fundamental rights should be "specified in the text of the Constitution, and not left to lower level norms".[97] In its Opinion, in addition to providing legal assistance on the three legal issues submitted to it, the Commission has expressed concern with regard to shortcomings noted in relation to the constitution-making process: its lack of transparency and very tight timeframe, the absence of dialogue between the majority and the opposition, and the insufficient opportunities for an adequate public debate.

EU scope of action: In the debate at the European Parliament on the revised Hungarian constitution held on 6 July 2011, the Hungarian Presidency read a statement on behalf of the Council to the effect that:

> "[t]he Treaty has not conferred any power to the Council to deal with national Constitutions of the member states. Under article 4 paragraph 1 and 2 of the Treaty of the EU, the adoption of a Constitution remains of the exclusive competence of the member state concerned. Therefore the Council has not been in a position to discuss the newly adopted constitution of Hungary."[98]

The European Parliament resolution called on the Commission to conduct a thorough review and analysis of the new Constitution and of the cardinal laws to be adopted in the future in order to check that they are consistent with the *acquis communautaire*, and in particular the

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[96] European Commission for Democracy though Law (Venice Commission), Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th session on 17-18 June 2011, Opinion no. 621 / 2011 dated 20 June 2011

[97] *Ibid.*

[98] Transcript of the statement published at http://www.europarl.europa.eu/en/media-professionals/content/20110608SHL81173/html/Revised-Hungarian-Constitution-77894

Charter of Fundamental Rights of the European Union, and with the letter and spirit of the Treaties".[99]

Timeline of Hungary's adoption of Religion Law and reaction to it

In its Opinion on the new Constitution of Hungary of 20 June 2011, the Venice Commission stated that:

> "the adoption of the new Constitution in April 2011 represents the beginning of a longer process of establishment of a comprehensive and coherent new constitutional order, which implies adoption or amendment of numerous pieces of legislation and new institutional arrangements. It is essential for Hungary to make sure that all subsequent legislative and other measures are fully in line with the international norms and standards which are binding for Hungary".[100]

In contravention to the spirit of this recommendation, on 12 July 2011 – one month after the release of the Venice Commission opinion on the new Hungarian Constitution - Hungary adopted a Law on the Right to Freedom of Conscience and Religion, and on Churches, Religions and Religious Communities. The new Religion Law includes a retroactive provision to "de-register" over three hundred minority faiths that have been registered as religions in Hungary since the adoption of the 1990 Religion Law. Under the new law, only fourteen churches will maintain their registered religious status and the rights and privileges attendant with such status. All other groups will lose their status as religious organizations unless they are "re-registered" through burdensome, oppressive, and discriminatory administrative and legislative proceedings. The most surprising and objectionable amendment to the bill introduced without adequate debate or reflection just two hours before the bill was passed was the decision to remove a provision providing for judicial proceedings for "re-registration" of religious groups and to substitute a new provision stating that "the competent authority to recognize a religious organization is the Parliament, with a two-thirds vote, rather than the courts or a ministry."

[99] Operative paragraph 2 of the resolution, *op.cit.*
[100] *Ibid.*

The adoption of the law, which will come into force on 1 January 2012, is part of the deterioration of human rights standards in the country and clearly falls within the purview of the motion for a resolution entitled "Serious setbacks in the fields of the rule of law and human rights in Hungary", signed by twenty-four members of the Council of Europe Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States (Monitoring Committee). The Resolution expressed the Parliamentary Assembly members "serious concern with respect to recent developments related to the rule of law, human rights and the functioning of democratic institutions in Hungary" and requested that a human rights monitoring procedure be initiated to ensure compliance by Hungary with the European Convention for Human Rights (ECHR) and other Council international instruments that it has signed and ratified. The issue of the right of freedom of thought, conscience and religion was studied by the Venice Commission in the framework of its legal opinion on Hungary's new constitution, adopted on 20 June 2011. The Venice Commission did not have a major objection to the constitutional provisions on this matter and assessed the respective article (i.e. Article VII) in the new constitution as falling in line with Article 9 of ECHR. However, the Venice Commission stated unequivocally that:

> "[t]he significant number of matters relegated, for detailed regulation, to cardinal laws requiring a two-thirds majority, including issues which should be left to the ordinary political process and which are usually decided by simple majority, raises concerns. Cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law".[101]

