The Fundamental Rights Agency of the EU: a step on the way toward an integrated EU policy in the domain of fundamental rights

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<A>1. INTRODUCTION

The discussion on fundamental rights in the EU has very deep roots that sprouted almost at the same time as the European integration. The story, though told in hundreds of books, articles and reports, is still ongoing. As Elise Muir recently stated, "one aspect that should figure prominently in any forward looking reflection on the European project is the protection and promotion of fundamental rights. The theme runs across several recent crises, whether we discuss social rights in the context of the euro and financial shocks or rights of third country nationals as threatened by current world imbalances. The theme also cuts across all areas of EU intervention, be they internal or external."[1]

The story is long but still needs to be further explored, especially if one aims to focus not on the main actors performing on the European "stage" but on some more hidden and underexplored bodies. Among the many actors who have played and still play a significant role in the drama, the Fundamental Rights Agency (FRA) can be considered a background actor, the main characters of which are the Parliament, the Commission and – above all – the Court of Justice.

After a short overview over the pre-history of the FRA, the present essay deals first with the difference between negative and positive integration and its consequences. It then addresses the (late) establishment of the FRA and its difficulties as evidence of the problematic situation of fundamental rights in the EU. After a survey of the activities put forward by the Agency in its ten years of life, the essay closes with some remarks on the influence this apparently second level actor has played in the very complex and busy scene of fundamental rights protection within the EU institutional landscape.

<A>2. THE RAISING OF THE IDEA OF A MONITORING AGENCY FOR THE PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE

To address the role of the FRA within the development of the human rights at the EU level and its contribution to the protection of such rights, one has to go back to the year 1996, when

[1] E. Muir, *Reflections on the European Project: Some Thoughts on the Agenda*, VerfBlog 22 December 2016, Discussion on Chalmers, Jachtenfuchs and Joerges, 'The End of the Eurocrats' Dream: Adjusting to European Diversity'.

the *Comité des Sages*, composed of Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson, presented its ground-breaking report *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* at the Social Policy Forum. The report underlined the growing importance of human rights in the European and the international arenas[2] while denouncing, at the same time, the lack of comprehensiveness, the fragmentation and the marginalisation of the policies of European institutions in the field. As one of the remedies to this situation, the *Comité* suggested the creation of an agency, whose main features were outlined and explored under an institutional perspective in the well-known essay by Alston and Weiler. In that essay, the two prominent scholars suggested a new institutional framework able to put into place a fully-fledged European policy for the protection of human rights[3], in which the activity of a monitoring body was held to be of primary importance.

After the presentation of the report of the *Sages*, the Commission established another independent expert group on fundamental rights, chaired by Professor Spiros Simitis. This group of scholars was tasked with the elaboration of recommendations and suggestions for facing the urgent need for a comprehensive approach to the guarantee of fundamental rights. The report clearly emphasised the importance of judicial protection for fundamental rights and its explicit recognition by the Treaties by acknowledging that "it is vital to establish rights which are genuinely justiciable and which entail more than a passive obligation of non-violation."[4] At the same time, it stressed the fact that such protection, based on the duo of *charters and courts*, "…is by no means its only prerequisite. Legal remedies have to be complemented by legislative or administrative activities intended to implement and secure individual rights."[5] In other words, the role of courts (which was paramount in the first stage of the European integration), combined with the codification of rights in the Treaties, needed to be completed by a coherent institutional framework. And indeed one can find this in the report: "As imperative as an explicit recognition of fundamental rights is, attention must also be paid to furthering the protection of rights through policies and related organisational changes."[6]

As one can see, the two groups of experts that have worked on the protection of fundamental rights at the end of the last century agreed on the insufficiency of a protection based primarily on courts' activism; they proposed to add to the Treaties the explicit codification of such rights but, at the same time, perceived the need for a coherent policy based on adequate institutional arrangements. Only a similar "global" institutional framework was held to be able to generate the "comprehensive" approach to the protection of the rights of the European citizens which was perceived necessary for the EU at a time when Europe

[2] A. Cassese, C. Lalumière, P. Lauprecht and M. Robinson, 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000', in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press New York) 921–927

[3] P. Alston and J. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9 European Journal of International Law 658–723.

