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Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?

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Abstract

This paper looks at the mandate of the European Union Agency for Fundamental Rights (FRA), established in 2007, from the perspective of the Charter of Fundamental Rights of the European Union, which entered into force in 2009. It explores the relationship between FRA and the Charter by looking at the agency's institutional practice, its founding regulation and its Multiannual Framework, on which the Council of the European Union agrees every five years. The Florence-based European University Institute (EUI) proposed some 15 years ago an European Union (EU) human rights agenda for the new millennium. Many of the agenda's policy proposals have materialised ever since, including the establishment of a 'European Human Rights Monitoring Agency'. The Charter was not part of this set of proposals. However, this prominent bill of rights and the new Agency in Vienna are obviously closely related to each other. The author concludes that the agency, despite certain limitations in its mandate, is a 'full-Charter-body' which could unfold its potential better following a revision of its founding regulation. Such a revision should reflect that the EU Charter for Fundamental Rights has entered into force in the meantime. The author identifies two additional key elements for the need of revision: FRA's mandate should include the possibility for the agency to deliver opinions on proposed EU legislation on its own motion, and the agency should autonomously adopt its multiannual priorities.

Keywords

European Union Agency for Fundamental Rights (FRA), Charter of Fundamental Rights of the European Union, Multiannual Framework, founding regulation, human rights, fundamental rights, agenda for human rights.

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FUNDAMENTAL RIGHTS AND THE EUROPEAN UNION: HOW DOES AND HOW SHOULD THE EU AGENCY FOR FUNDAMENTAL RIGHTS RELATE TO THE EU CHARTER OF FUNDAMENTAL RIGHTS?

Gabriel N. Toggenburg*

Introduction: the Charter, the Agency and other progress in the direction of “leading by example”

“Leading by example” was the title of an ‘Agenda for Human Rights’ drafted by a *Comité des Sages*¹ about 15 years ago. Drawing on input by the European University Institute (EUI), the agenda identified fourteen initiatives that would provide the “foundation stones” allowing the European Union (EU) to lead by example.²

Building on six objectives – recognition of legal obligations; universality; indivisibility; consistency between internal and external policy; the necessity of a strong information base; and mainstreaming– the agenda called for a number of initiatives to be taken at EU level, such as: appointing a Commissioner for Human Rights; establishing a specialist Human Rights Office that informs the High Representative for the Common and Security Policy; widening the access to the then European Court of Justice; establishing a European Union Human Rights Monitoring Agency with a “general information-gathering function in relation to all human rights” within the scope of EU law; carrying out “balanced and objective surveys of the human rights situation both within the EU and in the world at large”; strengthening the European Parliament that it forms an “important force for promoting respect for human rights by and within the Union”, including a “greater interaction with the human rights committees in national parliaments”; ratifying the European Convention on Human Rights; in addition to the work of the Council Committee on Human Rights (COHOM) providing for more cooperation within the EU among government ministers dealing with major human rights responsibilities; enhancing the role of human rights in the EU’s development cooperation programmes; developing an official human rights code for business; introducing more detailed criteria for the operation of human rights clauses in agreements concluded with third states; clarifying the procedures to be applied in the context of Article 7 TEU (the sanctioning procedure); consulting more effectively with non-governmental organisations (NGOs) and establishing a “permanent forum to facilitate more systematic and productive interaction” with NGOs; as well as prioritising human rights education “within the Union as a whole”.

This comprehensive list comes up with a variety of concrete institutional and policy proposals, including the establishment of a “European Union Human Rights Monitoring Agency”. It remains, nevertheless, silent as regards the Charter of Fundamental Rights of the European Union. The agenda seems to be drafted with a conviction that it was not so much a set of legal rights and corresponding

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¹ The Comité was composed of Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson.

² The academic contributions as well as the agenda itself are to be found in Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, Oxford 1999.

explicit obligations that were missing but rather policies that would help the existing rights to become a reality. The agenda's drafters were indeed not alone in this Charter-sceptical approach.

Since the EU Charter for Fundamental Rights does neither extend the scope of EU law nor does it provide new EU competences, prominent lawyers questioned its added value. The current EU President, Joseph Weiler, for instance, questioned whether the European Union really needs the Charter and came to the following conclusion: "The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programmes and agencies to make rights real, not simply negative interdictions which courts can enforce."³ Others went even further and said that the Charter has a merely symbolic value. According to one author, the Charter is a "comical attempt to make use of nation-state artefacts" resulting in "Kitsch"⁴. A supposedly more relevant objection was that the Charter could lead to frustration among citizens – a concern repeatedly addressed by the European Commission in drawing the attention to the Charter's limits. One expert even warned that the Charter might come along with the risk of "unintended consequences such as 'fuelling anti-EU-feelings' similar to previous cases of symbolic policymaking in the EU"⁵.

Yet, one can also have a more positive approach to the Charter. Looking at the list of proposals enshrined in the abovementioned Agenda for Human Rights while recalling that the EU Charter of Fundamental Rights entered into force on 1 December 2009, there is something that strikes the observer: many of the postulations listed in the 1999 agenda were addressed around or soon after the entry into force of the EU Charter. The European Parliament, for example, changed at the end of 2009 its internal rules by introducing a new procedure for guaranteeing the observance of fundamental rights during the legislative process⁶. At the same time, the Council working group formation 'FREMP' (Working Party on Fundamental Rights, Citizens Rights and Free Movement of Person) became a permanent working group⁷. In 2010, the first EU Commissioner specifically responsible for fundamental rights took office and the European Commission adopted its strategy for the implementation of the Charter of Fundamental Rights, which promotes a "fundamental rights culture" in the institutions⁸. In 2011, the Council adopted "guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies", and in 2012 it adopted the European Union Strategic Framework and Action Plan on Human Rights and Democracy. The Framework and Action Plan established the first thematic Special Representative of the EU whose task is to focus on human rights.

Whereas it is not argued here that the Charter was causal for these and other fundamental rights relevant reforms, it is submitted that the Charter has indeed substantially contributed to a new momentum at EU level. Together with the FRA the entry into force of the Charter appears to have provided avenues through which the ideas enshrined in the 1999 agenda were able to travel quicker to reality than it had been possible in the slow decade before. The FRA was established seven years after the Charter was proclaimed and provides fundamental rights-relevant information based on qualitative

³ J.H.H. Weiler, Editorial: 'Does the European Union truly need a Charter of Rights?', in: *European Law Journal*, Vol. 6, No. 2, 2000, 95-97.