This is a crucial point for understanding the seriousness of the hasty adoption of a new Religion Law, introducing the requirement for "de-registration" of 300 registered faiths and religious associations with a two-third decision by Parliament. Despite the infringement on the right of freedom of thought, conscience and belief, laid down in Article 10 of the EU Charter of Fundamental Rights, and the discriminatory character of this legal act, the new law

[101] Summary of conclusions of the Opinion of the Venice Commission on Hungary's new Constitution, at http://www.venice.coe.int/, accessed on 30 September 2011

has not gained traction with the EU institutions in conformity with their mandate to safeguard the protection of EU values and fundamental rights. Civil society organizations and faith-based groups have issued numerous calls to raise awareness and demand revision of the law. On 10 August 2011, fourteen prominent Hungarian personalities, addressed an appeal to the European Commission Vice-President and EU Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding and the Commissioner for Human Rights of the Council of Europe Thomas Hammarberg "to take resolute action in defence of freedom of religion and other fundamental liberties that are presently in great danger in Hungary."[102] Among the fourteen signatories of the letter are the former mayor of Budapest Gabor Demszky, the former OSCE Representative on Freedom of the Media Miklos Haraszti, and the president of the Hungarian Helsinki Committee Ferenc Koszeg. Their assessment is that "[t]his law is only the latest disturbing example of the many serious setbacks in human rights and the rule of law that have occurred recently in Hungary."[103]

Recommendations

The European Union should make recourse to the repertoire of tools and mechanisms in place within different institutions at multiple levels, some of them linked and interdependent, to address concerns about performance by Member States as a test of the capacity of the emerging EU fundamental rights architecture to safeguard the protection of the EU values and fundamental rights both at the EU level and at the level of its Member States.

At the level of EU Agency for Fundamental Rights

- In complementarity to the work of other EU bodies, the Council of Europe and other international organisations and by all possible means, address issues of breaches or risk of breaches, of EU fundamental rights as part of the current thematic mandate of the EU Agency for Fundamental Rights, which is determined by the five-year Multiannual Framework (2007-2012) and in particular, the area dealing with discrimination based on *inter alia* religion or belief;

[102] Ex-Hungarian dissidents urge Europe to defend faiths, dated 9 August 2011, at http://www.eubusiness.com/news-eu/hungary-politics.bqe
[103] *Ibid.*

- Commission a report with the FRALEX (Fundamental Rights Agency Legal Experts) to provide a legal analysis of the aspects of discrimination in the new Religion Law of Hungary;

- Seek a mandate authorizing the Agency to prepare independent opinions, based on evidence, legal analysis and comparative contextualization, on the performance of the EU Member States as regards the protection of fundamental rights and EU values, when emerging situation of breaches, or a risk of breaches, warrant such opinions;

- Engage with civil society through the Fundamental Rights Platform to address concerns of deterioration of the performance of Member States in the area of fundamental rights protection and promotion;

- Create a tracking system to follow up on input coming from civil society organisations through the work of the Fundamental Rights Platform and the way they have been incorporated in reports and analysis of the Agency[104]; in addition, strengthen the mechanism of consulting civil society throughout the process of preparing the Annual Work Programme and the Annual Report of the Agency as well as ensure a strong feedback mechanism to keep civil society informed of the outcome of the FRA's work;

- Develop and maintain a consolidated database on the fundamental rights situation in Member States.

At the level of the European Commission

- Within the scope of its mandate to "asses a Constitution as any other legal act of a member state from the perspective of its compliance with Union law"[105], conduct a thorough analysis of the recently adopted legislative acts as part of Hungary's new constitutional arrangements.

[104] NGOs can send input to FRA, e.g. at http://fra.europa.eu/fraWebsite/networks/frp/frp-contributions/frp-contributions_en.htm, NGOs express concern that there is lack of feedback information on the status of their input.

