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MAKING FUNDAMENTAL RIGHTS A REALITY IN EU LEGISLATIVE PROCESS

Ex ante Review of Proposals for EU Legislative Measures for their Compatibility with the Charter of Fundamental Rights of the European Union

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ACADEMIC DISSERTATION

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ABSTRACT

This study looks at the *ex ante* review of fundamental rights in the EU legislative process. It examines the rights-based review, which is carried out at different phases of EU law-making procedure before the EU legal act concerned is formally adopted and entered into force. An *ex ante* review of EU legislative proposals is examined here with relation to selected substantive fundamental rights, most notably the right to privacy and the right to data protection. Therefore, the normative framework of the analysis of the EU legislative process consists of fundamental rights which derive from the EU Charter of Fundamental Rights and the European Convention on Human Rights and the case law of the Court of Justice of the European Union and the European Court of Human Rights.

Continuity and change in *ex ante* review of EU legislation will be examined by analyzing selected case studies involving concrete pieces of EU legislation that mainly fall under the Area of Freedom, Security and Justice - a highly sensitive policy sector from the point of view of fundamental rights. Most of the chosen legislative dossiers are inextricably linked with anti-terrorism measures. The research is predominantly of legal-empirical nature and intends to merge theory with practice in an analytical-descriptive way. The analysis of the selected case studies is guided by a reliance on such doctrinal and theoretical constructs of fundamental and human rights law as the test of permissible limitations on fundamental rights with the proportionality test at its apex. Moreover, aside from understanding fundamental rights as a set of negative obligations binding upon the legislature, due attention will also be paid to assessing how positive obligations regarding fundamental rights have been dealt with by the EU legislature.

In light of the major findings of the study, the EU system of rights-based constitutional review has significantly changed. This is due to the impact of the legally-binding EU Charter of Fundamental Rights entry into force in 2009, which carries fundamental rights aspects assuming increasing significance at the level of daily legislative activities by the EU institutions. Similarly, the Member States also appear to increasingly use "rights-language" in their national observations on EU legislative proposals. We are witnessing a considerable empowerment of EU *ex ante* review, but in a manner that this does not entail a corresponding weakening of the rights-based review by the courts, especially the CJEU. It is claimed that the EU system of rights-based review of EU legislation is evolving gradually towards a hybrid and essentially pluralistic system of review in which *ex ante* and *ex post* phases of review complement each other. Similarly, the fundamental rights review system of the EU involves a number of institutions and actors, at different levels and phases, carrying out their own part in the rights-based review of EU legislation as a whole. Given its essentially pluralistic normative and institutional composition, the EU's rights-based review system as a whole contributes to topical discussion on European constitutionalism and constitutional

pluralism. This evolution has led to fundamental rights being taken more seriously in the EU legislative process, which has also impacted institutions.

Keywords: Constitutional law, European Union, European Union law, Fundamental rights, *Ex ante* rights-based review of legislative proposals, legislative procedures of the EU

TIIVISTELMÄ

Väitöskirjassa tutkitaan EU-säädösten perustuslainmukaisuuden ennakollista valvontaa erityisesti perusoikeusherkällä EU:n vapauden, turvallisuuden ja oikeuden alueella. Kyseessä on eri tasoilla lainsäädäntöprosessin aikana tapahtuva perusoikeusvalvonta, johon osallistuu EU-toimielimiä ja muita toimijatahoja. Valvonta tapahtuu täten säätämisvaiheessa, ennen kuin EU-säädös on muodollisesti hyväksytty. Joulukuussa 2009 Lissabonin sopimuksen voimaantulon yhteydessä EU:n primäärioikeuden asemaan nostettu EU:n perusoikeuskirja on tärkeällä tavalla vaikuttanut perusoikeuksien asemaan EU-lainsäädäntöä valmisteltaessa.

Valtiosääntöoikeudellinen tutkimus pyrkii vastaamaan kysymykseen, miten perusoikeuksien valvontaa toteutetaan EU-päätöksenteon yhteydessä ja mikä on ollut perusoikeuksien vaikutus EU-säädösten muodostumisessa. Perusoikeuksien vaikutusta voidaan lähestyä lainsäätäjän negatiivisten ja positiivisten velvoitteiden kautta. Negatiiviset velvoitteet liittyvät perusoikeuksien rajoittamiseen, joka on mahdollista monen aineellisen perusoikeuden osalta perusoikeuskirjan ns. rajoitusartiklan nojalla. Tästä johtuen tutkimuksen tärkeä analyyttinen viitekehys on eurooppalainen perusoikeuksien rajoitustesti, joka rakentuu pitkälti kyseiselle määräykselle. Perusoikeuksien positiiviset velvoitteet koskevat perusoikeuksien edistämisvelvoitteita, jotka eivät ole olleet yhtä keskeisessä asemassa lainsäätäjän toiminnassa kuin rajoittaminen. Tästä huolimatta perusoikeuksien edistäminen on aiempaa näkyvämmässä asemassa EU-instituutioiden ja asiantuntijatahojen kannanotoissa eri lainsäädäntöhankkeissa. Tutkimuksessa lähestytään tutkimuskysymyksiä konkreettisten EU-lainsäädäntötapausten valossa. Monet säädösehdotuksista liittyvät tietosuojaan ja terrorisminvastaisiin lainsäädäntötoimenpiteisiin.

Tutkimuksen keskeisin tulos on, että EU-tasolla perinteisesti vahvan perusoikeuksien jälkikäteisen tuomioistuinvalvonnan rinnalla on kehittymässä ja merkittävästi voimistumassa ennakollinen perusoikeusvalvonta, jossa EU-lainsäätäjä on keskeisessä asemassa. Merkillepantavaa on, että EU-toimielimistä erityisesti Euroopan parlamentti on ottanut tärkeän roolin perusoikeuksien edistämisessä ja perusoikeuksien huomioonottamisessa perusoikeuksien rajoittamistilanteissa. Euroopan parlamentti on toiminut erityisen aktiivisesti saatuaan Lissabonin sopimuksen yhteydessä lisää toimivaltaa perusoikeuksien osa-alueella. Myös komissio on viimeisen vuosikymmenen aikana paremmin huomioinut perusoikeudet säädösvalmistelussa. Niin ikään asiantuntijatahojen, kuten EU:n perusoikeusviraston ja Euroopan tietosuojavaltuutetun, kannanotot ovat edistäneet perusoikeuksien asemaa osana EU-säädöksiä.

Huolimatta ennakollisen valvonnan vahvistumisesta, on EU-tuomioistuin edelleen tärkein perusoikeusvalvonnan toimija ja se toimii aktiivisesti, jos EU-lainsäätäjä epäonnistuu perusoikeuksien turvaamisessa. EU-tuomioistuimen lisäksi lainsäädäntöprosessissa toimivat instituutiot kuitenkin merkittävästi

aiempaa enemmän osallistuvat perusoikeusvalvontaan. Tämän kehityksen voidaan yleisesti nähdä vahvistavan perusoikeuksien asemaa osana EU-oikeutta, mikä heijastuu myös kansalliselle tasolle. Järjestelmä, jossa monet toimijat EU-lainsäädännön säätämisvaiheessa, toimeenpanossa ja soveltamisessa valvovat yksilön perusoikeuksien toteutumista, vahvistaa Unionin perusoikeusulottuvuutta. EU:n perusoikeuskirjalla on ollut erittäin myönteinen vaikutus tähän kehitykseen myös EU-lainsäädännön valmistelussa ja säätämisvaiheessa.

Asiasanat: Eurooppaoikeus, Euroopan unioni, Euroopan unionin lainsäädäntömenettelyt, perusoikeudet, perusoikeuksien ennakollinen valvonta, valtiosääntöoikeus

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"Don't lose your grip on the dreams of the past you must fight just to keep them alive."
Eye of the Tiger
- Sullivan, Peterik, 1982

Some people call writing a doctoral thesis a journey, some an adventure, while for someone it may be a systematic process of self-development. I'd call it a 15 round boxing match. Bruised and battered for boxing against myself, but so much richer of so many experiences and professional lessons learned I wouldn't change this doctoral exercise to anything else. No pain, no gain. Having once felt I'd rather be a shepherd than a part-time doctoral student I must finally say that this has been the best professional experience ever.

23 June 2016: The Brexit. The UK referendum paves the way for the UK leaving the European Union. Or maybe, rather than paving the way, it politically finalizes the whole issue. Still out of words, I now know I have to say something even more frankly and outspokenly: I'm a firm believer in the European integration process and this dissertation is a sincere European address on EU fundamental rights. European Union is too precious a community among European nations to be tossed in the trash simply due to short-term populistic policy objectives (i.e. winning next elections) of some politicians. European Union is worth embracing not least because of its fundamental rights dimension.

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This dissertation doesn't reflect positions of my current employer, Fortum Corporation, nor any of my previous employers, most notably Ministry of Foreign Affairs and Ministry of Employment and the Economy. Views presented in the following pages are purely those of the author.

Now, let's get ready to rumble!

In Espoo, Finland, 10 November 2016,

Kim Fyhr

CONTENTS

ABBREVIATIONS

ACTA	Anti-counterfeiting Trade Agreement
AFET	Committee on Foreign Affairs
AFCO	Committee on Constitutional Affairs
AG	Advocate General
CLC	Constitutional Law Committee of the Finnish Parliament
CJEU	Court of Justice of the European Union
COHOM	Human Rights Working Group
CoE	Council of Europe
COREPER	Committee of Permanent Representatives of the Member States
DAPIX	Working Group on Information Exchange and Data Protection
DG	Directorate General
DHS	Department of Homeland Security
DPA	Data Protection Authority
DROI	Sub-committee on Human Rights
EC	European Communities
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EHHR	European Human Rights Reports
EIO	European Investigation Order
EP	European Parliament
EPO	European Protection Order
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EURATOM	European Atomic Energy Community
FRA	European Union Agency for Fundamental Rights
FREMP	Working Party on Fundamental Rights and Citizenship
IA	Impact assessment
IAB	Impact Assessment Board
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IIA	Inter-institutional agreement
IPR	Intellectual property right
ITRE	Committee on Industry, Research and Energy
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OSCE	Organization for Security and Co-operation in Europe

PeVL	Statement of the Constitutional Law Committee (Perustuslakivaliokunnan lausunto)
PNR	Passenger Name Record
RoP	Rules of procedure
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRAN	Committee on Transport and Tourism
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations

I INTRODUCTION: SCOPE AND AIMS OF THE RESEARCH

1. Point of departure

This study explores *ex ante* review of EU legislative proposals for their compatibility with fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union. In other words, this study is about rights-based review of legislative measures within the EU. For this purpose, various phases of the EU's legislative process will be reviewed with a focus on questions such as the following: How are fundamental rights guaranteed by the Charter taken into account in the varieties of EU legislative processes? Who assesses the compliance of legislative proposals with fundamental rights? What are the grounds for such review? Why and how has rights-based *ex ante* review evolved? What is the relationship between *ex ante* review by the institutions of the EU and *ex post* review by the EU courts with the Court of Justice at their apex?