⁴ U. Haltern, 'Europe Goes Camper: The EU Charter of Fundamental Rights From a Consumerist Perspective', in: *Webpapers on Constitutionalism & Governance beyond the State* 3(2001), available at http://www.wiso.uni-hamburg.de/fileadmin/sowi/conweb/conweb_wiener/2001/conWEB3-2001.pdf, 15.

⁵ Antje Wiener, 'The constitutional significance of the charter of fundamental rights', in *German Law Journal*, Vol. 2, No. 18, 2001, pp. 1-9, 9, online at <http://www.germanlawjournal.com/index.php?pageID=11&artID=113>.

⁶ See rule number 36 'Respect for the Charter of Fundamental Rights of the European Union', available online at <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>.

⁷ FREMP is tasked with "all matters relating to fundamental rights and citizens rights including free movement of persons, negotiations on accession of the Union to the ECHR, the follow-up of reports from the EU Agency for Fundamental Rights." See Council document as of 167 December 2009.

⁸ COM(2010) 573 final, of 19.10.2010, at Para. 1.3.3.

and quantitative evidence, as well a “permanent forum to facilitate more systematic and productive interaction” with civil society as mentioned by the 1999 Human Rights Agenda. It thereby complements the Charter. One can agree that the Charter “together with the creation of the Fundamental Rights Agency ... provided a focus for a system of EU human rights protection”.⁹

This paper looks at the EU Agency for Fundamental Rights (FRA) and the EU Charter for Fundamental Rights in order to understand how the EU’s expert body responsible for fundamental rights relates to the EU’s bill of fundamental rights. It does so by starting off with a brief introduction to the FRA as the EU fundamental rights body (section 2). Then it deals with the question on how the Charter is addressed in the agency’s founding regulation¹⁰ and its Multiannual Framework (MAF) (section 3). What then follows is a description of how the Charter is used in the agency’s work, including some examples of how the agency dealt with Charter (section 4). The paper concludes with some thoughts as to how the relationship between FRA and the Charter could be further strengthened in the future (section 5).

The Agency: a glimpse at its role in the EU’s institutional landscape

FRA is the only EU body that is solely and specifically tasked to deal with the protection of fundamental rights. In contrast to the three major EU institutions – the Council of the European Union, the European Commission and the European Parliament – FRA is not a political institution. It is an expert body that “shall fulfil its tasks in complete independence”¹¹. Moreover, FRA is not – unlike the EU institutions – entitled to issue legally binding decisions. Finally, unlike, the Court of Justice of the European Union (CJEU), the European Ombudsman or the European Parliament’s Petitions Committee, FRA is not tasked to deal with individual complaints.

The Agency has an advisory role; its objective is to provide the relevant EU institutions and other bodies of the European Union and its Member States “*with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights*”.¹²

To fulfil this overall objective of providing assistance and expertise in the area of fundamental rights, the agency is entrusted with different tasks that can be clustered under three main categories:

Firstly, it collects and analyses information and data in specific thematic areas. These themes are normally those defined in its Multiannual Framework (see section 3). However, on request the agency can collect data and provide analysis on fundamental rights issues falling outside this framework but, of course, within EU competence.

⁹ D. Anderson and C.C. Murphy, ‘The Charter of Fundamental Rights: history and prospects in post-Lisbon Europe’, EUI Working Papers Law 2011/08, available online at http://cadmus.eui.eu/bitstream/handle/1814/17597/LAW_2011_08.pdf, 19. In contrast with the authors it is here submitted that this “system” will not be “less reliant than previously on the Council of Europe”. Quite to the contrary: arguably, the Agency has increased the visibility of the Council of Europe and its standards and mechanisms within the EU machinery. Just to give one simplistic but still telling example: the Agency’s Annual report 2012 has 302 pages and refers to “Council of Europe” 324 times. The above mentioned handbooks are a more serious example of the robust and fruitful cooperation between the Agency and the Council of Europe: these handbooks are produced together with the Court in Strasbourg. For more details see the Council of Europe document DD(2012)1006 as of 26 October 2012 “Overview of the cooperation between the European Union Agency for Fundamental Rights and the Council of Europe”, available online at http://fra.europa.eu/sites/default/files/fra-council-europe-coopoverview-july2011-june2012_en.pdf.

¹⁰ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in OJ L 53 as of 2 February 2007, 1-14 (in the footnotes referred to as FR).

¹¹ See Art. 16(1) FR.

¹² See Art. 2 FR.

Secondly, the agency uses the evidence drawn from its research to formulate advice for both the EU institutions and Member States. Such ‘evidence-based advice’ can take a variety of forms, including reports, opinions, workshops or informal input to the EU institutions.

Thirdly, the agency is tasked to raise awareness of fundamental rights and promote dialogue with civil society organisations. Again, this is done through a variety of means and formats, including online tools or the Fundamental Rights Platform¹³.

This is not the place to provide details on the agency’s genesis¹⁴; its structure, tasks and potential¹⁵; its mandate¹⁶; its independence¹⁷; its relationship with civil society¹⁸, its added value¹⁹ or its activities²⁰ in a broader sense. What, however, can be said after five years of the agency being in place and against

¹³ For detailed information on the Fundamental Rights Platform that has by now over 350 participating non-governmental organisations (NGOs), see <http://fra.europa.eu/en/cooperation/civil-society>.

¹⁴ G. Schusterschitz, ‘Raum der Freiheit, der Sicherheit und des Rechts’, in: G. Woschnagg (ed.), *Hinter den Kulissen der EU-Österreichs EU-Vorsitz und die Zukunft Europas* (Graz:Styria 2007), 251-262; W. Hummer, ‘The European Fundamental Rights Agency’, in A. Reinisch and U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing, 2007), 117-144; E. Howard, ‘The European Union Agency for Fundamental Rights’, in: 4 *European Human Rights Law Review* (2006), 445-455; J. Muck and J. Pietsch, ‘Die Europäische Grundrechteagentur’, in: 19 *Europäische Zeitschrift für Wirtschaftsrecht* (2005), 587-589; U. Werther-Pietsch, ‘Der lange Weg zu einer Europäischen Menschenrechtsagentur’, in: 1 *Juridikum* (2005), 10-1.