[4] Executive summary of the Report, in European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, *Report of the Expert Group on Fundamental Rights: Affirming Fundamental Rights in the EU: Time to act*, Unit V/D.2, February 1999, 5.

[5] Id. 13.

[6] Ibid.

was moving fast toward monetary union and enlargement.

Having assessed the insufficiency of the traditional instruments for the protection of rights, based on charters and courts as well as the need of a global policy put forward by a reformed institutional framework, a "fundamental rights agency" was envisaged – among a wide range of measures – to complete the institutional picture composed by the Council, the Commission, the Parliament and the Courts, as well as Member States.

Despite this widespread agreement on the need of this new dimension of EU action in the field of human rights, it took several years before the Fundamental Rights Agency was established in 2007.[7] The time span alone provides evidence of how problematic this step was perceived both by the European and international institutions,[8] and by the state governments,[9] all of them fearing an undue interference in their domains and in their competences. Moreover, the failure of the approval of the Constitutional Treaty in 2004 contributed to doubts about the opportunity of creating an agency for fundamental rights with a broad mandate as part of a complete fundamental rights policy, since both would lack a consolidated constitutional framework.[10]

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[7] O. De Shutter, 'The EU Fundamental Rights Agency: Genesis and Potential', in K. Boyle, *New Institutions for Human Rights Protection* (OUP 2009) 93, 136. See also, W. Hummer, 'The European Fundamental Rights Agency', in A. Reinich and U. Kriebaum (eds), *The Law of International Relations – liber amicorum Hanspeter Neuhold* (Eleven International Publishing 2007); D. Geradin and N. Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', in P. Eeckhout and T. Tridimas (eds), *Yearbook of European law* (OUP 2005) 137, 197.

[8] On the critical position of the Council of Europe, see O. De Shutter, 'The Division of Tasks between the Council of Europe and the European Union in the Promotion of Human Rights in Europe: Conflict, Competition and Complementarity', in M. Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013).

[9] The UK government stated, "Respect for fundamental rights has been for many years a general principle of the Community, and the Agency should look first at those human rights which thereby form part of Community law. In this context, the Charter of Fundamental Rights could also be used as a starting point, as a statement of rights, freedoms and principles applicable at Union level, bearing in mind its horizontal Articles and the official explanations. In addition, although it should not play a policy or operational role on human rights issues in third countries, it is for consideration whether the Agency should be available to provide assistance to countries interested in EU best practice, for example as part of the accession process or European Neighbourhood Policy. The UK believes that an Agency established with such a remit would be able to focus on tasks of greatest priority to citizens throughout the EU. Any role for the FRA based upon Articles 6 and 7 TEU would compromise its effectiveness and run the risk of overload. It would also lead to unwelcome and inefficient duplication with other established or developing institutions in the Council of Europe, within the Union itself, and within Member States – in the case of the latter also compromising the principle of subsidiarity". Summary of the UK position regarding the establishment of the European Fundamental rights Agency. PACE Doc. 10894 11 April 2006, available at http://ec.europa.eu. On the objections of the House of Lords, the German Bundesrat and the French Senate, see 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.

[10] The Lisbon Treaty was signed in 2007, in the same year that the Agency was established (15 February 2007). The Treaty of Lisbon and the EU Charter of Fundamental Rights became legally binding on 1 December 2009. Even though the Charter was not legally binding, the Agency used the Charter as a reference point of its activities and work, even before it was entered into force. See for instance, the FRA Opinion on a proposal for a Council Framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes (28/10/2008). See J. M. Schlichting and J. Pietsch, 'Die Europäische Grundrechte-agentur. Aufgaben – Organisation – Unionskompetenz' (2005) 19 EuZW, 587, 589. See also G. N. Toggenburg, *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?* (December 2013) 13 EUI Department of Law Research Paper. Available at http://ssrn.com/abstract=2368194 or http://dx.doi.org/10.2139/ssrn.2368194. See also, G. N. Toggenburg, 'Exploring the Fundament of a New Agent in the Field of Rights Protection: The Fundamental Rights Agency in Vienna' (2007) 8/7 EYMI, 624, 626.