The status of fundamental rights in EU law is nowadays unchallenged, thus an in-depth analysis is unwarranted for such issues as: whether fundamental rights prevail over such fundamental market freedoms, free movement of goods, or the status of fundamental rights within the EU legal order. This is because the dominance of economic - or internal market oriented - fundamental rights has withered away due to the entry into force of the Lisbon Treaty in 2009, including the case law of the Court of Justice of the European Union (CJEU).[1] Indeed, the starting point of this research is that the entry into force of the Lisbon Treaty in December 2009 rendered the EU Charter of Fundamental Rights a legally binding rights catalogue with the same legal value as the founding treaties of the EU themselves, thereby revealing the constitutional dynamics of the EU Charter, particularly insofar as the CJEU is concerned. Indeed, while the other EU institutions started taking the Charter into account in their practices in the 2000s, the CJEU took notice of the Charter against a backdrop of judicial self-restraint until 2009.[2] However, the Charter has really become a point of reference for the Court from the Lisbon Treaty onwards.

For some time, the constitutional review architecture of the EU was predominantly, if not exclusively, based on the judicial review of the CJEU.

[1] It is important to notice that here I will utilize the Court of Justice of the European Union (CJEU) instead of the European Court of Justice (ECJ). The name of the Court was changed when the Lisbon Treaty entered into force. For the sake of coherence, I refer to CJEU throughout the text even if I refer to the time before it formally came into existence. Exceptions to this rule are direct quotations.

[2] Prior to the Lisbon Treaty, there were a few cases in which the Court did take judicial notice of the Charter as the *acquis* of fundamental rights recognized in the EU legal order in the 2000s. See e.g. the first reference by the CJEU to the Charter in Case C-540/03, Parliament v the Commission and the Council, paragraph 38.

The CJEU has always had the competence to declare invalid such EU legislative measures that conflict with the founding treaties of the EU or other norms of the EU primary law, including fundamental rights as part of the general principles of EU law. However, during the last decade we have witnessed a significant development in the EU law-making process as the EU institutions have taken a stronger role in assessing the compatibility of draft EU legislation with fundamental rights. The overarching objective of this study is to examine this rights-based *ex ante* review of EU legislative instruments at different levels and phases of EU legislative process. In light of the findings of this study, I dare to suggest that the evolution of *ex ante* review has significantly transformed the overall EU system of rights-based review. This shift has anchored rights-based review as an integral part of EU legislative process. It has also had a marked impact on the way that the substance of fundamental rights has been assessed.

Concrete EU legislative measures will be focused on later in this thesis through the prism of selected substantive fundamental rights, notably the right to privacy and right to data protection. This analysis will be guided by a reliance on such doctrinal and theoretical constructs of fundamental and human rights law as the test of permissible limitations on fundamental rights with emphasis on the proportionality test. Moreover, aside from understanding fundamental rights as a set of negative obligations binding upon the legislature, due attention will also be paid to assessing how positive obligations regarding fundamental rights have been dealt with by the EU legislature. What will be seen in the end is fundamental rights being taken increasingly more seriously in the EU law-making process. This fits well in the overall constitutional development of EU law, which has undergone significant changes over the years in relation to fundamental rights and constitutional issues in general. The role of constitutional issues has increased remarkably in European integration and in the same vein, the Charter has brought fundamental rights to the essential core of EU law. Therefore, it is possible to see that fundamental rights are nowadays probably stronger than ever in the EU legal order and the megatrend seems to be that their significance in the constitutional system of the EU is bound to grow even more in the future. This has an enormous impact on the pluralistic European constitutionalism, which sets the overall constitutional framework for fundamental rights protection within European integration.

2. Research objectives and major limitations

Given the development described above the primary research question to be answered in this study is:

How is ex ante review of fundamental rights carried out in the EU legislative process particularly in the Area of Freedom, Security and Justice and what is the impact of fundamental rights on the legislation?

In light of this question, I will tackle this research topic by analyzing how fundamental rights based *ex ante* review is executed in the EU law-making process. The most important issues therefore are the EU legislation and the impact of fundamental rights, as enshrined in the Charter, during legislative process. What pulls these two threads together are the various *ex ante* review mechanisms that aim at securing compliance with fundamental rights of the EU legal instrument before it is formally adopted and enters into force. At the heart of this activity are the EU institutions and the other actors participating in the law-making process. Constitutional review dealt with in this study is based on fundamental rights and is targeted on legislation.

The primary research question can be divided in the following sub-questions, which for their part refine the primary question and set it in the thematic context. This set of sub-questions consists of the following questions:

1) *What are the tools at the disposal of EU institutions in ex ante review in terms of limitation and promotion of fundamental rights?*
2) *Has the rights-based ex ante review proved effective in light of the selected EU legislative files?*
3) *How have ex ante review mechanisms shifted the balance of power between the EU institutions?*
4) *What has been the impact of European constitutionalism on ex ante review with many actors involved in the preview process?*

If we perform a conceptual analysis on the primary question, we should first look at the main concepts, namely the legislative process and the fundamental rights. Regarding the legislative process, I refer to the law-making process of the EU. I chiefly concentrate on the ordinary legislative procedure under the Lisbon Treaty.[3] This can be justified with the temporal restriction of this study - it focuses on the post-Lisbon era. I will tackle the legislative process in a rather straightforward fashion and present how *ex ante* review is conducted in an order of the legislative process. The presentation is therefore process-oriented instead of an institution-specific solution, since a procedural approach is more viable than too rigid an institution-specific approach. In addition, work economic reasons frame this choice. What I do not study is the EU decision-making process as such. Even though the ordinary legislative procedure is a focus of this dissertation it is unintended to represent the sole topic addressed. In addition to procedural aspects, the research discusses much in terms of substance, fundamental rights and their role in legislation.

This dissertation does not cover fundamental rights *en bloc* - the overall umbrella of an important group of general principles of EU law. The idea is to concentrate on a quite restricted number of substantive fundamental rights in the context of concrete EU legislative dossiers. It is quite natural that coherence needs to be built in linking the discussion to the EU regime of

[3] Special legislative procedures are largely excluded from the analysis. The same also goes for comitology and delegated acts, which represent very different forms of legislative process from the ordinary legislative procedure.

fundamental rights and the legislative procedure. The presented question suggests that I concentrate on legislative dossiers falling under Title V of Treaty on the Functioning of the European Union (TFEU): the Area of Freedom, Security and Justice (AFSJ). This choice can be justified with the fact that the fundamental rights related problems and issues are most often encountered in the AFSJ files. Before the Lisbon Treaty this was the case with the former third pillar issues. The focus on AFSJ files is also warranted because after the entry into force of the Lisbon Treaty, far-reaching institutional changes have been introduced into the decision-making in this field with the European Parliament's (EP) enhanced role as the co-legislator.[4]

Many of the case studies fall within the category of anti-terrorism legal instruments. These pieces of legislation in the field of anti-terrorism are very sensitive from the point of view of fundamental rights. Experience from these examples has shown that very often these legal acts can be problematic with regard to data protection. There are, however, also other legislative dossiers falling under the AFSJ that have been tackled in this study. The reason for this is that they demonstrate some common lines in the institutional changes in relation to *ex ante* review. Furthermore, the aim has been to get some critical mass for the analysis instead of having only one or two cases in the analysis.

The novelty of the research is therefore the overarching focus on how the key institutions involved in the EU legislative process carry out *ex ante* review instead of the traditional focus on *ex post* review of the CJEU. This study should therefore be considered as a new opening towards *ex ante* review of fundamental rights at the EU level. It also aims at contributing to linking the practical *ex ante* review in the legislative process to the wider theoretical framework of European constitutional pluralism. I will argue that this budding form of *ex ante* review has in very recent times become an integral part of EU legislative process and contributed to taking fundamental rights seriously in law-making. We can identify especially the advantage of having in place a system of checks and balances with regard to fundamental rights, which in my view has been a beneficial way to guarantee that if one institution omits a fundamental rights aspect of a draft EU legal instrument, there will be another institution to fill the gap by providing positions promoting fundamental rights. We have a reason to state that *ex ante* review is no longer in an embryonic form. We must nonetheless admit that change does not happen overnight and in some cases the CJEU has been forced to step in to the scene to remedy the situation when the legislature has not secured compliance with fundamental rights during the legislative proceedings.

The issue of permissible limitations to fundamental rights is of utmost importance for the output of this study. I first of all present the general context where permissible limitations find their way to the EU drafting phase of

[4] In spite of this conscious limitation I have not entirely excluded other pieces of EU legislation because also in the sectorial legislation in other policy areas, fundamental rights problems may become real. Such problems can often go unnoticed in these legislative files with no direct and obvious link to fundamental rights.

legislation. The presentation not only derives from European law as it stands, most notably Article 52(1) of the Charter, but equally importantly from the interpretation practice of the CJEU and European Court of Human Rights (ECtHR). By the same token legal research aiming at systematization of general dogmas regarding permissible limitations have been precious for visualizing the environment, in which permissible limitations are considered and operated. Furthermore, as for the case of proportionality, permissible limitations deriving from general dogmas will be set in the context of the concrete EU legislative dossiers. In light of the selected concrete examples, the importance of testing permissible limitations to fundamental rights will be shown. As the analysis draws to a close, we will be able to conclude that tests for permissible limitations carried out in the EU *ex ante* review have had a great impact on the final outcomes of legislative processes regarding various EU legal acts. The analysis focuses on proportionality, in particular. As will be demonstrated, proportionality has not been a mere principle to be taken into account in the law-making process but has indeed proved a gatekeeper with a decisive function of determining whether a draft legal act will be passed or not.

The test of permissible limitations is essential as a framework for the analysis. This is due to the fact that most of the fundamental rights set out in the Charter are subject to limitations and this is why the test can be utilized as yardstick in assessing the impact of substantive fundamental rights on legislation. Permissible limitations hence function as both analytic and systematic as well as a practical tool in tackling the research questions.[5]

Despite the fact that permissible limitations - i.e. negative obligations - are a key element in this study, I will also embark on the issue of positive obligations. The focus of this presentation has clearly been set on negative obligations, but for the realization of fundamental rights positive obligations imposed on the EU legislature to promote fundamental rights in the legislation in different ways is equally important. The first sub-question is related exactly to limitation and promotion of fundamental rights. In the analysis the practical tools that are being used by the EU institutions in *ex ante* review will be revealed with a view to assessing the limitation and promotion of fundamental rights in the selected EU legislative files.

The second sub-question of this dissertation focuses on the effectiveness of *ex ante* review carried out by different EU institutions. The answers provided are intended to shed light on changes made to EU legislative texts in the course of *ex ante* review of fundamental rights. I aim to identify how different EU institutions have removed problematic issues from the legal texts and addressed fundamental rights-related concerns in the *ex ante* review.

[5] The opinion of the FRA on Passenger Name Record is a neat illustration of the application of the permissible limitation test, not least because on p. 6 the FRA notes that the impact assessment of the Commission Services did not specifically mention this test and accordingly, the Agency regarded requirements for limitations of fundamental rights as meriting a deeper analysis in this context. Opinion of the European Union Agency for Fundamental Rights 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. Vienna 14 June 2011.