¹⁵ O. de Schutter, ‘The EU Fundamental Rights Agency: genesis and potential’, in K. Boyle, *New Institutions for Human Rights Protection*, (Oxford:OUP 2009), 93-136; H. Tretter, ‘Die Grundrechteagentur der Europäischen Union: Feigenblatt oder Aufbruchssignal?’, in: 10 *Jahrbuch für Menschenrechte* 2008 (2007), 257-264; G. N. Toggenburg, ‘Die Grundrechteagentur der Europäischen Union: Perspektiven, Aufgaben, Strukturen und Umfeld einer neuen Einrichtungen im Europäischen Menschenrechtsraum’, in: *MenschenRechtsMagazin* (2007), 86-104; M. Pacini, ‘L’agenzia dell’UE per i diritti fondamentali’, in: 7 *Giornale di diritto amministrativo* (2007), 693-701; O. de Schutter, *Monitoring Fundamental Rights in the EU: the contribution of the Fundamental Rights Agency*, (Oxford: Hart, 2005).

¹⁶ G. N. Toggenburg, ‘The role of the new EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance?’, in: 3 *European Law Review* (2008), 385-398; A. v. Bogdandy and J. v. 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’, in: *Common Market Law Review* 2009, 1035-1068; L. Scaffardi, ‘L’incerto mandato dell’Agenzia europea per i diritti fondamentali’, in: 1 *Quaderni Costituzionali* (2008), 156-159.

¹⁷ G. N. Toggenburg, ‘Das Postulat der “Unabhängigkeit“ zwischen irreleitendem Mantra und glatter Notwendigkeit: das Beispiel der EU-Grundrechteagentur in Wien’, in: *Österreichische Verwaltungswissenschaftliche Gesellschaft* (Hrsg.), Schriftenreihe ÖVG, forthcoming.

¹⁸ M. Kjaerum and G. N. Toggenburg, ‘The Fundamental Rights Agency and Civil Society: Reminding the Gardeners of their Plants’ Roots’, in J. Pichler and A. Balthasar (eds.), *Open Dialogue between Institutions and citizens – chances and challenges*, proceedings of a series of workshops on Article 11(2) TEU in Brussels 2011/2012, 147-160, for an online version see http://www.eurac.edu/en/research/institutes/imr/activities/Bookseries/edap/Documents/2012_edap02.pdf.

¹⁹ Ramboll (2012), External evaluation of the European Union Agency for fundamental rights; N. Milanova (HRWF), ‘EU Agency for fundamental rights (FRA): a reality check’, 2011, available at <http://www.hrwf.org/Joom/images/reports/2011/fra%20a%20reality%20check.pdf>; B. Sokhi-Bulley, ‘The Fundamental Rights Agency of the European Union: a new panopticism’, in *H.R.L. Rev.* 2011, 11(4), 683-706; Ines Härtel, ‘Die Europäische Grundrechteagentur: unnötige Bürokratie oder gesteigerter Grundrechtsschutz?’, in: 4 *Europarecht* (2008), 489-513; R. Nuyens, *The benefit of the EU Fundamental Rights Agency within Europe’s Human Rights Regime*, 2007, thesis available at http://essay.utwente.nl/702/1/scriptie_Nuijens.pdf; G. N. Toggenburg, ‘The EU Fundamental Rights Agency: Satellite or Guiding Star? Raison d’être, Tasks and Challenges of the EU’s New Agency’, *SWP Comments 2007 / C 05*, available at <http://www.swp-berlin.org>.

²⁰ The Annual Work Programmes of the Agency are all available in full text online at <http://fra.europa.eu/en/about-fra/what-we-do/annual-work-programme>. See also e.g. G.N. Toggenburg, ‘Menschenrechtspolitik’, in W. Weidenfeld and W. Wessels, *Jahrbuch für Europäische Integration* 2013 (Baden-Baden: Nomos 2013), 203-208; G. N. Toggenburg, ‘EU-Grundrechtsagentur: Tätigkeiten an der „Zeitenwende“’, in: V. Deile et al. (eds.), *Jahrbuch Menschenrechte 2011* (Wien: Böhlau, 2010), 393-404; G. N. Toggenburg, ‘EU-Grundrechtsagentur: die Dynamik der Startphase’, in V. Deile et al. (eds.), in: *Jahrbuch Menschenrechte 2010* (Wien: Böhlau, 2009), 289-299; G. N. Toggenburg, ‘Die ersten Schritte der EU-Grundrechteagentur in Wien’, in: 11 *Jahrbuch für Menschenrechte* 2009 (2008), 274-286.

the backdrop of the overall fundamental rights landscape of the EU, is that the FRA adds value to the fundamental rights landscape in Europe by providing a variety of innovative elements, including²¹:

- socio-legal research covering all EU Member States thus providing comparable information and analysis across the EU²²;
- focus on rights holders (individuals) as opposed to duty bearers (states), thus providing information also on the situation on the ground (rather than the law in the books)²³;
- outreach to civil society, including through its Fundamental Rights Platform that brings together over 350 NGOs through annual meetings and online consultations;
- role as an independent expert body within the EU, including through its legal opinions on draft EU legislation (see the examples in section 4);
- a ‘joined-up governance approach’ to the protection of fundamental rights in the EU, also taking full account of the contribution of local and regional actors as well as the United Nations and the Council of Europe²⁴ and developing networks with equality bodies, National Human Rights Institutions or Ombudspersons.

It is against this backdrop that the European Council invited the EU institutions in the Stockholm Programme to “make full use of the expertise of the European Union Agency for Fundamental Rights and to consult, where appropriate, with the Agency, in line with its mandate, on the development of policies and legislation with implications for fundamental rights, and to use it for the communication to citizens of human rights issues affecting them in their everyday life”.²⁵

The Agency’s Founding Regulation and its Multiannual Framework: A Case of ‘Charter-Blindness’?

Many different motives were behind the creation of the FRA: one of them being the Charter. The Commission stated in 2005 that the FRA is meant to “*establish a centre of expertise on fundamental rights issues at the EU level. Establishing an Agency will make the Charter more tangible, and the close relation to the Charter is reflected in the Agency’s name*”.²⁶

Among stakeholders there was “a broad consensus in considering that the Charter should be the point of reference for the mandate of the Agency”²⁷ and the European Commission stated that the agency will be required to make “overviews of the EU situation on a regular basis, covering the same time

²¹ Compare FRA, *Bringing rights to life: The fundamental rights landscape of the European Union* (Luxembourg: Publications Office of the EU, 2011), available online at <http://fra.europa.eu/en/publication/2012/bringing-rights-life-fundamental-rights-landscape-european-union>.