Many of those doubts were dispelled during the different steps undertaken by the different EU institutions before the decision to create the Fundamental Rights Agency was made, but the basic constitutional problem remained unresolved. And, therefore, a compromise was agreed, according to which the Agency was established but not as part of an institutional framework able to design, enact and implement a fully fledged policy. This is the reason why one of the first documents tracing the path along which the Agency should act, i.e. the Founding Regulation[11] – together with the first Multi-annual Framework (hereinafter MAF) – designed a rather limited mandate, conferring to the Agency only nine thematic areas to be explored and monitored, thus explicitly excluding the area covered by the third pillar as well as a formal involvement with the procedure foreseen by Art. 7 TEU.[12] In other words, in contrast with the philosophy envisaged by the legal scholarship of the late nineties, the competent institutions ruling over FRA gave the Agency very narrow and scattered tasks reflecting (and not repairing) the fragmentation and the marginalisation denounced almost ten years earlier.

Despite the limits encountered by the FRA from the very beginning of its establishment, it is important to clarify the contribution offered by the activities of FRA – that are new and very important for a sound and comprehensive policy of protection of human rights – to the understanding of what it means in the present era to protect rights.

Protection of rights today needs to open itself to all the dimensions of possible rights violations. Such protection, in turn, should be based on a deep knowledge of the legal systems in which rights are embedded and their effectiveness, in order to *avoid* violations and to suggest to the competent institutions, on the basis of the acquired knowledge of the field, the best policies able to provide the necessary protection of fundamental rights. It is no matter that this idea was put in place only partially: it is important to underline that the original project was a very rational one and that this global goal must be pursued even at present.

<A>3. NEGATIVE VERSUS POSITIVE INTEGRATION AND THE NEED OF A MONITORING AGENCY FOR A SOUND POLICY IN THE FIELD OF FUNDAMENTAL RIGHTS

In parallel with the framing of the project of a comprehensive policy for human rights based on an independent monitoring agency with a broad mandate along with other arrangements in the existing institutional framework, legal scholarship put under criticism the monopolist role played by the Court in the protection of fundamental rights.[13] They underlined the incapacity

[11] Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1 (hereinafter FRA Founding Regulation).

[12] A recent article by political scientists, based on the so called "information processing approach to public organizations" shows, on the contrary, that "the FRA is able to circumvent its formal restrictions through the exploitation of the structural incoherence and gaps that are inevitable concomitants of political compromise in its daily operations". See T. Blom and V. Carraro, 'An Information Processing Approach to Public Organizations: The Case of the European Union Fundamental Rights Agency' (2014) 18 European Integration online Papers (EIoP), 1–36, available at http://eiop.or.at/eiop/pdf/2014-001.pdf.

[13] A. von Bogdandy and J. von Bernstoff, *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* (2009) 46 C.M.L.R., 1067. According to E. Miur, "the politicisation of fundamental rights

of the judicial system to overcome the unilateral approach labelled "negative integration," as opposed to positive integration, the latter being much more effective than the former. And indeed, there is a marked difference between positive and negative integration: the latter is confined to redressing the violation of legal principles (such as equality) or constitutional rights (such as data protection and privacy), while the former requires positive steps to be undertaken in order to achieve specific goals in terms of protection of rights. There is therefore an urgent need to bridge the cleavage between the two dimensions of rights protection.

This "positive" role of European institutions can be achieved by the Parliament, the Council and the Commission, provided that some basic reforms are introduced by the legislator. But, to be fully efficient, the action of such institutions must be prepared with and accompanied by data collection, information, and knowledge of the situation on the ground both at the European and national levels, and the involvement of civil societal entities.

All these activities, based on knowledge provided by experts and stakeholders, should be enacted by a monitoring body independently performing comprehensive activities in the field of rights protection. Those activities could pave the way to the elaboration of adequate "positive" policies, thus understood not as a *political* choice (often perceived as divisive[14]) but as a necessity imposed by neutrally assessed, structural, *technical* problems of a factual nature.

<A>4. THE MONITORING ACTIVITY OF THE FRA AND ITS RELEVANCE IN THE PROTECTION OF HUMAN RIGHTS

The same legal scholarship that has underscored the insufficiencies of Community policies in the field of human rights has also identified some causes of them. Among others, they have considered the incapacity of the European approach to human rights as deriving from a gap in the knowledge of the real rights situation on the ground. Taking as examples the UN bodies responsible for controlling the implementation of Treaties signed by public authorities, they proposed to transplant such examples at European and state levels;[15] the monitoring agency that they were furthering should have been capable of collecting such information "in a regular, ongoing and systematic fashion."[16]

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will inevitably remain intertwined with a strong constitutional framing. This would create pressure on the Court to increasingly use a human rights discourse and place it – as well as itself – in a position of greater centrality in the European political process", Reflections on the European Project: Some Thoughts on the Agenda, Verfassungsblog, 22 November, 2016 (cit. n. 1).