The third sub-question stems from the primary question to a large extent and is intended to identify the impacts of *ex ante* review of fundamental rights on power relations of the institutions. The goal is to determine the recent developments in terms of continuity and change, thus the analysis must be of a more general nature. It should also be noted that this question is not answered by providing an institution-specific analysis. Conclusions to be presented rather spring from the legislative process as positions of the institutions are analyzed in the course of the law-making process in a chronological order. Due to the need to focus mainly on the prevailing primary question I have chosen to give somewhat less attention to this secondary, but nevertheless interesting, question.

The fourth sub-question tackles the impacts of pluralistic European constitutionalism on the emerging *ex ante* review at the EU level. Here, I seek to address the interrelationship between *ex ante* review and *ex post* review. Furthermore, the relations between different forms of *ex ante* review conducted by institutions and stakeholders involved in the EU legislative process will be touched upon. The aim is to reveal different types of co-operation between institutions that are springing from the pluralistic European constitutionalism on one hand, and contributing to strengthening it on the other.

An overview will be made of interplay of democracy and fundamental rights within the frame of different models of constitutional review, be they vested in parliamentary organs or the courts. This point is pertinent with regard to the primary research question. It should also be noted that the intention is not to engage in a deeply theoretical discussion, but rather to offer some practical insights into different methods of *ex ante* review. An in-depth analysis would have required a very theoretical approach. In this presentation I have chosen the approach of tackling the issue in a more general way. I consider that changes in the institutional relations springing from *ex ante* review of fundamental rights are extremely important and that is why this evolution deserves to be discussed in even more detail.

In practical terms, I will examine how legal texts have changed in the course of EU legislative process. This means starting from the initial legislative proposals and going through consecutive amendments, comparing different text versions with each other, looking at legal discourses utilized by different EU institutions and bodies, and analyzing the impact of different positions in light of final legal texts. The analysis will be carried out based on rights, taking into account proportionality and the test of permissible limitations to fundamental rights. The hypothesis, at this point, assumes that the fundamental rights in legal texts have strengthened overall during the last years.

In connection with the analysis on evolving legislative texts, one inevitably comes across with the issue of competence.[6] Nonetheless, the analysis of the

[6] Pursuant to Article 5 (1) of TEU "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and

selected cases from the angle of competence is intentionally excluded from this thesis. Instead, the topic will be approached from the perspective of fundamental rights.

It is necessary to stress that I am operating at the EU level for this analysis, thus I do not study the national preparation of EU legislative initiatives, including the review of their compatibility with fundamental rights. Brief excursive remarks in this regard have, however, been made in the presentation.

3. Sources, methodology and key concepts

Fundamental rights, a body of substantive fundamental rights deriving from the EUCFR and the ECHR and the interpretation practice of the CJEU and the ECtHR, provide a critical normative framework for analysis of the EU legislative process. This framework builds especially on the Charter and as a consequence, in accordance with Article 52(3) of the Charter, also the role of ECHR is essential. The analytical-descriptive perspective of the study means that I will describe the phenomena relevant for this study and analyze their substance and impacts. An example could be a legislative proposal, which will be analyzed from the angle of different EU institutions' positions in the framework of law-making process.

For the analysis of law in action it seems to be the case that a jurist's toolkit is simply not good enough. When we try to get below the surface of law-making process, methods and scientific tools of social and political science prove especially useful and valuable. This is clearly due to the extremely political nature of legislative processes in the EU, with many EU institutions and other significant players involved in the multi-level process of EU regulation. The law-in-action component discusses to impact assessments in particular, an important source material for this study. A brief mapping exercise on durations of AFSJ legislative processes has also been carried out. For these reasons, this study finds its home-base somewhere in the intersection of law and political science. Even though this research can be positioned in between several branches of law, notably European Union law, constitutional law and international law, "the school" which this research has perhaps the closest link to is that of European constitutional law. This study focuses particularly on constitutional elements in safeguarding fundamental rights, especially in the EU. It can also be regarded to be of interdisciplinary nature due to its links to political science.

proportionality". The EU competence can be exclusive competence but also, and more often, shared competence with the Member States. The Union exclusive competences are defined in Article 3 and shared competence with Member States in Article 4 of TFEU. There is also a third but minor category of competence, namely supporting competence that is set out in Article 6 of TFEU. The extent and limits of the EU competence is always governed by the Treaty and consequently it is the CJEU that is the ultimate interpreter of the limits of the EU competence on a case-by-case basis in light of the Treaty.

Due to its legal-empirical character, this study is somewhat different from studies inspired by traditional legal dogmatics. It is a humble attempt to bring a quite novel approach to a field of research dominated by legal dogmatism.[7] In light of the results of the study it is rather easy to disagree with the views presented mostly in past times highlighting the need to exclude empirical elements from the research on constitutional law.[8] In my opinion, empirical research can bring added value to the discipline of constitutional law. In the following tome, a strong emphasis has been placed on the legislative process *per se*, and thus a very close link exists with legislative studies. Throughout this study I strive to merge theory and practice. In the pursuit of this goal, theories and studies on constitutional review have proved essential. Therefore, I sincerely hope that this thesis provides inputs to all disciplines interested in fundamental rights in the EU framework.

In order to gain some idea of the other sources used, the material may be divided into five main categories. First, we have to deal with the legislation itself. For a study on EU law, both primary and secondary EU legislation is needed. The constantly-present constitutional and fundamental rights angle requires observing the primary EU law, the Treaties. Secondary EU legislation, such as Directives are analyzed when we approach the sectorial AFSJ policies and the related legal instruments. This is the black-letter law part of the study. Second, we need to take onboard the analysis on *travaux préparatoires* of these EU legal instruments. This is the phase where the *ex ante* control of fundamental rights is present. *Travaux préparatoires* relevant for this topic is the preparatory material produced by the institutions involved in the legislative process – the initiator of EU legislation; the Commission and the co-legislators; the Council and the EP.[9] Third, the EU is a legal system constructed above all on court jurisdiction although at different levels. Therefore, court cases by various courts, most notably the CJEU, the ECtHR and national constitutional courts have been used. This is certainly important, regardless of the focus being set on the *ex ante* control. Fourth, even though the legal and practical value of statements and opinions of the EU Agency for Fundamental Rights (FRA) is not yet completely clear, the inputs of FRA can also be considered to fall within this group due to their strong steering effect

[7] For a classical notion of constitutional law it is worth quoting Georg Jellinek who found that "die Staatsrechtslehre ist, wie bereits erwähnt, eine Normwissenschaft. Ihre Normen sind von den Aussagen über das Sein des Staates als sozialer Erscheinung scharf zu trennen". Jellinek Georg: Allgemeine Staatslehre. Zweite, durchgesehene und vermehrte Auflage. Verlag von O. Häring. Berlin 1905, p. 49. In the same vein, Jellinek continues on the dogmatic content of legal norms making a sharp distinction between juridical method and methods springing from other disciplines: "Allein der dogmatische Gehalt der Rechtsnormen kann nur durch die ausschliefslich vom Juristen geübte Kunst der Abstraktion aus den rechtlichen Erscheinungen und der Deduktion aus den also gefundenen Normen geübt werden. Diese Rechtsdogmatik ist durch andersgeartete Wissenschaft nicht zu ersetzen." Ibid.

[8] Compare with Jellinek, "Alle Untersuchungen über empirische, biologische, naturwissenschaftliche, soziologische Behandlungsweise des Staatsrechtes betreffen in Wahrheit die soziale Staatslehre. Für das Staatsrecht gilt aber nur die juristische Methode.", p. 50.

[9] Examples of this are for instance the Commission's impact assessments and explanatory memoranda, the EP reports on EU legislative dossiers, the proposed EP amendments and Council preparatory documents. The use of Council preparatory material is however somewhat complicated due to limited access to documents. This should not, nevertheless, prevent us from addressing the whole scale of EU legislative work on the AFSJ. It should be noted that in the EU generally the value attached to *travaux préparatoires* in interpretation is not that significant as in some national legal systems. This material however can be regarded as an important expression of the political will of the legislator.

in the legislative process. FRA contributions have a significant impact on the outcomes of *ex ante* review mechanisms of the EU, most notably within the EP preview procedures. The effect of EP statements and opinions is therefore important but predominantly of indirect nature. In the discussed data protection EU files, the opinions and comments of the EDPS are of great relevance for this study and they have been used to a large extent.[10] Fifth, we can distinguish the group of legally non-binding sources, such as communications of the Commission, Council Conclusions and EP resolutions. Although these documents lack legal effect, they very often reflect the political objectives and upcoming or envisaged legal initiatives. For example, in the impact assessment work these non-binding instruments may function as important practical tools in everyday analysis on legal instruments. Relevant research literature on EU fundamental rights and law-making in the EU forms a considerable part of the research material.

Much has been written about fundamental rights in the context of the EU. A great number of studies concerning enforcement of these rights under the auspices of the EU already exist. However, an area that has not attracted that much attention is related to soft-law-oriented mechanisms that aim to protect and promote fundamental rights in the EU already at the preparatory phase of legislation. Some general studies describe the fundamental rights regime of the EU, of which especially one is worth mentioning. The EU and human rights edited by Philip Alston *et al.* is perhaps, even today, the most exhaustive study on fundamental rights in the EU, touching on several topical issues in this field of research.[11] It is clear that interest in fundamental rights aspects of European Union law has increased significantly during the last decade or so. This can be seen especially in the increasing number of academic dissertations on this topic. As a consequence I have been able to take advantage of the results of these studies concerning this important area of European constitutional law.[12] As this research is stressing constitutional aspects of EU law I have used a great extent of existing research literature on European constitutional law, of which numerous examples could be mentioned. However, I will simply reference one distinguished scholar, Joseph Weiler, whose works have been of great help to me in understanding the nature of European constitutionalism especially and the specific question of final authority in EU law.

The national control of EU fundamental rights is also addressed in this dissertation; In this context especially Juha Lavapuro's dissertation is considered due to analogies that can be drawn from review of national systems of constitutional control adapted to the EU level. The dissertation study of

[10] It is also possible to identify material at the national level that can in practical terms be juxtaposed with court rulings. This is the case with opinions and statements of the bodies conferred with constitutional powers in the preparatory phase of legislation, such as the Finnish CLC. In practice opinions and statements have strong impact in the constitutional control system. Moreover, this kind of material is very helpful in analyzing the *ex ante* review mechanisms at the national level.

[11] Alston Philip et al. (eds.): The EU and Human Rights. Oxford University Press. Oxford 1999. This book is, nevertheless, starting to be outdated mainly because of constitutional changes that have taken place or are currently occurring within the EU legal architecture.

[12] Human rights in international law are a topic of which one can find remarkably more source material for a legal study. This is not least because human rights have been an issue in international law much longer than in the EU law.

interest covers the new constitutional review of fundamental rights, where the scope has been set on the fundamental rights review mechanisms at the national level in Finland.[13] Lavapuro's focuses on the recent changes in the fundamental rights review in Finland also effectively covering the international and European impacts of these international and supranational impacts on the Finnish system, although these aspects are not directly the scope of the study. In addition to its institutional approach, the work also presents interesting argumentation in the margins of dimensions related to fundamental rights and democracy.