²² Whereas international monitoring cycles look at different groups of States at different points of time, the Agency provides snapshots of all EU Member States at one single moment of time.

²³ To just give one example: for the FRA survey on gender based violence against women the Agency interviewed over 40,000 women across 27 EU Member States collecting data on the extent, frequency and severity of violence against women in the EU, including data on women's access to and experience of police, healthcare and victim support services.

²⁴ The weight FRA gives to the standards and mechanisms developed in the context of the Council of Europe and the United Nations is for instance reflected in the last chapter of its annual report that is dedicated in its entirety to international obligations. For 2012, see online at: http://fra.europa.eu/sites/default/files/annual-report-2012-chapter-10_en.pdf.

²⁵ The Stockholm Programme – an open and secure Europe serving and protecting citizens, in OJ 2010 C115 as of 4 May 2010, 1-38, 8.

²⁶ See the European Commission’s proposal for Council regulation establishing a European Union Agency for Fundamental Rights, COM(2005) 280 final as of 30 June 2005, 2.

²⁷ COM(2005) 280 final, 4.

period and using the Charter as a common frame of reference”.²⁸ Indeed, the founding regulation as proposed by the Commission prominently referred to the Charter in the regulation’s operational part.²⁹

This stands in contrast to the wording of the founding regulation as adopted in 2007 by the Council: Only two considerations in the Preamble refer to the fundamental rights catalogue of the European Union.³⁰ The ninth consideration states that the agency should in its work refer to fundamental rights “as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations. The close connection to the Charter should be reflected in the name of the Agency.”³¹

This “close connection” does, however, not spill over to the text of the regulation. Article 3(2) of the founding regulation sets out the substantive scope of the agency and hence defines the standards the agency is to apply in its work: FRA “shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union.” The two sources mentioned in this quoted provision (that is, in this form no longer in force) are the European Convention on Human Rights (ECHR) and the general principles of EU law – but not the Charter. Yet, there is a banal explanation for this omission: presumably, it was perceived as inappropriate to keep a reference to the Charter in the legally binding part of the founding regulation at a time when political developments led it appear unpredictable when (and whether at all) the Charter would become legally binding.³² The inclusion of a Charter reference in the body of the agency’s regulation as proposed by the European Commission was, in fact, criticised as a normative anticipation that would take something for granted that was not sure to happen: the Charter becoming legally binding.³³

It is submitted that this ‘Charter-omission’ is not of practical relevance since the pre-Lisbon founding regulation has to be read and interpreted from a post-Lisbon constitutional perspective. Therefore, the Charter is very well one of the main standards FRA has to take into account and apply under its mandate. This is indeed confirmed by the agency’s institutional practice (see section 4). From the perspective of ‘constitutional aesthetics’, however, it remains a blemish that the fundamental rights bill of the EU is not appropriately reflected in the founding regulation of the EU’s fundamental rights body (see below under 5).

From the perspective of the Charter, it is not only interesting to see how the Charter is (not) reflected in the founding regulation but also to throw light on how the Charter relates to the second important legal basis for the agency’s activities, its Multiannual Framework (MAF).

With regard to the material scope of the agency’s activities, the founding regulation establishes a two track system: Wherever FRA is operating on the basis of a request of one of the three major EU institutions it can deal with all issues that fall within the scope of EU competencies (provided that the

²⁸ COM(2005) 280 final, 37.

²⁹ It states in its Art. 3 Para. 2 that the agency shall, in carrying out its tasks, refer to fundamental rights “as set out in particular in the Charter of Fundamental Rights of the European Union as proclaimed in Nice on 7 December 2000”. See COM(2005) 280 final, 14.

³⁰ Consideration No. 2 reads as follows: “The Charter of Fundamental Rights of the European Union (2), bearing in mind its status and scope, and the accompanying explanations, reflects the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the social charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights”.

³¹ See the consideration no. 9.

³² It is recalled that in 2005 the draft treaty establishing a Constitution for Europe encountered major political resistance. The negative outcomes of the referenda in the Netherlands and in France left the treaty reform – including the ambition of rendering the Charter legally binding – hanging in the air.

³³ See Schlichting and Pietsch, ‘Die Europäische Grundrechteagentur’, in: (2005) 19 *Europäische Zeitschrift für Wirtschaftsrecht*, 588.

agency's financial and human resources so permit)^{34,35} All Charter rights can be the focus of such a FRA activity, irrespective of the nature of the requested action (such as a study, a survey or an opinion). The situation is different where the agency is not acting on a request but on its own initiative. In these cases, FRA's room for manoeuvre is substantially limited since it is required to "carry out its tasks [only] within the thematic areas determined by the Multiannual Framework".³⁶ What does this mean in terms of the agency's 'Charter-relevance'?

Due "to the political significance" of the MAF, the founding regulation establishes that it is the Council of the European Union "itself" who has to adopt the MAF.³⁷ The first one ran from 2007 to 2012, the second five year framework runs from 2013 to 2017 but was adopted only on 11 March 2013.³⁸ This new MAF covers the following nine thematic areas: "(a) access to justice; (b) victims of crime, including compensation to victims of crime; (c) information society and, in particular, respect for private life and protection of personal data;(d) Roma integration; (e) judicial cooperation, except in criminal matters; (f) rights of the child; (g) discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation;(h) immigration and integration of migrants, visa and border control and asylum;(i) racism, xenophobia and related intolerance."³⁹

According to the founding regulation, the Council when selecting MAF-areas has to stick to the following four conditions: the selected areas have to include "the fight against racism, xenophobia and related intolerance"; they have to be "be in line with the Union's priorities, taking due account of the orientations resulting from European Parliament resolutions and Council conclusions in the field of fundamental rights"; they have to have "due regard to the Agency's financial and human resources"; and, they must ensure "complementarity" with the remit of other EU bodies and international bodies, including the Council of Europe.⁴⁰

These are clear-cut conditions. The text of the MAF, however, gives a nebulous picture of what a 'thematic area' is. The MAF is phrased in an unsystematic way and appears to be hybrid in nature: some areas are specific fundamental rights, others are broad policy areas. For instance, the "respect for private life and protection of personal data"; "rights of the child" and "discrimination" reflect fundamental rights as listed in the Charter. This gives the impression as if the MAF would select some Charter rights and ignore others. The majority of elements listed in the MAF are, nonetheless, broad policy areas such as "information society", "immigration and integration of migrants, visa and border control and asylum" or "Roma integration". It is therefore submitted that the MAF cannot be characterised as a deliberate 'Charter picking exercise'. Rather the Charter creates a transversal normative matrix through which the Agency is supposed to look at a variety of policy areas.