[14] J. H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision,* in European Law Journal, 1995, 1: 219–258.

[15] The relevance of monitoring activity for human rights protection at the international level is clearly explained by V. V. Stoyanova, 'The Council of Europe's Monitoring Mechanisms and Their Relation to Eastern European Member States' Noncompliance' (2005) 45 S. Cal. L. Rev., 739. See also J. Hughes and G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' (2003) 1 JEMIE, 1.

[16] Aston and Weiler, supra n. 3, 699.

This understanding of the value of information as a basis of political actions, as utopian as it may sound, surely played a strong influence on the most active bodies in the field of human rights, so that eventually, as discussed above, the FRA was established in 2007 and started working in 2008,[17] an era in which both the Austrian crisis (with the report of the three wise men) and the project of incorporating the Charter of Fundamental Rights into the Constitutional Treaty raised new interest in the issue.

In order to assess the role of this new body in the field of human rights, it is worth giving an overall picture of the activities put in place in its almost ten years of existence.[18]

Back in 2014, a doctoral thesis discussed at the University of Milan assessed that "although the Agency has in few years produced 81 reports, 5 handbooks in cooperation with the Council of Europe, 23 working discussion papers, issued 15 opinions, worked on 43 research projects and promoted dissemination strategies of a culture of respect for fundamental rights among the civil society, this institution is not very well known."[19] Since then, the FRA has increased its productivity. Data collected from the institution's website show the strong commitment of the FRA to human rights, in particular in the area of non-discrimination (also in part because the Agency was built upon the pre-existing EUMC[20]) and data protection. In the last 3 years the Agency has enlarged its field of activities even more. Since 2014, it worked on 21 items between projects and surveys (of which 9 are still ongoing or in preparation); it delivered 9 opinions (7 between 2016 and 2017).[21] Moreover, from 2014 to January 2018, the Agency published almost 40 reports on several and varied topics: access to data protection remedies, violence against women, migrants, disability, victims of crime, child protection, workers moving, freedom of business, healthcare, discrimination on grounds of sexual orientation, gender identity and sex characteristics, detention and so on. This enlargement of the field of interest of the FRA, especially in the macro-area of discrimination, can be linked to the second MAF, entered into force on 11

[17] A detailed report on the steps undertaken by EU institution as to the creation of FRA is offered by Blom and Carraro, supra n. 12, 15 On the same subject, see also M. Nowak, 'The Agency and National Human Rights Institutions for the Promotion and Protection of Human Rights', in O. De Schutter and P. Alston, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford and Portland, Hart Publishing) 91–107.

[18] On the premise of the creation of the Agency, see P. Alston and O. De Shutter, 'Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency', in P. Alston and O. De Shutter, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005).

[19] M. Giungi, 'Strengthening Fundamental Rights Protection at European Union Level: The Role of the European Union Fundamental Rights Agency' (PhD Thesis, University of Milan 2015). According to Blom and Carraro, supra n. 12, 3, the FRA is also rather neglected by political scientists studying the EU.

[20] The EUMC (European Union Military Committee) was established on the basis of the Kahn Commission proposal by the Council Regulation (EC 1035/97 of 2 June 1997).

[21] In 2014, the Agency produced the Opinion on a proposal to establish a European Public Prosecutor's Office; in 2015, the Opinion on the exchange of information on third-country nationals under a possible system to complement the European Criminal Records Information System; in 2016, an Opinion concerning an EU common list of safe countries of origin, an Opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information, an Opinion concerning requirements under Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities within the EU context; an Opinion on the impact on children of the proposal for a revised Dublin Regulation and an Opinion on the impact of the proposal for a revised Eurodac Regulation on fundamental rights. In 2017, it delivered an opinion on improving access to remedies in the area of business and human rights at the EU level; and moreover, an opinion on the impact on fundamental rights of the proposed Regulation on the European Travel Information and Authorisation System (ETIAS).