The research literature that has been used in order to capture the institutional framework has dealt with general EU law and also the particular EU institutions at stake in the *ex ante* review of fundamental rights in the EU legislative process. Previous research in the field of *ex ante* review is relatively scarce and it has centred more on the national systems of *ex ante* review. A lot has been written about judicial review aspects at the European level and the research has concentrated on the one hand on the CJEU and on the other hand the national courts, most importantly the prestigious constitutional courts of some Member States. So far one has looked more or less in vain for studies on *ex ante* review carried out by the EU legislative institutions. There are, however, quite recent example studies on European law with focus on constitutionalization and law-making. In particular the Constitutionalization of European Private Law by Hans-Wolfgang Micklitz deserves to be mentioned, but there are also other interesting strands of research in this regard.[14] This is especially true when it comes to the novel domain of the Lisbon Treaty, the AFSJ. The EU legislation being the backbone for the analysis of this study, it is clear that general studies on law-making process of the EU as such are of great importance.[15] Despite the fact that the AFSJ has so far been of less academic interest, simply because of its brief existence, it is possible to turn to previous research on the former third pillar matters– very often due to the palpable sensitivity of its legislation from the point of view of fundamental rights.[16]

The most important theoretical contribution that this thesis has benefited from comes from the debate on new models of constitutional control that took place at the turn of the millennium. The forerunners in this debate were, above

[13] Lavapuro Juha: Uusi perustuslakikontrolli. Suomalalainen lakimiesyhdistys. Helsinki 2010.

[14] Micklitz Hans-Wolfgang: Constitutionalization of European Private Law. Oxford University Press. Oxford 2014. For interesting insights into the impact of EUCFR on the EU law-making see also Di Federico Giacomo (Ed.): EU Charter of Fundamental Rights: From Declaration to Binding Instrument. Springer Netherlands. Dordrecht 2011. Equally intriguing an article in this sense is Muir Elise: The Fundamental Rights Implications of EU legislation. Some Constitutional Challenges. Common Market Law Review 51. 2014.

[15] For concise presentations on the ordinary legislative procedure of the EU see Craig Paul and De Búrca Grainne: The Evolution of EU Law. Second Edition. Oxford University Press. Oxford 2011. and Hartley T.C. The Foundations of European Union Law. Seventh Edition. Oxford University Press. Oxford 2010. Anna Hyvärinen offers in her article fresh insights into the ordinary legislative procedure by unveiling also interesting practices in the legislative procedure that are not necessarily evident if one only reads the relevant EU primary law provisions. See Hyvärinen Anna: Lainsäätäminen Euroopan unionissa - säännöt ja käytännöt. Defensor Legis 6/2012.

[16] A good example of a quite recent study on the evolution, or even revolution, of the former third pillar and its transformation into the AFSJ is Hinarejos Alicia: Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillar. Oxford University Press. Oxford 2009.

all, Stephen Gardbaum and Ran Hirschl, who particularly touched upon the constitutional control in the axis of sovereignty of the Parliament and judicial review.[17] They elaborated the change in this scale towards judicial review, also drawing attention to the idea of some hybrid models of constitutional control that aim to provide middle ground in terms of constitutional control. This happens by not vesting the control too deeply into either of these counter-poles exercising review, be that *ex ante* or *ex post*. The model constructed by Gardbaum especially emphasizes the importance of pluralism and constitutional dialogue and it is a useful tool when approaching the multitude of EU institutions and their role in the *ex ante* review of fundamental rights. This leads us then to handle the next topic, namely the often problematic relationship between democracy and fundamental rights. This harkens back to models that are in place in the pre-adoption and the judicial phases of constitutional control. Research on these topics has been highly valuable and in this connection I have also often encountered the democracy deficit of the EU. This is the case when I have tried to illustrate the status of democratic control over the legislative process on EU legislative dossiers that in this case have had a direct link to the sensitive sphere of fundamental rights.

Research on Finnish constitutional law has also been included to this study where research on the role of the CLC of the Finnish Parliament that is in a pivotal position in the interpretation of the Finnish constitution vis-à-vis European legislation is of great significance in particular.[18] Especially articles and books by Tuomas Ojanen have been a constant source of inspiration in this sense. The Finnish experience of *ex ante* review of legislation has a lot to offer also to the European discussion on fundamental rights and intermediary models in rights-based review. Even though many national circumstances steer the functioning of the Finnish system, we can also identify some useful elements that can be utilized in a wider European context. Finnish studies on *ex ante* review and the CLC can offer an interesting surface against which European fundamental rights questions and systems of preview can be reflected. The same goes for the Finnish test of permissible limitations to fundamental rights, where the research of Veli-Pekka Viljanen must be paid tribute to, in particular.[19]

Before we address the previously-presented research questions, it is necessary to resolve the conceptual apparatus that will be used in this study. The research concerns fundamental and human rights. One really cannot make a distinction between human rights and fundamental rights because these rights constitute a wholeness of rights, which is basically of undivided nature.[20] Considering fundamental and human rights as a mutually exclusive

[17] See Gardbaum Stephen: New Commonwealth Model of Constitutionalism. The American Journal of Comparative Law. Volume 49. Nr. 4, 2001 and Hirschl Ran: Towards Juristocracy. The Origins and Consequences of New Constitutionalism. Harvard University Press. Cambridge, Massachusetts, 2004.

[18] After the Finnish accession to the EU in 1995 more and more attention in the discipline of law has been paid to the Europeanization of the Finnish law. In the focus in this development have been the fundamental rights whose development has undergone different remarkable turns due to the impacts of EU law and also the ECHR fundamental rights system.

[19] Viljanen Veli-Pekka: Perusoikeuksien rajoitusedellytykset. WSOY. Helsinki 2001.

[20] It may be recalled that it is stated in paragraph 5 of the Vienna Declaration and the Programme of Action adopted in the World Conference on Human Rights on 14-25 June 1993 that: "All human rights

dichotomy is thus futile. There are, however, differences in the utilization of these concepts. Many scholars in this field of law have utilized the concept of human rights in their studies instead of fundamental rights. The difference between the two concepts has been explained, for example as follows: "human rights are of universal nature, i.e. are generally taken granted to everyone within a State's jurisdiction while some of the EU's 'fundamental rights' that originate from the general principles of law in some cases only belong to the EU citizens".[21] Consequently, the EU system of protection has faced criticism, especially regarding the condition of an individual to be a citizen of an EU Member State in order to be able to enjoy fundamental rights safeguarded by the EU. Another issue is the need of the case concerned to have a sufficient link to EU law. This situation is somewhat different from the system of protection provided, for example, by the ECHR system. However, it is characteristic for the EU system to link granting certain rights only for citizens.[22] Although this distinction remains valid, I have decided to use the term "fundamental rights" throughout the study.

Fundamental rights include several substantive fundamental rights. For the reason of work economy, these will not all be discussed here, however due to the importance of at least the right to data protection, the right to privacy and the prohibition of discrimination need to be discussed in a more detailed manner. This is mainly because of the significance of these rights for the legislative dossiers utilized in this thesis. It is important to acknowledge that some substantial fundamental rights have a stronger impact on fundamental rights than others. For example, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) could be used to evaluate these rights.

The impacts of fundamental rights can be quite different depending on the angle from which they are being viewed. It is quite evident that impacts on the legislator and the process of preparing legislation can vary from effects that fundamental rights may have on the courts. This means that the approach that has been accepted as the point of departure in this study differs from the traditional dogmatic approaches focusing on judicial activities and interpretations of the courts. We should not, however, omit this part of the legal cycle, as it provides important signals to the legislator in addition to the normative framework of the written EU law. In this case we should also briefly touch upon the form of fundamental rights. We can make a distinction between prohibitions of something and rights to something. In relation to prohibitions we should note that there are absolute fundamental rights, which

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are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

[21] Leino-Sandberg Päivi: Particularity as Universality. The Politics of Human Rights in the European Union. University of Helsinki. Helsinki 2005. p. 23.

[22] When dealing with fundamental rights protection in the EU there are some major differences in even EU Member States' notions of fundamental rights although the EU can be regarded as a culturally and historically unified actor in this field, at least at a general level. For discussion on the differences in conception of human rights in light of good examples see ibid., pp. 75-115.

cannot be interfered.[23] In other fundamental rights, the EU legislator has a wider room for manoeuvre.

On the non-derogable nature of certain fundamental rights, one should start by studying the emergency clauses of the ICCPR. In fact, Article 4 of the ICCPR only enables restricted possibilities to derogate from the obligations[24]. According to this provision, non-discrimination is indeed the gatekeeper when considering whether to open the door for derogation.[25] In this context, we should also pay attention to the form of these fundamental rights. We can distinguish between fundamental rights set out in the form of prohibitions and fundamental rights provided in the form of positive obligations. The latter can, for example, oblige the legislator to take action in order to promote or contribute to the realization of fundamental rights in its activities. These activities can include, for instance, legislation or budgetary decisions.

Fundamental rights issues may emerge eventually in the adjudicative phase, either in a national court or in the CJEU. National courts may and sometimes are obliged to lodge a preliminary reference to the CJEU with regard to accomplishing harmonious interpretation of EU law.[26] What effect, then, do fundamental rights have on policy-making of the EU and the EU Member States and the interpretation practice of the CJEU? Some major factors can be identified when considering the CJEU interpretation practice. Fundamental rights may have a function of an aid in the interpretation practice. Furthermore, fundamental rights as general principles of EU law can be regarded as grounds for judicial review of EU instruments.[27] In this regard, fundamental rights also apply when EU Member States are implementing EU measures at a national level[28] as well as in circumstances dealing with EU Member States' derogations from the EU competition rules[29].

4. The structure of the dissertation

The dissertation can be divided into three main parts. Part I provides an introduction to the whole research and leads the reader to the green pastures of the normative framework and theory relevant for this study. Part I thus

[23] In the EUCFR we can pinpoint above all Articles 4 (prohibition of torture and inhuman or degrading treatment or punishment), Article 5 (prohibition of slavery and forced labour), Article 19 (protection in the event of removal, expulsion or extradition) and Article 21 (non-discrimination).

[24] It is set out in Article 4, paragraph 1 "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

[25] It is worth remembering that ICCPR explicitly prohibits derogations under this emergency clause in relation to certain key Articles of the Covenant.

[26] For CJEU case law on conformity in interpretation of EC law see such cases as C-14/83 Von Colson, C-157/86 Mary Murphy, C-106/89 Marleasing and C-91/92 Faccini Dori.

[27] For further clarification see Tridimas Takis: General Principles of EC Law. Oxford University Press. Oxford 1999, pp. 23-27.

[28] See C-5/88 Wachauf.

[29] See C-260/89 ERT.

paves the way for Part II of the research, which is in a way the "steak" of the study. It builds on this general part of the study and examines law in action with the means of concrete EU legislative files. Part II can be regarded as an applied case study or rather as a collection of several legislative case studies. This is the legal-empirical part. The theory presented in part I will be in practical terms interconnected with concrete legislative files. Instead of focusing on one or two legislative files I have chosen another approach: In order to have a critical mass to illuminate continuity and change in this field of research, the number of main cases is altogether seven. The thesis will draw to a close in the concluding Part III. In Part III, the time is ripe to present *de lege ferenda* conclusions and findings that the study has given rise to. Furthermore, concrete proposals of how to develop *ex ante* review in the EU will be touched upon. Part I is launched by introducing the EU legislative process, which functions as the starting point for analysing the phases where and how *ex ante* review is carried out.