Therefore the absence of certain Charter rights from the wording of the MAF can hardly be read as an exclusion of these rights from FRA's mandate. Social and economic rights are an important example in this context. Admittedly, proposals to include explicitly social and economic rights were neither successful in the context of the adoption of the first MAF (2007), nor in the context of the adoption of

³⁴ See Art. 3(1) FR.

³⁵ See Art. 5(3), second sentence FR.

³⁶ See Art. 5(3), first sentence FR.

³⁷ See consideration no. 11 and Art. 5 FR.

³⁸ See on this belated adoption the last section.

³⁹ See Art. 2 of Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, in OJ L 79, 21.3.2013, p. 1-3. This second MAF covers more or less the same areas as the first one, with the exception that "*Roma integration*" has been added as a new area and the "*participation of EU citizens in the Union's democratic functioning*" has been removed.

⁴⁰ See Art. 5 (2) FR.

the second MAF (2013).⁴¹ This does not mean, nevertheless, that the agency should not look at the rights as listed in the Charter's title on "solidarity". In fact, it would be difficult to fully grasp the broadly defined MAF areas if the agency would be excluded from dealing with "socio-economic" rights. For instance, "racism, xenophobia and related intolerance" is an area that is related to socio-economic rights as listed in the Charter, including the right of access to placement services (Article 29); fair and just working conditions (Article 31); social security and social assistance (Article 34); health care (Article 35). Similar can be said of other MAF areas.⁴²

One can therefore conclude that the MAF is not limiting FRA's normative scope and does thus not reduce it to a 'half-Charter-Agency'. The MAF rather selects policy areas the agency has to focus on. In these areas, the normative scope as defined in the founding regulation has to apply.⁴³ And as was argued above, the normative backbone of FRA's mandate includes the EU fundamental rights as they result from the ECHR but also from the Charter.

Nevertheless, it goes without saying that the MAF leads to a situation where not all of the Charter rights are of equal relevance to the agency's institutional practice. The areas listed in the current MAF are of specific relevance to the Charter titles on freedoms (title II) and equality (title III) and less so for the titles on citizens' rights (title V) and solidarity (title IV) with the other two substantive Charter titles on dignity (title I) and justice (title VI) being positioned somewhere in between.

The Charter in the Agency's Practice: Legal Benchmark, Structuring Tool and Administrative Matrix

FRA uses the Charter as a tool throughout its work. This functional approach is evident in at least three contexts briefly set out in the following section.

Firstly, the Charter is used as a normative benchmark where the agency is providing legal analysis. This is particularly the case where the agency is asked – in line with its founding regulation – to express its opinion on the "compatibility with fundamental rights"⁴⁴ of legislative proposals discussed at EU level.⁴⁵ Examples in this regard include FRA's opinion on the proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union where the agency checked the proposal against the presumption of innocence, right of defence, legality and proportionality of criminal offences and penalties, and *ne bis in idem* (Articles 48 to 50 of the Charter); right to property (Article 17 of the Charter) and access to justice, in particular rights of victims (Article 47 of the

⁴¹ Consideration No. 8 of the MAF decision states rather shyly the following: "the Agency should take into consideration the economic and social preconditions enabling an effective enjoyment of fundamental rights when collecting and disseminating data within the thematic areas established by this Decision".

⁴² "Access to justice" is of immediate relevance for environmental protection (Article 37 of the Charter) and consumer protection (Article 38), to mention only two articles. "Victims of crime, including compensation to victims of crime" may relate to the prohibition of child labour and the protection of young people at work (Article 32 of the Charter). "Roma integration" is a prime example of an area where all social and economic rights play a core role. "Discrimination" as a horizontal right is relevant for all socio-economic rights. "Rights of the child" is an area where the prohibition of child labour and the protection of young people at work (Article 32 of the Charter) is only the most prominent example of a relevant social right and so on and so forth.

⁴³ This does not mean that the MAF would not present a limitation. The MAF area of "judicial cooperation, except in criminal matters" shows that the broadness and reach of the MAF areas did not go unnoticed at the political level: without any rationale (apart from a political one) a highly relevant issue – namely criminal law – was withdrawn from the reach of the agency's own initiative activities. This shows that the MAF indeed has a steering function.

⁴⁴ See consideration no. 13 FR.

⁴⁵ See Art. 4(2) FR.

Charter).⁴⁶ When analysing the fundamental rights implications of the EU's proposed data protection reform package, the FRA drew particular attention to the freedom of expression and information (Article 11 of the Charter), the freedom of the arts and sciences (Article 13 of the Charter), the freedom to conduct a business (Article 16 of the Charter), rights of the child (Article 24 of the Charter), non-discrimination (Article 21 of the Charter) and access to justice (Article 47 of the Charter).⁴⁷ And, to give yet another example, the FRA checked the proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships against equality before the law (Article 20 of the Charter) and the principle of non-discrimination (Article 21 of the Charter).⁴⁸ The latter Charter provision was also central to the agency's assessment in its opinion on the proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.⁴⁹ In FRA's opinion regarding the draft directive on a European Investigation Order (EIO), the right to a fair trial (Articles 47 and 48 of the Charter) as well as privacy and data protection (Articles 7 and 8 of the Charter) formed the main normative benchmark the proposed piece of EU legislation was checked against.⁵⁰

Secondly, the Charter is used as a structuring tool in many of the FRA reports.⁵¹ This approach, on the one hand, links FRA work and its findings to clear-cut legal obligations. On the other hand, it provides visibility to the Charter as such. In this sense, the "close connection"⁵² between the Charter and the agency as alluded to in the Preamble of the founding regulation is not only a fact that characterises the agency's daily work but also becomes visible in the publications based on this work.⁵³

Thirdly, the Charter is also of relevance as a matrix that structures a variety of planning instruments of FRA. Its Annual Work Programme, for instance, structures the description of projects alongside the skeleton of the Charter. The Charter titles like "freedoms", "equality", "citizens' rights", "justice" become headings in a variety of planning documents reminding FRA staff of the normative basis of the agency's objective and tasks.

That the FRA uses the Charter as a legal benchmark but also as a structure for its planning documents as well as its reports is just the functional side to the relationship between the Charter and the agency. Much more relevant and interesting is, of course, the substantive relationship between the two – that is, the FRA findings on the implementation of the Charter on the ground.