March 2013. As to the third MAF, entered into force on 1 January 2018, it is worth noting that it includes a list of thematic areas slightly more detailed than the first one adopted in 2008. Despite these additions, the FRA's scope at ten years doesn't seem so far from its start. The following table shows the new fields of action included during the years of each of the FRA's MAFs. It demonstrates that no big differences can be identified.

<Fields of Action in FRA's MAFs >

MAF 2007–2012	**MAF 2013–2017**	**MAF 2018–2022**
compensation of victims; access to efficient and independent justice	**victims of crime**, including compensation to victims; access to justice	victims of crime and access to justice;
/	Roma integration;	integration and **social inclusion** of Roma;
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 discriminations);	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;	**equality** and discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on the grounds of **nationality**;
asylum, immigration and integration of migrants; visa and border control.	immigration and integration of migrants, visa and border control and asylum.	migration, borders, asylum and **integration of refugees** and migrants.

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<A>5. THE ACTIVITY OF THE FRA AS A BRIDGE BETWEEN EU INSTITUTIONS AND CIVIL SOCIETY

Along with the monitoring activities, the *Comité des Sages* designed for the new Agency a second field of action as foreseen at the European Council meeting in Luxembourg in December 1997. In that framework, recommendations were put forward designed to strengthen the role of civil society in protecting human rights as the second face of the coin of

the new policy in the field.[22] The scholarship, in turn, has warned that "all relevant structures and institutions must be made more open and responsive to pressures from civil society and other watchdogs to respect human rights."[23] Not only the *Comité des Sages*, but also the Simitis Report stressed that "the guarantee of rights must be seen an open process, based on dialogue within civil society and capable of responding to new challenges."[24]

In these ten years this platform has been fundamental for the FRA's life. Following the idea that a general policy on fundamental rights should involve representatives of civil society, the Agency was tasked to include in its institutional framework a network of non-governmental organisations, social partners, research centres, representatives of competent public authorities and other persons or bodies that have to do with fundamental rights matters. Such a network should cooperate to establish a permanent dialogue at European level between institutions and civil society and to participate in discussions, meetings, conferences, campaigns, round tables and seminars both at the European and national levels in order to promote and disseminate the findings of the FRA.

As a consequence, a Fundamental Rights Platform was established and has played a fundamental role for the FRA life in these ten years.[25] The FRP is a network of societal bodies and institutions working in the field of fundamental rights, is understood as a "device" for exchanging information and sharing knowledge, and ensures cooperation between the Agency and the stakeholders. The Agency can request that the FRP make suggestions to the Management Board as to the Annual Work Programme, to give feedback on the Annual Report and to help disseminate outcomes and recommendations arising from the work of the Agency, which it has done with positive results.

<A>6. CONCLUSIONS

Examining the bulk of work done by the Agency since its establishment, one can wonder why its influence in shaping European and state policies on human rights is still relatively low.[26] The main actors in the field remain the courts, to which legal scholars and political actors still focus their attention. On the side of a more comprehensive fundamental rights protection, many of the problems envisaged in the late nineties are still unresolved. As it has been said, almost 20 years from the "powerful call (n.d.r. of Alston and Weiler)" for the development of coherent EU fundamental rights policies, "the EU does not have a fully-fledged competence to regulate fundamental rights." In 20 years, many steps have certainly been made both in the

[22] European Council Meeting in Luxemburg 1996 strengthening, in particular, training and education programmes concerning human rights, 12–13 December 1996.
[23] P. Alston, M. R. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford University Press 1999) 5
[24] Report of the Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act* (Simitis Report February 1999) 5.
[25] According to Blom and Carraro, supra n. 12, 11, the FRA is ranked high as to its "social" dimension due to the high level of involvement of private actors in the decision making process.
[26] As to the informal influence of FRA on the activity of EU institutions and of the Council of Europe, see Blom and Carraro, supra n. 12, 23–27. According to these scholars, "in terms of its political, administrative and judicial competences the FRA is a 'weak' agency". Nonetheless, the Council of Europe, the EP and the Commission have started to cooperate with FRA more intensively, thus allowing FRA to extend its monitoring activity to the domain of the former third pillar and of the Charter of Fundamental Rights.

field of negative duties and in the enhanced opportunities for positive interventions. Nonetheless, "the EU still has no direct mandate and institutional framework to develop a fundamental rights policy…"[27] and "the EU Court of Justice…cannot make up for the absence of the necessary legal and political commitments on the part of the other institutions."[28]

Today more than ever, the development of a fully-fledged EU fundamental rights policy is a promising path for rethinking the EU integration process itself.