The challenge of this study is to establish a link between the theoretically oriented Part I and the practical Part II, which presents concrete legislative dossiers. I have tried to "facilitate the dialogue" between these two main elements of the study by applying the theory of Part I to these legislative files. The interaction of the two parts reveals some interesting insights into the recent development of the AFSJ specifically that go back to such important issues as institutional balance, competence, democratic legitimacy and effects of some substantive fundamental rights on the law-making process as such. The connection between the balancing of fundamental rights and due requirements for their limitation will be illustrated. Light will also be shed on the issue of how the impacts of fundamental rights on the legislator differ from the impacts on the courts. As we will see, there is a clear difference between these two forms of impacts and it is relatively easy to enter a caveat to the notion highlighting the unity of the two aspects.

"The own voice of the study" can mainly be heard in Part II, which sets the selected EU legislative dossiers in the normative framework consisting of fundamental rights. As will be demonstrated at a later stage, very often the issues of proportionality and permissible limitations have played a significant role in fundamental right considerations of different EU bodies involved in the EU decision-making. The contribution of this study to the scientific discussion on this topic therefore emerges in Part II and the final conclusions presented in Part III. The hypothesis at this stage would be that the *ex ante* review of fundamental rights is about to break through to the EU system of protection of fundamental rights. I will be arguing that the development can be constructed by reflecting concrete legislative exercises within the frame of theoretical and normative models regarding proportionality, permissible limitations and positive obligations. All this can be considered as a contribution to the strengthening of institutionally pluralistic and rights-based *ex ante* review of fundamental rights and hence also the democratization of fundamental rights in the EU. A ubiquitous issue, which in many ways determines the structural choices made in this study, is the procedural approach focusing on the subsequent steps of the EU legislative process. Despite the above described two-fold basic structure, the EU law-making

process is the general idea, which in a cross-cutting way gives the form to the presentation.

PART ONE: GENERAL FRAMEWORK OF ANALYSIS

II SETTING THE SCENE

1. The evolution of fundamental rights protection in the EU: A short introduction

The EU legal system is indeed one of its kind with such fundamental doctrines as the direct effect and supremacy/primacy of EU law.[30] EU law is supreme to the national law even if the conflicting norms deal with a norm of the EU law and a constitutional provision of an EU Member State.[31] The EU legal system carries an effective judicial control mechanism because the CJEU manages this task and sanctions have been put in place for not complying with EU law. Liability is the *ultima ratio* in securing compliance.[32]

The story of the evolution of the fundamental rights regime in the EC/EU legal order is well known. Nevertheless, we must be retrospective in order to have prospective views on the future developments. Fundamental rights have their roots deep in the historical European soil.[33] For a long time, this development was largely due to the activism of the CJEU. As a consequence of several bold judgments of the Court, fundamental rights guaranteed by constitutional traditions of Member States, the European Convention on Human Rights and international human rights agreements have, over time, become accepted as general principles of EC/EU law. Only later did these fundamental rights become codified in the Charter. The turning point in many respects was the entry into force of the Lisbon Treaty on 1 December 2009 and the subsequent change in the status of the EUCFR from a legally non-binding document to legally binding set of provisions with the position of primary EU law. The Treaty of Lisbon and the elevation of the status of the EUCFR is also the starting point of this study notwithstanding the importance of the development fundamental rights in the EU law.

As the European Community legal system began to be developed, fundamental rights did not play a very central role. The first cases concerning the protection of fundamental rights were dealt with by the Court of Justice of the ECSC. The landmark ruling of the Court in case Stork made it quite evident that fundamental rights fell outside the scope of the then still emerging Community law.[34] The absence of fundamental rights was not merely due to

[30] Case C-26/62 Van Gend en Loos and Case C- 6/64 Costa v ENEL.

[31] See case C-35/76 Simmenthal.

[32] See cases C-6/90 Francovich and C-46/93 Brasserie du Pêcheur.

[33] It should be noted that the WWII experience solidified the need to protect human rights at the international level since during the war, nation-states had executed unbelievable and extreme atrocities in the name of racist ideologies but also disguised behind the ideas of national sovereignty and exclusive national jurisdiction. Lauren Paul Gordon: The Evolution of International Human Rights. Visions seen. University of Pennsylvania Press. Philadelphia 1998. p. 139.

[34] Case C-1/58 Stork.

the way that judge-made law evolved, but because it was not present in the primary law of the Communities. The text of the ECSC Treaty was quite limited in its scope and lacked considerable fundamental rights provisions. The emphasis of EC Treaty, then, was mainly on the economic domain with a view to making the four freedoms a reality. The Treaty was largely silent on issues related directly to fundamental rights.[35]

In the late 1960s, the CJEU took the first steps to construct the doctrine of fundamental rights as general principles of EC law.[36] First, in its praxis the CJEU raised the constitutions of Member States as sources whence these fundamental rights in the EC legal framework derive. Second, the CJEU stated that international agreements are regarded as sources of these rights. The ECHR was given a special status in this regard. However, this bold and far-reaching manoeuvre was soon to receive a counter-reaction, especially from the Italian and German constitutional courts, mainly due to the absence of a written catalogue of fundamental rights at the EC level. There is, however, no need to engage in a presentation of the dialogue between the CJEU and national constitutional courts on the relation between EU law and national law[37] nor the discussion with ECtHR on the relation between EU fundamental rights and the ECHR[38].

2. The EU Charter of Fundamental Rights: From a political declaration to EU primary law

There are no uniform rules for *ex ante* review. Attempts thus far in turning the tide in this regard have mainly found their expression in the form of soft-law instruments. This is important because it may often be the case that soft-law at some point cascades down to hard-law. The EU has paid increasing attention to the assessment of how proposals for EU legislation meet the target of being in line with fundamental rights during the last few years. Especially the EUCFR has proved a major driver in this regard.[39] The Charter was

[35] We should note that Euratom Treaty lacks fundamental rights provisions and is furthermore quite limited in its scope. This being the case, Community law instruments deriving their legal basis from the Euratom Treaty are much fewer in number than those springing from the EU Treaty. Therefore the Euratom Treaty receives little attention in this presentation. See article Cusack Thomas F.: A Tale of the Two Treaties: An Assessment of the Euratom Treaty in relation to the EC Treaty. 40 Common Market Law Review 2003.

[36] Regarding the CJEU and the notion of fundamental rights as general principles of EC law, see the following CJEU cases: C-29/69 Stauder, C-11/70 Internationale Handelsgesellschaft, C-4/73 Nold, C-36/75 Rutili and C-44/79 Hauer.

[37] See Frontini (1974), Solange I (1974), Solange II (1986), Brunner v. Maastricht Vertrag (1993).

[38] For notable ECHR cases see Open Door Counselling v Ireland (1992) and Informationsverein Lentia v Austria (1993), Matthews v the UK (1999), Bosphorus v Ireland (2005). For important CJEU cases, see C-12/86 Demirel, joined cases C-46/87 and C-227/88 Hoechst (Level of protection regarding right to be heard in administrative processes and the limits of the right to privacy), C-374/87 Orkem (CJEU may adopt views on the interpretation of the ECHR differing from those of the ECtHR) and C-159/90 Grogan (The level of right to life of the unborn guaranteed by the Irish Constitution vis-à-vis economic freedoms/access to services, namely abortion).

[39] The Charter can and should be used in the EU legislative process in the same way as in the interpretation practice of the courts. On how judges use the Charter see Eriksen Erik Oddvar, Fossum John Erik and Agustín José Menéndez: The Charter in Context. In Eriksen Erik Oddvar, Fossum John

adopted in 2000 in the legally non-binding form of a solemn proclamation. After that, the Treaty establishing a Constitution for Europe was submitted for Member States' ratification. As a consequence of the failure to do so, the idea of Charter in a legally binding form was revived in the context of the Lisbon Treaty. On 1 December the EUCFR became a part of primary EU law.

Marek Safjan pinpoints five important features of the EUCFR: first, in addition to its legal significance, it is also an act expressing EU values. Second, it has the status of primary law. Third, it can be used for assessing the validity of secondary EU law. Fourth, the importance of "connecting points" between national law and EU law in the context of application of guarantees set out in the EUCFR has been taken up. Fifth, the EUCFR cannot be considered to be an autonomous source for EU powers with respect to national systems, nor can it be regarded as defining the autonomous field of the application of EU law.[40]

Article 51 of the Charter sets out important normative framework for the field of application of the EUCFR:

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

This does not mean that the Charter could not have an impact on the legislative process.[41] In fact, it is extremely important to note that the Charter

Erik and Agustín José Menéndez (eds.): The Chartering of Europe. The European Charter of Fundamental Rights and its Constitutional Implications. Nomos. Baden-Baden 2003, p. 27.

[40] Safjan Marek: Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict? EUI Working Papers. LAW 2012/22. Department of Law. p. 2. The usefulness of a Kelsenian approach in current constitutional debate on interaction between legal systems can be rather found in providing different options in clarifying validity and authority of EU law. See Richmond Catherine: Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law. In MacCormick Neil (ed.): Constructing Legal Systems. European Union in Legal Theory. Kluwer. Dordrecht 1997.

[41] A valuable research material that is available for researchers on EU policy-making is the eurobarometers. All the way since 1973 these surveys have been conducted on behalf of the Commission on various policy topics. It is a good way to find out how EU citizens feel about different EU policies. In 2012 a eurobarometer survey was published with a view to enlightening EU citizens' attitudes towards and notions of the EUCFR. The main finding of this research was that general knowledge on the application of the Charter was low among respondents. Furthermore, there was a common tendency to consider the EU institutions as having the same redress function as national courts or independent bodies. Generally, however, awareness of the Charter had increased compared to the previous survey finalized in 2007 before the entry into force of the Lisbon Treaty and the change in the legal status of the

is binding on the EU institutions. Therefore, the Commission, the Council and the EP must comply with the Charter when preparing EU legislation. The scope also includes other bodies involved in the legislative process, such as FRA. One could even argue that these aspects related to the scope call for a reinforced mechanism to comply with the Charter in the EU law-making. In the following section I will tackle the issue of how fundamental rights can contribute to the acts and behaviour of the EU legislator. Even though the Charter does not create new EU competence, we can see that it has an effect on the law-making process, both in a positive and a negative fashion. The EU now has a written catalogue of fundamental rights, which it lacked in its current form in the pre-Lisbon era, but which is now codified in the Treaty. For the European legislator the EUCFR will serve as a guideline. What is extremely important is to understand that the interpretation practice of the CJEU on fundamental rights also occupies a pivotal position in steering the activities of the legislator. In this context, we should not forget the ECHR, and related case law of the ECtHR, that has had a special impact on the evolution of EU law on fundamental rights.