It is nevertheless impossible to summarise all Charter-related findings of FRA since, as mentioned above, the Charter is referred to throughout the agency's work. I will therefore limit myself to some

⁴⁶ FRA Opinion-03/2012, 'Confiscation of proceeds of crime', Vienna, 4 December 2012, available at http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf.

⁴⁷ FRA Opinion -2/2012, 'Data protection reform package', Vienna, 1 October 2012, available at <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>.

⁴⁸ FRA Opinion - 1/2012, 'Property consequences of registered partnerships', Vienna, 31 May 2012, available at http://fra.europa.eu/sites/default/files/fra-opinion-2012-property-regimes_en.pdf.

⁴⁹ FRA Opinion - 1/2011, 'Passenger Name Record', Vienna, 14 June 2011, available at http://fra.europa.eu/sites/default/files/fra_uploads/1786-FRA-PNR-Opinion-2011_EN.pdf.

⁵⁰ FRA Opinion, 'Draft Directive regarding the European Investigation Order', Vienna, 14 February 2011, available at http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf.

⁵¹ In the first five years of its existence, FRA has published over 90 reports. These are all accessible in full text and often in various languages at: <http://fra.europa.eu/en/publications-and-resources>.

⁵² Consideration No. 9 FR.

⁵³ A FRA colour code is assigned to the different titles of the Charter. The colour of the most relevant Charter title forms the background colour of the cover page of the respective report. And the relevant Charter title – for instance "equality" or "justice" – is also indicated in a prominent yellow box on the upper right side of FRA reports. Moreover, FRA highlights in a box at the very beginning of all thematic reports which of the Charter articles are of most relevance.

remarks of a more horizontal nature, so on some of the work the FRA did on the Charter itself rather than on its specific provisions and their implementation.

It appears that within the EU the Charter is absent yet present at the very same time. It is present in the sense that it is used for legal arguments not only at EU level but also across the EU Member States. At the same time, however, the knowledge of the Charter and its reach remain limited.

Data collected and analysed by FRA confirm that there is a richness of references to the Charter in the courtrooms of the EU Member States. A considerable share of these references is made in contexts that fall outside the scope of EU law. There might, however, be a risk of two Charter interpretations – one within an EU context and another one that is applied in purely internal situations, so in national context beyond any EU law relevance. It appears that the sometimes blurred boundaries of EU law might contribute to a situation where “*national courts are still not entirely clear about how to apply the Charter*”.⁵⁴

The agency tries to address this need by, for example, producing handbooks. FRA has so far published a *Handbook on European non-discrimination law*⁵⁵ and a *Handbook on European law relating to asylum, borders and immigration*⁵⁶, jointly with the European Court of Human Rights (ECtHR). The former handbook sets out the body of non-discrimination law under the ECHR and EU law as a single, converging system. Similar handbooks taking the same approach are forthcoming in other areas of law, such as data protection and the rights of the child.

The lack of awareness of the Charter is, nonetheless, not only an issue among those who apply the law but also among the general population – the main ‘holders’ of fundamental rights. Some 64 % of the general population have heard of the Charter according to a 2012 Eurobarometer report.⁵⁷ This is an increase of 16 percentage points as compared to 2007. So the trend is positive. However, digging deeper, the results remain very sobering: only 11 % of the general population say they do actually know what the Charter is. The knowledge is generally low across countries with Spain having the highest knowledge levels at 20 % and France the lowest at 3 %. Particularly low is the precise knowledge of when the Charter does and does not apply: when given specific scenarios only 14 % of respondents are able to correctly identify in all three cases which are true and which are false.

FRA is expected to play an active role in clarifying the scope of the Charter to citizens and promote awareness about the Charter.⁵⁸ At the end of 2012, the agency launched a ‘Charter 4 mobile app’,⁵⁹ thereby offering a one-stop-shop on fundamental rights for mobile devices with regularly updated information on an article-by-article basis. For every Charter article, related EU-relevant information is rendered directly accessible: international law, CJEU case law, a selection of ECtHR and national case law, as well as related FRA publications. Moreover, FRA offers on its website a “Charterpedia” – a compilation of international, EU and national constitutional law in the area of fundamental rights, linked to the relevant Charter articles.⁶⁰

⁵⁴ I. Butler (2012), I., ‘The EU Charter of Fundamental Rights: What can it do?’, Open Society Background Paper, available at <http://www.opensocietyfoundations.org/sites/default/files/eu-charter-fundamental-rights-20130201.pdf>, 2.

⁵⁵ FRA, *Handbook on European non-discrimination law* (Luxembourg: Publications Office of the EU, 2012), available at <http://fra.europa.eu/en/publication/2012/handbook-european-non-discrimination-law>.

⁵⁶ FRA, *Handbook on European non-discrimination* (Luxembourg: Publications Office of the EU, 2013), available online at <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration>.

⁵⁷ Flash Eurobarometer 340, April 2012.

⁵⁸ European Commission (2011), ‘2010 Report on the application of the EU Charter of Fundamental Rights’, COM(2011) 160 final Brussels as of 30 March 2011.

⁵⁹ See <http://fra.europa.eu/charter4mobile/>.

⁶⁰ The European Parliament’s Civil Liberties Committee (LIBE) created this compilation, which FRA took over in 2008.

To give a last example for a Charter-related activity of FRA, reference can be given to a 2012 seminar on ‘Bringing the Charter to life: opportunities and challenges of putting the EU Charter of Fundamental Rights into practice’ organised with the Danish Presidency of the Council of the EU. Recommendations flowing from that seminar included proposals for additional actions⁶¹: it was, for instance, found useful to “publish a guide on the scope of application of the Charter” directed at legal practitioners and policymakers. It was also proposed to establish a network of existing systems and mechanisms for protecting and promoting rights. The purpose of such a network would be to guide individuals to the appropriate body when seeking assistance and redress, “so that no individuals are left without a response to their complaint, and the coherence of the fundamental rights system is demonstrated and reaffirmed”.⁶² This network could include “the European Commission, the European Parliament’s Committee on petitions, the European Ombudsman, the European Data Protection Supervisor, equality bodies, national human rights institutions, other institutions with a human rights remit and national authorities, the registries of the CJEU and the ECtHR as well as the FRA”.⁶³

Rendering the “Close Connection” Between the Charter and the Agency More Fundamental: A Triptych of Proposals