[105] Statement by EU Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding at the European Parliament's debate on Hungary's revised Constitution, held on 6 June 2011, transcript published at http://www.europarl.europa.eu/en/media-professionals/content/20110608SHL81173/html/Revised-Hungarian-Constitution-77894

- With respect to the foregoing, implement the instructions issued by the European Parliament as part of its Resolution of 5 July 2011 on the Revised Hungarian Constitution, "to conduct a thorough review and analysis of the new Constitution and of the cardinal laws to be adopted in the future in order to check that they are consistent with the *acquis communautaire*, and in particular the Charter of Fundamental Rights of the European Union, and with the letter and spirit of the Treaties".[106]

At the level of the European Parliament

- Follow closely the situation of fundamental rights in EU Member States and use the Annual Reports on Fundamental Rights in the EU and its Member States to analyse thoroughly cases of breaches, or risks of breaches, of EU values and fundamental rights;

- Initiate a public debate on the implications of the recently adopted restrictive legislative acts in Hungary and table a motion for resolution on the new Religion Law, as the Resolution adopted by the European Parliament on the Media Law[107];

- Refer to the authority of the European Parliament, as provided for by Article 7(1) TEU, to initiate the activation of the prevention mechanism in cases where there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.

At the level of the European Council

- Refer to the Declaration made by the Council on the proceedings under Article 7 and use "the possibility for the Council to seek the assistance of the […] 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."[108]

[106] P7_TA(2011)0315
[107] P7_TA(2011)0094
[108] *Op.cit.*

- Refer to Article 7(1) and Article 7(2) TEU to address cases where there is a clear threat of a serious breach or where there is a serious and persistent breach of the common values by EU Member States.

This part of the report is focused on the recent developments in Hungary in the area of fundamental rights and freedoms in view of the country's repeated adoption of a series of restrictive acts over the last few months. This accounts for some of the country-specific points listed in the general set of recommendations. However, this report generally seeks to expand the debate on how to make the EU fundamental rights architecture more effective and these recommendations should be also seen as part of this broader effort.

LIST OF RELEVANT DOCUMENTS

Council of the European Union

Inter-Institutional Approach to Impact Assessment, politically endorsed by Council and Commission in November 2005 and by Parliament in July 2006

European Council Decision, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens,* 2010/C 115/01

Council conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 3071st JUSTICE and HOME AFFAIRS Council meeting, Brussels, 24 and 25 February 2011

Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental rights of the EU, Council of the European Union 3092nd GENERAL AFFAIRS Council meeting, 23 May 2011

European Commission

Commission Communication, *The European Union's Role in Promoting Human Rights and Democratization in Third Countries,* COM(2001) 252 final of 8 May 2001

Commission Communication, *Article 7 of the Treaty on the European Union: Respect for and promotion of values on which the Union is based*, COM(2003) 606 final of 15.10.2003

Commission Communication, *The Fundamental Rights Agency: Public Consultation Document,* COM (2004) 693 final of 25.10.2004

Commission Communication, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring*, COM (2005) 172 final of 27.4.2005

Commission Proposal for a Council regulation establishing a European Union Agency for Fundamental Rights, COM (2005) 280 final of 30.06.2005

Impact Assessment Guidelines, SEC (2009) 92 of 15.1.2009

Commission Communication, *Communication on Smart Regulation in the European Union*, COM (2010) 543 final of 7.10.2010

Commission Communication, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM (2010) 573 final of 19.10.2010

European Parliament

Resolution on *The situation of fundamental rights in the European Union (2009): effective implementation after the entry into force of the Treaty of Lisbon*, 15 December 2010

ANNEX

Principles relating to the Status of National Institutions (The Paris Principles)

Adopted by General Assembly resolution 48/134 of 20 December 1993

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall 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; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and,

where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other orgnization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for

the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert thei

EU AGENCY FOR FUNDAMENTAL RIGHTS
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Alternate: Eckart Klein

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Alternate: Sophia Koukoulis-Spiliotopoulos

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Member: Miguel Azpitarte-Sanchez
Alternate: Adoración Galera Victoria

[109] List of members accessed on 15 September 2011 at http://fra.europa.eu/fraWebsite/about_fra/who_we_are/management_board/members/members_en.htm

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Alternate: Philippe Mettoux

Italy
Member: Daniela Bas
Alternate: Lorenza Violini

Cyprus
Member: Iliana Nicolaou
Alternate: Aristos Tsiartas

Latvia
Member Ilze Brands Kehris (Chairperson)
Alternate: Martins Mits

Lithuania
Member: Tomas Davulis
Alternate: Dalia Vitkauskaité-Meurice

Luxemburg
Member: Fabienne Rossler
Alternate: *Nomination pending*

Hungary
Member: Attila Péterfalvi
Alternate: Balázs Schanda

Malta
Member: Raymond Zammit
Alternate: Ian Spiteri Bailey

Netherlands
Member: Petrus van Dijk
Alternate: Sylvia Wortmann

Austria
Member: Hannes Tretter (Vice-Chairperson)
Alternate: Christian Strohal

Poland
Member: Maciej Dybowski
Alternate: Dorota Pudzianowska

Portugal
Member: *Nomination pending*
Alternate: *Nomination pending*

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Alternate: Simina Tanasescu

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Member: Blaž Ivanc
Alternate: Janez Kranjc