Article 53 of the Charter sets out the level of protection of fundamental rights.[42] In the context of this dissertation, it is unnecessary to discuss the level of protection because once in the EU legislative process, the issues of legal basis, subsidiarity and proportionality have been considered adequate. We can therefore take it for granted that the level of protection is sufficient. It is enough simply to state that very often the EU level of protection has been in national discourses considered as some kind of a minimum standard that does not hold true.[43]

2.1. Drafting the Charter: aims and purposes

The Charter was drafted by the European Convention building on the mandate of the Cologne European Council.[44] The codification of the fundamental rights into one document was thus focused on in order to provide a response to the criticism expressed, for example, by constitutional courts of some Member States on the occasion of non-existence of an EU fundamental rights catalogue. In this sense, this exercise can be regarded as simplification. Conversely, the purpose was to strengthen the visibility and impact of

EUCFR. See Flash Eurobarometer 340. The Charter of Fundamental Rights of the European Union. Published in April 2012. Conducted by TNS Political & Social at the request of Directorate-General Justice. Survey co-ordinated by Directorate-General for Communications, p. 7.

[42] Pursuant to Article 53 of the Charter on the level of protection "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

[43] This has been the case in Finland where, in my opinion, only the right to property and maybe some aspects related to transparency like the public access to documents can regarded to be at a higher level of protection than in the EU. Similarly, many other fundamental rights would probably be at a lower level in Finland without the current EU and ECHR fundamental right protection regimes.

[44] Cologne European Council Conclusions of 3-4 June 1999 and particularly the Annex IV on the Drawing up of a Charter of Fundamental Rights of the European Union.

fundamental rights in the face of some major internal fundamental right issues being raised in the EU.[45]

One of the aims of the Charter was to better integrate fundamental rights into the legislative work of the Union. The note from the Praesidium is a particularly interesting document in relation to aims and purposes of the Charter in its initial mode, as it provides explanations to the complete text of the Charter. An especially important explanation is related to Article 51 on the Scope of the Charter. It is stated in the explanations that "the aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity".[46] It follows very clearly from this that the EU legislature, consisting of EU institutions, must act in compliance and within the framework of the Charter.

One of the key goals of the Charter was to gather the fundamental rights as interpreted by the CJEU into one EU document. As was clear at the time of the drafting of the Charter, the time for discussion about the legal status of the Charter would come later. In fact, this occurred quite soon with the intergovernmental conferences related to amending the Treaties during the 2000's and the work of the European Convention which prepared the European Constitutional Treaty that was to be rejected in the French and Dutch referenda in 2005. Practical work of the European Convention was carried out in Working Group II on Charter.[47]

2.2. The effects of the Charter in the EU's decision-making processes in the 2000s

After the solemn proclamation the Charter clearly functioned as guideline for both the Court and the EU legislature. The impact of the Charter is more visible in the interpretation practice of the Court than in the legislative proceedings of the EU legislature. There is one obvious reason for this: The Charter as a codification of the Court's fundamental rights doctrine is more an expression of the line of the Court than the will of the EU legislature.

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[45] See Shaw Jo: Law of the European Union. Palgrave. Basingstoke 2000, pp. 361-363. It should be recalled that in February 2000 fourteen EU Member States took bilateral actions against Austria as a result of nomination of the Austrian Federal Government in which also the right wing populist Austrian Freedom Party participated. The sanctions which were carried out outside the EU structure were lifted in September 2000 after a report by the so-called three wise men recommended putting an end to the sanctions. The sanctions against the nomination of the government coalition have been considered to be predominantly of political, not of legal nature. See Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja. Adopted in Paris on 8 September 2000.

[46] Note from the Praesidium. Draft Charter of Fundamental Rights of the European Union. Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 Convent 50. CHARTE 4473/00, Brussels 11 October 2000. p. 46.

[47] See Mandate of the Working Group on the Charter. The European Convention. CONV 72/02. Brussels 31 May 2002. There were two main aspects in the Working Group's tasks, namely the procedures for and consequences of any incorporation of the Charter into the Treaties and the consequences of any accession by the Union/Community to the ECHR.

From an institutional point of view, we can therefore conclude that the Charter played an important role already prior to its entry into force in a legally binding form in 2009 in the interpretation practice of the Court. We should nonetheless not overdo this impact simply because the Charter *per se* was already an incarnation of the case law of the Court. The bundling of these doctrines in an aspirational EU document failed to change the Court's stance on fundamental rights. The position of fundamental rights was already strong in the EU law before the entry into force of the Lisbon Treaty and this was mainly thanks to the Court's activism in the field of fundamental rights.

Notably during the 2000's, especially the CJEU has contributed to this development by its adjudication in some landmark rulings. In Schmidberger, the CJEU ruled that fundamental rights which were predominantly of a general nature prevailed over economic-oriented rights which have been considered until now a sacrosanct cornerstone of EU law.[48] It would be very difficult indeed to imagine that the Court would have adjudicated in a given case in a similar manner some 20 years ago. The view presented in Schmidberger was further confirmed in case Omega Spielhallen in which the Court weighed and balanced between freedom to provide services and rights to human dignity and found the case concerned in favour of latter aspects.[49] The Charter, taking into account Advocates General opinions on these cases, may also have had an impact in putting "non-economic" fundamental rights on an equal footing with other fundamental rights.

The effect of the legally non-binding Charter was much greater in the functioning of the EU legislature. At least the proclamation of the Charter gave rise to a considerable change in the way how the Commission started to deal with fundamental rights in the preparation of EU legislation.

A good example of a matter deriving from the Charter is the Communication on compliance with the Charter dating back to 2005.[50] This Communication draws attention especially to impact assessments in the legislative process, but also takes up other viable options in securing compliance with fundamental rights at the preparatory phase of the legislative process. In the Communication, the Commission identifies the cornerstone instruments to be used for making this objective real. The first one is impact assessment that must be conducted in connection with legislative initiatives. Impact assessments must include an evaluation of the different impacts on individual rights. The second aspect deals with explanatory memoranda included in the legislative proposals. The Commission finds that the explanatory memorandum should contain a section on the legal basis for

[48] Case C-112/00 Schmidberger. In this case at issue was weighing and balancing between free movement of goods which was the basis of transport company Schmidberger's argumentation and a decision of Austria not to prohibit an environmental protest that caused closure of Brenner motorway and thus impeded deliveries of cargo. The CJEU ruled the case in favour of Austria.

[49] C-36/02 Omega Spielhallen. In this judgment, the CJEU referred to its recent case law that has highlighted the significance of the ECHR. Furthermore, the Court held that "in Germany the principle of respect for human dignity has a particular status as an independent fundamental right". See paragraphs 33 and 34.

[50] See Communication from the Commission. Compliance with the Charter of Fundamental Rights in Commission legislative proposals. COM(2005) 172 final.

compliance with fundamental rights.[51] Nevertheless, these EU level initiatives are clearly closely connected to the pursuit for better regulation – a principle that has been pushed forward by institutions of the EU. Better regulation and better quality in the legislative process of the EU has been one of the most visible objectives of consecutive EU Presidencies during the last decade. The Commission has also placed more efforts on scrutinizing that any proposal for legislation is compatible with fundamental rights, particularly those set out in the Charter.[52]

The fact that the Nice European Council brought such a political commitment of taking fundamental rights seriously in EU activities probably gave significant impetus to the EP which at the time did not have legislative competence in the field of fundamental right sensitive third pillar. The EP has always taken a high profile in the promotion of fundamental rights despite the fact that it fell outside legislative proceedings of fundamental right related legislative files.

The Council, which is even today lagging behind in impact assessments of its amendments, could not stay out of this development. It had to increasingly strengthen its *ex ante* review of fundamental rights and generally reinforce the status of fundamental rights in its policies.

The outcome of Nice also gave input for the Convention whose task was to prepare the Constitutional Treaty of the EU. As is known, the Convention approach to the Charter, i.e. making it legally binding, was sustained and preserved in the architecture of the Lisbon Treaty. For the time after Lisbon it is difficult to exhaustively state how much of the changes was due to the changes in competences of EU institutions, dissolution of pillar structure and how much due to entry into force of the Charter in a legally binding form.

The entry into force of the Lisbon Treaty and the significant change in the status of the Charter have also changed the position of fundamental rights in EU law. I would, however, suggest that fundamental rights had a strong position in the EU law already before the Charter was turned into a legally binding document. If fundamental rights held a strong position already in CJEU interpretation practice, the legal situation does not change a great deal if these rights are now set out in the EU primary law. I would rather claim that the change in the status of the Charter has been an important message also to

[51] Ibid. p. 3. Impact assessments on fundamental rights aspects of legislative proposals bring added value to the important preparatory phase. The second point dealing with explanatory memoranda in my opinion risks becoming an empty shell with mere references to some key documents, such as the Charter. Furthermore, explanatory memorandum only reflects the Commission's thinking behind the initiative and will not become part of an EU legal instrument when it is adopted.

[52] See e.g. Communication on application of the Charter of Fundamental Rights of the European Union. SEC(2001) 380/3.

the EU legislature.[53] It has significantly contributed to bringing EU institutions to the apex of safeguarding Charter rights in law-making.[54]

2.3. The Lisbon Treaty and the Area of Freedom, Security and Justice

The EU offers its citizens an Area of Freedom, Security and Justice.[55] In Title 1 of TFEU where policy area-specific competences and their natures have been defined and set out, we should look especially at Article 4 that lists the areas of shared competence. This includes also the AFSJ.[56] The important bulk of provisions on AFSJ has been set out in Title V of the TFEU. To begin, the importance that should be attached particularly to the first paragraph of Article 67 cannot be overstated. It is stated in this paragraph that "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".[57] The fundamental right dimension has hence been elevated to the same level as the establishment of the AFSJ with all the related rules. The change in the EU legislative framework has brought significant changes to roles of the institutions especially in the AFSJ. One could well argue that the Union dimension in this policy area has increased and consequently the former third pillar of the EU has faced significant communitarization.[58] This can be seen in the empowerment of the EP the CJEU and the erosion of Member States' dominance in legislative dossiers concerning fundamental rights issues. This trend seems to enhance the possibility of the Commission to provide middle ground between the Council and the EP, the new actor in terms of equal status in the legislative process.

In the AFSJ, the Member States have maintained the partial right of initiative in this field but conditions for submitting initiatives are now stricter. Under the TFEU, it can now be made by at least seven Member States while under the EU Treaty it was possible for one single Member State to make the proposal.[59] This can be foreseen to anchor the right of initiative in the AFSJ more deeply to the Commission in the future to come. Additionally, we should see the role of the Commission also within the framework of the competences of the CJEU in the new constitutional framework in the field of fundamental rights.[60] This is the case because of the Commission's position as the Guardian

[53] For the development of the influence of the Charter on EU legislation see Violini Lorenza: The Impact of the Charter of Fundamental Rights on European Union Policies and Legislation. In Palmisano Giuseppe (Ed.): Making the Charter Rights a Living Instrument. Brill Nijhoff. Leiden 2014.

[54] For recent observations of impact of the Charter see De Vries Sybe, Bernitz Ulf and Weatherill Stephen. (Eds.): EU Charter of Fundamental Rights as a binding Instrument. Five Years and growing. Hart publishing. Oxford 2015.

[55] See Article 2 of TEU.

[56] In accordance with Article 4 "Shared competence between the Union and the Member States applies in the following principal areas:... (j) area of freedom, security and justice.

[57] Article 67 (1) of TFEU.

[58] Piris Jean-Claude: The Lisbon Treaty. A Legal and Political Analysis. Cambridge University Press. Cambridge 2010, p. 225.