According to its founding regulation, FRA had to undergo an “independent external evaluation of its achievements during the first five years of operations on the basis of terms of reference issued by the Management Board in agreement with the Commission”.⁶⁴

The evaluation’s results were presented at the end of 2012 and concluded among others that FRA’s stakeholders see the agency as a “unique provider of comparative, EU-wide reports and data ... covering a need for objective and reliable information which was previously not catered for”.⁶⁵ Furthermore, the evaluation report states that “stakeholders perceive that, as a consequence of the mandate and the MAF, the Agency’s full potential towards providing advice in the field of fundamental rights is not utilised”. Moreover, the exclusion of police and judicial cooperation in criminal matters from the MAF “is seen by several stakeholders as inconsistent from the European citizens’ perspective, as this means that not all the fundamental rights included in the EU Charter on Fundamental Rights are covered by the mandate of the FRA”.⁶⁶

Against this backdrop, one could conclude that the founding regulation and the MAF run the risk of painting a misleading picture of an agency that is concerned with fundamental rights in some policy fields and not in others or – even worse – an agency that is tasked to look at some fundamental rights but not at others. In addition, the (for the rest very positive) external assessment points to another element: there were “several opinions regarding the independence of the FRA, which is seen as limited

⁶¹ FRA (2013), ‘Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice’, conference report, available at: <http://fra.europa.eu/sites/default/files/copenhagen-seminar-report.pdf>.

⁶² The scope of EU law and especially the reach of the fundamental rights obligations stemming therefrom are still far from being crystal-clear. The ‘fundamental rights landscape’ within the Union is composed of a large number of standards, institutions and mechanisms. An ongoing project at FRA is ‘CLARITY’, an acronym standing for “Complaints, legal assistance and rights information tools for you”. This project will result in a portal consisting of an online information tool providing information to victims on how and where they can make a complaint while mapping bodies providing victim advice and assistance – such as equality bodies and national human rights institutions and possibly trade unions, non-governmental organisations and legal advice centres.

⁶³ FRA (2013), ‘Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice’, conference report, available at <http://fra.europa.eu/sites/default/files/copenhagen-seminar-report.pdf>.

⁶⁴ See Art. 30 FR.

⁶⁵ Ramboll (2012), ‘External evaluation of the European Union Agency for fundamental rights’, 95, available online at http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf.

⁶⁶ Id., at 97.

due ... to its restricted mandate in terms of issuing at its own initiative FRA opinions regarding legislation”.⁶⁷ What is here addressed is not the agency’s operational independence (which appears to be beyond any doubt) but its lack to take autonomously a specific kind of decision: FRA opinions on legislative proposals are drawn up on full independence but it still remains a fact that they require the request of an EU institution in order to be at all possible.

In the following, three proposals are brought forward that could be taken into consideration should the (wording of the) agency’s mandate be revised in the future so that it can fully unfold its potential as a “full-Charter-body”. It is submitted that these proposals are small but relevant steps. Given that the current founding regulation is a flexible and broadly phrased instrument, there does not appear a need for further amendments, let alone an overall reform of the mandate. They should suffice to allow FRA to play a needs-oriented role in many contexts, including the rule of law initiative. And such changes would be well covered by EU primary law so that there is no need to wait for a treaty amendment to give “the EU legislator greater powers as regards the mandate of the Fundamental Rights Agency”.⁶⁸ But of course, from a political perspective, the fact that Article 352 TFEU (the article the Agency’s founding regulation is based upon) requires unanimity voting in the Council, leads to a situation where every single EU Member State can veto even the most minor reform of the Agency’s mandate. This is very different with the European Data Protection Supervisor (EDPS) whose mandate can be changed in the ordinary legislative procedure.⁶⁹ Against this background, Member States should in the context of the next amendment of the treaties consider, whether it would not be consistent to align the Agency’s situation with that of the EDPS. To mention the EU Fundamental Rights Agency in the treaties and to lay down that its mandate can be changed by acting in accordance with the ordinary legislative procedure would provide both: stability and flexibility. The treaty status of the agency would guarantee the very existence of an EU fundamental rights agency (stability) and the ordinary legislative procedure would allow the mandate to be changed where a qualified majority of Member States see a corresponding need (flexibility).

Turning to what is needed in order to clarify the agency’s role as a full Charter body three needs are brought forward here:

Firstly, the wording of the founding regulation should be “lisbonised”: now that the Charter is legally binding, it should be made evident that the EU fundamental rights body uses as its normative backbone the fundamental rights bill of the Union. This appears not only necessary from the perspective of ‘constitutional aesthetics’ but also important in order to avoid creating a distorted perception of what the agency’s normative backbone and its substantive scope are.

‘Lisbonising’ the language of the founding regulation would also entail making the EU’s founding values as enshrined in Article 2 TEU more visible. Currently, they are only partly⁷⁰ referred to in the preamble of the founding regulation. This is another anachronism that appears disturbing in times

⁶⁷ Id., at 97.

⁶⁸ So the view expressed in the speech 13/677 held by Viviane Reding on 4 September 2013: ‘The EU and the Rule of Law – What next?’, available online at http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm.

⁶⁹ Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data is based on Article 286 of the Treaty establishing the European Community. Article 286 (2) TEC read as follows:

“the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.”

⁷⁰ Since the regulation uses in its first consideration the Pre-Lisbon wording of Article 6(1) TEU, three EU founding values are not referred to: human dignity, equality and the rights of person belonging minorities.

where the discussion on the constitutional implications of the EU's founding values are no longer confined to academic circles but moved to the very forefront of European debates.⁷¹

Secondly, there appears a need to reform the MAF. In this context, it was proposed that the latter should be 'lisbonised' by including also the thematic areas of police cooperation and judicial cooperation in criminal matters. The responsible rapporteur in the European Parliament showed, in fact, "deep regret" that the Council could not agree on the inclusion of the thematic areas of police cooperation and judicial cooperation in criminal matters in the agency's new MAF 2013-2017. She argued that following the entry into force of the Treaty of Lisbon, police cooperation and judicial cooperation in criminal matters "have become part of the law of the Union and are therefore covered by the scope of the tasks of the Agency".⁷² The discussion within the legal services of the EU institutions was in this regard centred on the question whether the inclusion of the areas of judicial cooperation in criminal matters and police cooperation in the MAF could at all be done on the basis of the current founding regulation or would rather require a revision of the latter. However, what is advocated here is a seemingly more radical proposal: namely to get rid of the MAF altogether.