Slovakia
Member: Beata Oláhová
Alternate: *Nomination pending*

Finland
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Alternate: Elina Pirjatanniemi

Sweden
Member: Anna-Karin Lundin
Alternate: Christina Johnsson

United Kingdom (UK)
Member: Marie Staunton
Alternate: Sarah Cooke

Council of Europe
Member: Guy De Vel
Alternate: Rudolf Bindig

European Commission
Member: Paul Nemitz
Alternate: Lina Papamichalopoulou

European Commission
Member: Emmanuel Crabit
Alternate: Julien Desmedt

Croatia (Observer)
Member: Ksenija Turković
Alternate: Snježana Vasiljević

ANNEX

EU AGENCY FOR FUNDAMENTAL RIGHTS

MEMBERS OF THE SCIENTIFIC COMMITTEE

The FRA Management Board, at its meeting of 2-4 June 2008, appointed the members of the Agency's Scientific Committee (1). The members of the Scientific Committee are the following[110]:

- Prof Florence Benoit-Rohmer
- Dr Alpha Connelly
- Prof Patrick Devlieger
- Dr Peter Jambrek
- Mr Jeremy McBride (Chairperson)
- Dr Angela Me
- Ms Kati Mustola
- Prof Stefano Rodotà
- Dr Patrick Simon
- Prof Jacqueline Dutheil de la Rochère (Vice-Chairperson)
- Prof Armin von Bogdandy

[110] At http://fra.europa.eu/fraWebsite/about_fra/who_we_are/scientific_committee/scientific_committee_en.htm, retrieved on 15 September 2011

ANNEX

EU AGENCY FOR FUNDAMENTAL RIGHTS: NATIONAL LIAISON OFFICERS (NLOs)

Belgium
Ministry of Justice: Alexander Hoefmans

Bulgaria
Ministry of Foreign Affairs: Genka Georgieva

Czech Republic
Office of the Government of the Czech Republic, Council for Human Rights: Miloš Koci

Denmark
Ministry of Justice: Rasmus Kieffer-Kristensen

Germany
Federal Ministry of Justice: Almut Wittling-Vogel

Estonia
Ministry of Foreign Affairs: Dea Hannust

Ireland
Department of Justice, Equality and Law Reform: Naill McCutcheon

Greece
Hellenic Ministry of Interior: Athina Sofianidou

Spain
Spanish Observatory of Racism and Xenophobia: Nicolas Marugán Zalba

France
Ministère de la Justice et des Libertés: Eric Maitrepierre

Italy
Ministry of Foreign Affairs: Diego Brasioli

Cyprus
Ministry of Justice and Public Order : Alexandra Frangou

Latvia
Ministry of Justice: Irina Vasiljeva

Lithuania
Ministry of Justice: Vygante Milasiute

Luxembourg
Ministère de la Justice: Laurent Thyes

Hungary
Ministry of Justice and Law Enforcement: Peter Csuhány

Malta
Office of the Attorney General: Victoria Buttiġieġ

Netherlands
Ministry of the Interior: John Morijn

Austria
Federal Chancellery: Brigitte Ohms

Poland
Ministry of Foreign Affairs: Renata Kowalska

Portugal
High Commission for Immigration and Intercultural Dialogue: Bernardo Manuel Vieira Santos e Sousa

Romania
Ministry of Foreign Affairs: Steluța Arhire

Slovakia
Section of Human Rights and Minorities, Office of the Goverment of the Slovak Republic: Milica Janculova

Slovenia
Government Office for EU Affairs: Veronika Boskovic

Finland
Ministry of Justice: Camilia Busck-Nielsen

Sweden
Ministry of Employment: Anna Schölin

United Kingdom
Ministry of Justice: Jenny Pickrell

Croatia (observer)
Office for Human Rights: Tatjana Vlašić