[59] Piris, p. 191.

[60] On the role of the CJEU in the context of the Lisbon Treaty see Andriantsimbazovina Joël: A qui appartient le contrôle des droits fondamentaux en Europe? In Favreau Bertrand (Ed.) La Charte des Droits Fondamentaux de l'Union européenne après le traité de Lisbonne. Bruylant. Bruxelles, 2010, pp. 39-40.

of the Treaties. In the field of judicial co-operation in criminal matters and police co-operation the Commission is now also allowed to bring infringement actions.[61] Drawing inspiration from international organizations it can be noted that much depends on the Member States' willingness to change the fundamental matters such as power exercised over the Member States.[62]

This thesis aims to pre-eminently tackle the fundamental rights-based review that takes place in the legislative phase. Despite this perspective, the very recent approach of the CJEU especially in the AFSJ should also be highlight. It has become evident that with the entry into force of the Lisbon Treaty, the CJEU has also been among those institutions whose powers have grown. Previously, the CJEU held a restricted role in the matters falling under the intergovernmental pillars of the EU, but as a consequence of the latest Treaty amendments, the CJEU has penetrated into the interpretation of the former third pillar that is currently called the AFSJ.[63] This is of particular interest for this study because after all, the CJEU is the ultimate interpreter of the primary law of the EU and has before the Lisbon era been the major contributor to the emergence of fundamental rights in EU law.

The EU law regulating the third pillar of the EU was long considered to be a type of public international law, while lacking certain elements of EC measures, such as direct effect and primacy.[64] This is the case despite similarities to legislation under the former Community pillar. Furthermore, this legislation adopted outside the framework of the Community was different from legal instruments adopted within the framework, especially because of its enforcement with less importance attached to the CJEU for reasons of less room for legal manoeuvre. This, for its part, had an empowering effect on the national courts in this sphere. In spite of this, the CJEU engaged in bold interpretations also in the sphere of the third pillar ranging from cases *Pupino* to *Kadi*.[65] In *Pupino*, the CJEU stretched the obligation of loyal cooperation conform interpretation to cover also third pillar matters and secondly in Kadi blurred the demarcation line between pillars by pushing forward with the notion of coherence of EU law with the EC and EU law covered.[66] De Búrca has considered that the CJEU has expressed especially in *Kadi* the approach of judicial pluralism.[67]

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[61] Piris, p. 188.

[62] Steiner Henry J., Alston Philip and Goodman Ryan: International Human Rights in the Context. Law, Politics, Morals. Third Edition. Oxford University Press. Oxford 2008, p. 670.

[63] The increase of competence of the CJEU has occurred particularly in the domain of AFSJ. As Hinarejos has shown, the common foreign and security policy, that previously formed the second pillar of the EU, has also gone through a significant change, with its own special features, in terms of the competence of the CJEU. See Hinarejos Alicia: Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental pillar. Oxford University Press. Oxford 2009 , see pp. 122-182.

[64] Hinarejos, p. 17.

[65] See C-105/03 Criminal proceedings against Maria Pupino and C-402/05 Kadi.

[66] For a concise outline and analysis of the case Kadi from the angle of constitutional pluralism see Anthony Gordon: EU Law's Fundamental Rights Regime and Post-National Constitutionalism. In Birkinshaw Patrick and Varney Mike (eds.): The European Union Legal Order after Lisbon. Kluwer Law International. Alphen aan de Rijn 2010, pp. 188-196.

[67] De Búrca Gráinne: The CJEU and the international legal order: a re-evaluation. In De Búrca Gráinne and Weiler J.H.H. (Eds.): The Worlds of European Constitutionalism. Cambridge University Press. Cambridge 2012, p. 148.

The Lisbon Treaty means above all a drastic change in the nature of former third pillar law extension of judicial control into this sphere.[68] There has long been resistance towards increased powers of the CJEU in the previous third pillar of the EU, which was very much due to strong positions of some Member States, most notably the UK. This underscores the importance of the intergovernmental nature of this pillar.[69] The changes brought to the core of EU primary law, especially regarding the AFSJ, is likely to bring clarity to the nature of law that comprised the former third pillar, and in terms of judicial control. According to some estimations, it may also remove the need for judicial activism.[70] Further to this, the change in the constitutional framework will also most likely lead to further empowerment of operational support Agencies, such as Europol and Eurojust, that are functioning in the former third pillar. The role of the national Parliaments has strengthened in many ways as a consequence of the Lisbon Treaty. The most significant change has obviously been the national Parliaments reinforced position in reviewing the principle of subsidiarity, but there are also interesting amendments that go directly to the AFSJ, too.[71] National parliaments can have their voice heard in the EU decision-making process. There are, however, a couple of limitations to this. First of all, the voice of the parliament is of indirect nature because it will be exercised through the national government. Second, it may be the case that not all national parliaments pursue to exercise this.[72]

As the AFSJ was established in the context of the Lisbon Treaty, most of the upcoming legislation in this field was transferred to the framework of ordinary legislative procedure.[73] The emergence of the EP as a co-legislator will probably have a very profound effect on fundamental rights at the EU level and hence on the whole constitutional framework governing this very sensitive sphere.[74] Legal instruments of the former third pillar of the EU – for example Council Framework Decisions – which were previously used in this field, can now be replaced with Directives and other legal instruments.

Jean-Claude Piris, a merited scholar and a long-serving Director General of the Legal Service of the Council and thus the man behind the practical execution of many Treaty changes, has commented the Lisbon Treaty from the point of view of AFSJ as follows: He considers that the communitarization of measures affecting every citizen has been brought under full parliamentary

[68] For analysis on impacts on such basic premises as direct effect and primacy see Hinarejos, p. 49

[69] See i.a. Denza Eileen: The Intergovernmental Pillars of the European Union. Oxford University Press. Oxford 2002, pp. 314-315.

[70] Hinarejos, p. 189.

[71] Pursuant to Article 12 c) of TEU "National Parliaments contribute actively to the good functioning of the Union…by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area….".

[72] Norton Philip: National Parliaments and the European Union: where to from here? In Craig Paul and Harlow Carol (Eds.): Lawmaking in the European Union. Kluwer Law International. Dordrecht 1998, p. 211.

[73] Pursuant to Article 67 paragraph 1 of the TFEU: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

[74] The sensitivity of the area of fundamental rights can be expected to be even more visible as further co-operation and integration is needed in matters related to internal and external security. See Piris Jean-Claude: The Constitution of Europe. A legal Analysis. Cambridge University Press. Cambridge 2006, p. 195.

control both at the European and national levels. Together with the extension of powers of the EP, the national parliaments now also have a greater role and the so-called citizens' initiative has been introduced.[75] As a solution to the democracy deficit problem, Piris sees the stronger involvement and greater powers of national parliaments in the EU decision-making process. Steps in this direction have been taken in the Lisbon Treaty, but Member States have still organized the involvement of their parliaments in quite different ways.[76] The significance and visibility of this policy area has obviously increased remarkably, especially due to the war against terrorism that was launched by the United States and its allies as a response to large-scale terrorist attacks against civilian targets. In addition to terrorism, other types of organized international crime have also enhanced the importance of the former third pillar of the EU. This makes the AFSJ an area in which the EU can also show its citizens the added value that the Union can bring into this field with enhanced co-operation between the Member States. This not only addresses the need for confidence building and increasing credibility, but a real necessity to work closely in the international field to fight such phenomena as international crime.

[75] Piris Jean-Claude: Where will the Lisbon Treaty lead us? In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, pp. 60-61. Later, Piris concludes that "the irruption of national parliaments into the EU legislative process is especially important, at a time when the European Parliament has failed once again, in the June 2009 elections, to attract more voters and, therefore, more legitimacy". Ibid., p. 65.

[76] Piris, p. 70-71. Piris considers that how national parliaments organize their scrutiny of their governments in the EU decision-making process can be arranged in a flexible manner using for instance the following options: a provision in the national constitution, a law adopted at the time of ratification of a new EU Treaty, a judgment of the constitutional court, a formal agreement between the parliament and the government and practices accepted explicitly or implicitly by the government.

III Fundamental rights impact assessment in various phases of EU legislative procedures

The must first be a policy objective. If the intention within the Commission is to refine it into a legislative proposal, an impact assessment will be carried out. At this point it is the Commission that executes impact assessment using its existing machinery, such as the Impact Assessment Board (IAB). Then comes the Commission proposal and, once in the pipeline, other institutions enter the picture. If an AFSJ legislative initiative is initiated by Member States that submit the proposal it is most likely lacking an extensive impact assessment. It would therefore be preferable that in the AFSJ, the initiative would be left more and more in the hands of the Commission.

After the legislative proposal has been presented, it enters the proceedings of the co-legislators, the Council and the Parliament. The two institutions respectively deal with the proposal and form their positions. In the end, the positions of the institutions will be merged in inter-institutional negotiations and this will most probably sooner or later lead to the adoption of the EU legal instrument. I have placed a procedural phase which I call 'consultation phase' after the initiation phase and before the handling of the co-legislators. For 'consultation phase' I am referring to consultation of expert bodies, most notably FRA but also EDPS, which are active in legislative processes. It should not be mixed generally with 'consultation', which takes place at various phases of the legislative process.[77]

In the following I have illustrated *ex ante* review in the context of the EU ordinary legislative procedure - the law-making process which nowadays covers most of the fundamental right sensitive AFSJ legal initiatives. I have described the ordinary legislative procedure and set the *ex ante* review of fundamental rights into this framework by illustrating when and how this *a priori* assessment is carried out. I have divided the key phases for *ex ante* review of fundamental rights in five main stages:

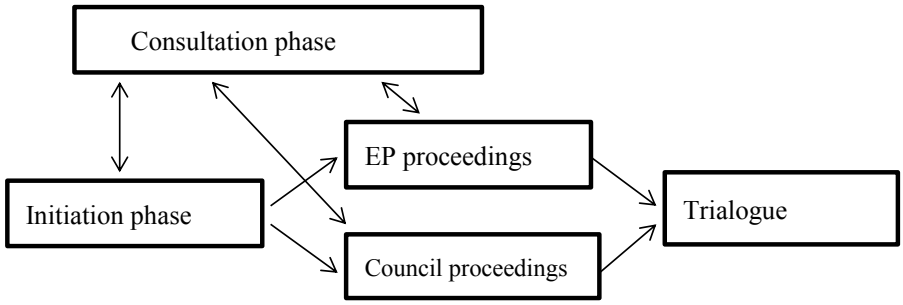
1) Initiation phase
2) Consultation phase
3) Council proceedings
4) EP proceedings
5) Trialogue

All the phases except for the trialogue phase contain two main elements. First, I will set the scene for each phase by providing the background for

[77] Especially in the initiation phase a wide-ranging consultation process is carried out. For example the Commission organizes public consultations with the aim of gathering opinions and positions from stakeholders on policy and legislative initiatives under consideration and preparation.

the *ex ante* review. The key issue is to clarify how the framework for *ex ante* review has developed and what are the main actors conducting the review. The focus has been set on the legal-political framework, which is the basis for *ex ante* review. The second element consists of practical tools in executing the *ex ante* review. I will shed light on how fundamental rights are assessed in practical terms during the course of the ordinary legislative process. It therefore makes real the objectives and aspirations, which have been described in the introductory part setting the scene for *ex ante* review in each phase of the legislative process. Trialogue is such an important phase of the legislative process due to its decisive role in finding consensus on a legislative text that it deserves a section of its own. The court phase falls outside the scope of the presentation because it mainly belongs to the *ex post* phase.[78] The following graph puts the above-mentioned five phases in the right order and illuminates what happens in the consecutive phases and how *ex ante* review at the EU level proceeds.