As was argued above, the MAF tends to be phrased in a hybrid language and is thus prone to be misunderstood. It is, of course, perfectly legitimate to require the agency to prioritise its work on certain policy areas. It remains, however, unclear why this prioritisation should be outsourced to a political institution like the Council of the European Union.⁷³ It is also perfectly understandable that EU agencies are not meant to "set their own political agendas".⁷⁴ Yet, there are many other ways on how one could guarantee that the agency's prioritisation is defined in close cooperation with the main EU institutions so that it is "in line with the Union's priorities, taking due account of the orientations resulting from European Parliament resolutions and Council conclusions in the field of fundamental rights".⁷⁵

In light of this, it is submitted that the list of FRA priority areas should neither be decided by the European Commission (as proposed by the Commission in 2005)⁷⁶, nor by the Council (as is laid down in the current regulation), nor by the European Parliament (as proposed in a Parliament committee in 2006)⁷⁷. It should rather be the agency⁷⁸ itself which establishes – in close cooperation with the three EU institutions – a multiannual programme providing the necessary degree of

⁷¹ See in this regard the focus section in FRA's 2012 Annual report, entitled 'The European Community of values: protecting fundamental rights in times of crisis', available online at http://fra.europa.eu/sites/default/files/annual-report-2012-focus_en.pdf. For a synopsis of the current discussions on a potential rule of law initiative at EU level, see G.N. Toggenburg, 'Was soll die EU können dürfen um die EU- Verfassungswerte und die Rechtsstaatlichkeit der Mitgliedstaaten zu schützen? Ausblick auf eine neue Europäische Rechtsstaatshygiene', ÖGfE Policy Brief, 10'2013, available online at http://www.oegfe.at/cms/uploads/media/OEGfE_Policy_Brief-2013.10.pdf.

⁷² See the recommendation on the draft Council decision establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights as of 8 November 2012, online at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0361&language=EN>.

⁷³ A fact that academia criticised, see, for example, J. Dutheil de la Rochere, 'Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty', in: *Fordham International Law Journal*, 6(2011), 1776-1799, at 1798; A. v. Bogdandy and J. v. Bernstorff, 'Die Europäische Agentur für Grundrechte in der europäischen Menschenrechtsarchitektur und ihre Fortentwicklung durch den Vertrag von Lissabon', in: *Europarecht* 2(2010), 141-164.

⁷⁴ See COM(2005) 280 final of 30.06.2005, 6 and 11.

⁷⁵ See Art. 5(2)(c) FR.

⁷⁶ See Art. 5(1), COM(2005) 280 final of 30.06.2005.

⁷⁷ See amendment no. 22 in LIBE 2005/0124 (CNS) as of 7 February 2006.

⁷⁸ In this sense already the EP's Committee for Constitutional Affairs, see amendment no. 31 in AFCE 2005/0124 (CNS), 27 February 2006.

prioritisation.⁷⁹ Such an approach would also avoid the risk of institutional blockage as was encountered in 2012.⁸⁰ In this context, it should be underlined that, under current law and contrary to what is envisaged in the founding regulation, the MAF is to be adopted on the basis of Article 352 TEU which results in a veto right granted to each and every EU Member State.⁸¹

Thirdly, the last of three proposals forming a ‘tritych’ of amendments would have the potential to render the link between the EU Charter of Fundamental Rights and the EU Agency for Fundamental Rights even more fundamental. This third proposal concerns the agency’s role vis-à-vis EU legislative proposals. The final report of the independent external evaluation mentioned above concludes that the agency is “an untapped resource” in the context of the legislative process at EU level. Indeed, according to Article 4(2) of FRA’s founding regulation the agency can only deal with EU legislative drafts when requested by the EU institutions to do so. This is limiting the agency’s role as a body scrutinising upcoming legislation that has fundamental rights implications.

Admittedly, in the past EU institutions (mainly but not only the European Parliament) requested FRA to scrutinize upcoming EU legislation. It appears, nevertheless, preferable if the agency was to express its opinions on draft legislation “without higher referral” and to “make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights”.⁸² It is submitted that it is counter-intuitive to make independent expert opinions on the “compatibility with fundamental rights”⁸³ of legislative proposals⁸⁴ dependent on a request by the (co-) legislator.

To conclude, FRA plays a relevant role to assuring that the rights as enshrined in the Charter do not remain black letter law but play a relevant role in the lives of individuals within the EU. The close to one hundred reports, opinions and surveys presented by FRA over its first five years use the Charter as a benchmark and assess to which degree its rights are upheld. In this sense, the link between the EU Agency for Fundamental Rights and the EU Charter for Fundamental Rights is of a vital nature. However, taking into account the recent entry into force of the Charter, this link is not sufficiently reflected in the agency’s founding regulation. Moreover, the MAF presents a form of external programming that is misleading and might be misread as reducing the agency to a ‘half-Charter-body’. It is submitted that there is no need for such a programming document to be released by the Council. It is further argued that the agency should be empowered to express itself whenever it is of the opinion that an EU legislative proposal raises a serious concern under the EU Charter of Fundamental Rights. Taking the Charter seriously might require taking proposals such as these into consideration. After all, leading by example does not come for free.

⁷⁹ An alternative would be to integrate the list of MAF areas in the new founding regulation (should the current one be revised). Such a scenario should however come along with a flexibility clause allowing the Agency to deviate from this list on its own initiative in cases where an urgent need arises.

⁸⁰ Since the Council failed to agree on the second MAF in due time, the stalemate of a MAF-less situation could only be avoided by mandating the EU Presidency to formally request the Agency “to submit on behalf of the Council a request to the Agency, in accordance with Article 4(1)(c) and (d), of the Regulation, to carry out the research and study activities and projects set out in the work programme, until such time when the adoption of the 2013-2017 MAF may require a revision of the work programme”. See Council conclusions of 20 and 21 December 2012, in OJ 2012 C 400, 5.

⁸¹ The FR establishes that the MAF is to be adopted on the basis of its Article 5. This is, however, a secondary legal basis within the meaning of the Court’s judgment in Case C-133/06 *EP v Council* [2008] ECR I-3189 and can therefore not be utilised. Any change of the MAF has therefore to use the legal basis of the founding regulation, namely Art. 352 TFEU.

⁸² See point 3.a.i. of the United Nations Paris Principles on the establishment of national institutions for the promotion and protection of human rights (the so called “Paris Principles” which are also referred to in consideration no. 20 FR).

⁸³ See consideration no. 13 FR.

⁸⁴ See Art. 4(2) FR.