In order to take this challenge on, however, we should be aware of the main causes that have prevented the flourishing of the EU human rights policy and, consequently, of the FRA's action.

First of all, the uncertainty about the constitutional basis for the EU activity in the field of rights might have played a role in limiting the activity of the FRA in a few listed areas. This limit, first taken into consideration by the report of the *Comité des Sages,* was reaffirmed on October 2004, when the Commission launched a public consultation on the Agency remit, tasks, structure, rights and thematic areas by issuing a Communication on the Fundamental Rights Agency. In that communication,[29] the Commission expressed its awareness on the delicate constitutional implication raised by the creation of the Agency. And the Council, when adopting the Founding Regulation, followed an even more prudent approach: as already said, it excluded both the third pillar and the implementation of Art. 7 of the TEU from the Agency's fields of action. This very cautious approach did not change even after the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights. As a result, at present, the EU still bears in itself a monitoring agency whose field of action has remained almost the same as ten years ago.

However, the status quo is difficult to change in the short run: indeed, according to Article 350 TFEU any change in the structure of the Agency needs to be unanimously taken by all Member States. Given the high degree of divisiveness of the human rights discourse within the EU framework (just think of the migrants issue or the "nuclear option" invoked for the Polish case), it is not likely that a unanimous decision on the FRA could be taken.

A second ground of weakness flows from the circumstance that the monitoring and assessing activity of the Agency is not considered an essential part of the decision making process in the field of human rights. As already mentioned several times, the original idea of a monitoring agency was deeply entrenched in the creation of a fully-fledged policy in the area of human rights by all the EU institutions.[30] But this suggestion remained partially ignored. One of the characteristics of the new policy originally envisaged was "the establishment of

[27] E. Muir, supra n. 1.
[28] Simitis Report, supra n. 25.
[29] Communication from the Commission, The Fundamental Rights Agency Public consultation document, COM (2004) 693 final.
[30] In the Nineties, one of the objectives of the proposed new human rights policy was "the acceptance of the fact that there is a need for a comprehensive and coherent EU human rights policy based on a clarification of the constitutional ambiguity which currently bedevils any discussion of the Community action in the field". Such a policy would have implied "the development of a pool of knowledgeable and experience personnel with the necessary technical and policy-making expertise in human rights, thereby overcoming the current dispersion of human and financial resources, especially within the Commission". Alston, Weiler, supra n. 3, 675.

detailed, systematic and reliable information bases upon which the various actors (including Member States, the Commission, the Council, the European Parlament and civil society) can construct integrated, calibrated, transparent and effective policies."[31] At present, the Agency's interventions remain puzzling: as to the reports, they are confined within the boundaries of the Founding Regulation and the MAF; as to the opinions directed to the EU institutions (such as those that the EP requests on legislative drafts), they depend upon the requests issued by the institutions themselves and only occasionally emerge from independent FRA action. The huge monitoring and fact-finding of the Agency only occasionally make the basis of judicial or legislative decisions.

This shows how far developed this system is where data collection, policy designing and enforcement activities are conceived as three steps of a unitary process.

The original idea – according to which "a veritable monitoring agency with monitoring jurisdiction over all human rights in the field of application of Community law"[32] should have been accompanied by "the establishment of a clear set of executive functions to be exercised by the Commission through the creation or designation of a Directorate-General with responsibility for human rights to be headed by a separate Member of the Commission"[33] and by "the development of a specialist human rights unit within the functions already envisaged to be performed by the new High Representative for the Common Foreign and Security Policy"[34] – still needs to be fully accomplished. However, the same original idea may represent today a new starting point for rethinking the EU fundamental rights architecture, which is very much needed in our times of crisis and constitutional challenges.

[31] Ibid., 674.
[32] Ibid., 677.
[33] Ibid., 677.
[34] Ibid., 677.