Figure 1. *Ex ante* review of fundamental rights in key phases of the ordinary legislative process



The picture above illustrates the key five stages of *ex ante* review in the EU legislative process. In addition to presenting the stages, Graph 1 also demonstrates the inter-relationships between the different stages and roughly sets the order of the process. One should, however, acknowledge that the phases are partly overlapping - for example the consultation phase can feed in to the legislative process for instance during the initiation phase or the EP and Council proceedings. Moreover, it is not totally excluded that the consultation phase could take place during the trialogue.

The rules governing ordinary legislative procedure are set out in Article 294 of TFEU. This law-making procedure of the EU, known previously as co-decision, has become the general rule for the adoption of EU acts. There are few exceptions to using ordinary legislative procedure.[79] Ordinary legislative procedure can well be characterized by equal competence of co-legislators, i.e.

[78] CJEU case law is important also for the EU legislator in the *ex ante* review because it can function as a basic point as an aid to interpretation also for the key institutions involved in the legislative process in analyzing if the draft EU legislation concerned is in line with EU fundamental rights.

[79] Good examples of such exceptions are, for instance, issues related to taxation and Euratom.

the Council and the EP.[80] The Council, the EP and the Commission deal with legislative proposals usually originating from the Commission in different phases of ordinary legislative procedure. Legislative work will initially be performed predominantly internally within each institution, but the central feature of the later stages of the process are inter-institutional negotiations which aim at reaching a compromise between different views of the institutions.

For the ordinary legislative process, I will initially present the first reading.[81] Approximately ¾ of all EU legal instruments are adopted during the first reading, which highlights its importance and makes it the most commonplace method of agreeing upon EU legislation. The first phase in drafting EU legislation is, however, the preparatory stage, which I call the 'initiation phase'.

1. Initiation phase

The first line of defence of fundamental rights in the EU legislative process can be found in the initiation phase of legislation. The Commission has a key role to play in the *ex ante* review of fundamental rights in the initiation phase.[82] It has been said that the EU is a complex network lacking single authority clearly responsible for the policy outcomes. The EU does not have a clear government, nor an opposition that could provide an alternative to the government in a democratic system.[83] In the EU, most of the duties of nation-states' governments have at the EU level been given to the Commission. It is

[80]For a well-illustrating chart see http://www.europarl.europa.eu/aboutparliament/en/0081f4b3c7/Law-making-procedures-in-detail.htm Visited on 10 February 2014.

[81]Pursuant to Article 294: 1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council.

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.

4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.

5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.

6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

[82] In the Barroso II Commission fundamental rights had a greater visibility due to appointment of Viviane Reding, then Vice-President of the Commission, as Commissioner responsible for fundamental rights among other duties. The Commission adopted zero tolerance policy towards breaches of fundamental rights and undertaken new responsibilities related to reporting. Furthermore, the Commission also confirmed its commitment as regards fundamental rights standards, also in the context of the legislative process, vis-à-vis other EU institutions. Fundamental rights: challenges and achievements in 2010, Annual report of the FRA, p. 7.

On the political agenda of Juncker Commission fundamental rights and the Charter have been raised even higher. The First Vice President of the Commission Frans Timmermans is in charge of better regulation, inter-institutional relations, the rule of law and the Charter of fundamental rights. The key task of the new Vice President is to ensure that every Commission proposal or initiative complies with the EUCFR. See Mission letter by President of the European Commission Jean-Claude Juncker addressed to First Vice President Frans Timmermans. Available at http://ec.europa.eu/about/juncker-commission/commissioners-designate/index_en.htm. Visited on 8 October 2014.

[83] Van Ham Peter: European integration and the post-modern Condition. Governance, Democracy, Identity. Routledge. New York 2001, p. 160.

obvious that despite similarities, considerable differences also exist between Member States' governments and the Commission. The Commission is also the "Guardian of the Treaties" as it shall ensure the compliance with the provisions of the Treaties and hence controls the other institutions', mainly the Council's and the EP's, compliance with EU law.[84] Furthermore, the Commission exercises its right of initiative and therefore crucially contributes to the policy and law-making processes of the EU. Inactivity of the Commission would mean a paralysis of the EU. Regarding the right of initiative, we should bear in mind that although the Council and the European Parliament have a right to request the Commission to deliver a legislative initiative, the Commission cannot be compelled to do so.[85] Thus there must be a policy objective and things get under way when the Commission makes a proposal for the EU legislate on.[86] The life-cycle of a EU legislative proposal within the Commission can be encapsulated into the following subsequent phases: the policy initiation phase; the drafting phase; inter-service coordination; agreement between specialized members of the cabinets, by the chefs of the cabinets and eventually the college itself.[87] In the preparation process of legislation, the Commission uses a lot of outside resources but is at the same time subject to considerable outside pressures from various stakeholders.[88] After the policy initiation phase within the Commission, a draft is drawn up by a middle-ranking official of the Directorate General (DG) who takes the text forward in his hierarchy all the way to the Director General. Then the draft will be passed through the cabinet to the *chefs de cabinet*.[89] The remaining phase within the Commission is the college of Commissioners. The college can do practically anything it likes with the draft. The most commonplace options are to accept it, reject it or return it back to preparation of the DG.[90] In the decision-making, the position of the President of the Commission is extremely important.[91] Within the Commission, the

[84] Lenaerts Koen and Van Nuffel Piet: Europees recht in Hoofdlijnen. Vierde, herziene uitgave. Maklu uitgevers NV. Antwerpen 2008, p. 275.

[85] Verhoeven Amaryllis: The European Union in Search of a Democratic and Constitutional Theory. Kluwer Law International. Dordrecht 2002, p. 232.

[86] As will be shown later also Member States still have the right of initiative in some very restricted policy areas. In practical terms, however, the Commission has a monopoly of the right of initiative.

[87] Spence David: The Directorates General and the services: structures, functions and procedures. In Spence David (Ed.): The European Commission. Third Edition. John Harper Publishing. London 2006, p. 146.

[88] Nugent Neill: The Government and Politics of the European Union. Sixth Edition. Palgrave MacMillan. Basingstoke, p. 169. Whether this can be regarded as a pro or con is a matter of the case concerned. Anyway, the Commission is under a great deal of lobbying from industry, NGOs and other stakeholders. Furthermore, when suggesting different policy proposals the Commission often uses studies of different institutes not under the Commission umbrella.

[89] On the role of cabinets see Nugent, pp. 158-159. A great deal of political power within the Commission can be found in the cabinets of the Commissioners. If you have political power in the EU you also have legislative power. This is why the role of cabinets in the legislative process should not be underestimated.

[90] Ibid., p. 163.

[91] Each and every EU file has a lead department but in order to ensure effective coordination informal contacts with other Directorates is needed. Similarly, a more formal procedure may take place with establishment and functioning of inter-service groups that work on dossiers having effects to several DGs. Here again, the coordination role has been vested in the Secretariat General. We should remember that although significant differences between different Commissioners and DGs may exist, deadlock within the Commission would also mean a no-go for the Union decision-making. See Christiansen Thomas: A Maturing Bureaucracy? The Role of the Commission in the Policy Process. In Richardson Jeremy (Ed.): European Union: Power and Policy-Making. Routledge. London 1996, p. 85.

coordination role is under the responsibility of the Secretariat General, which aims to ensure coherence of the Commission sectorial policies. Additionally, the Secretariat General is in a key position regarding the Commission's relations to other institutions, most notably towards the Council and the EP. This is also the case with complex, sensitive and controversial policy dossiers.[92]

Each Article of the Treaty setting out the legal basis for legal instruments in each policy area has its own specificities and the limits of competence vary.[93] Regarding the drafting of EU legislative proposals, the Commission may manoeuvre widely in deciding the legal basis of the legal instrument. This choice has a big impact on both substantive and procedural aspects of the legislative proposal. Given this importance, the legal basis can very often be a source of institutional conflict, including arguments whether to go for supranational or intergovernmental solutions.[94] The EU legislator deals with the issue of competence in the course of the legal proceedings. At the starting phase, discussion within the Council and the EP is usually concentrated mainly on the legal basis and it is the Commission who has to justify choices made in the selection of legal basis.[95]

We must now identify the legal-political recent developments in the initiation phase, which have paved the way for a strengthened *ex ante* review. Following this, I will illustrate and analyse the practical tools of *ex ante* review in the initiation phase. As the EU environment has become increasingly regulated by EU legislation, it has also become evident that when adopting new EU legislation the principle of better regulation needs to be taken into account. In order to make better regulation, a leading principle throughout the EU

[92] Kassim Hussein: The Secretariat General of the European Commission. In Spence David (Ed.): The European Commission. Third Edition. John Harper Publishing. London 2006, p. 75. From all this it becomes clear that the Secretariat General is of utmost importance in drawing the often differing positions of the Commission services together. With horizontal issues, such as fundamental rights and the objective of better regulation, the role of the Secretariat General is even more pivotal.

[93] This is also reflected with regard to international agreements and the issue of competence, see especially case C-22/70 ERTA, but also ruling 1/78, which dealt with the draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports. In paragraph 35 of the ruling the Court found that "…it is not necessary to set out and determine, as regards other Parties to the Convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time". The issue of competence can be extremely problematic especially in the so-called mixed agreements. After the acquisition of more powers in the matters that are currently covered by the AFSJ the Union dimension has been empowered also in the sense of international agreements, including the so-called mixed agreements, that very often include important issues related to competence between the institutions. On international agreements in the field of judicial co-operation in civil matters see for example Hix Jan-Peter: Mixed Agreements in the field of judicial co-operation in Civil Matters: Treaty-Making and Legal Effects. In Martenczuk Bernd and van Servaas Thiel (Eds.): Justice, Liberty, Security: New Challenges for EU external Relations. VUB PRESS Brussels University Press. Brussels 2008, pp. 254-255.

[94] See for example Usher John A.: The Commission and the Law. In Spence David (Ed.): The European Commission. Third Edition. John Harper Publishing. London 2006, p. 105.

[95] Especially interesting Treaty provision in the context of competence is the catch-all Article 352 of TFEU that enables EU action for achieving one of the objectives of the Treaty in the absence of necessary powers provided by the Treaty. In this case the Council adopts necessary measures by acting unanimously on a proposal from the Commission and after obtaining the consent of the EP. In Paragraph 2 of the Article the role of the national parliaments in monitoring subsidiarity has been highlighted in the spirit of Lisbon.

legislative process, the Commission has progressively launched impact assessments and considered whether new draft legislation, if adopted, would improve regulation in the particular subject area and bring added value to the existing regulatory framework under the auspices of the EU. A practical step towards this direction has been the Commission's initiative to withdraw a great number of its proposals for EU legislation that have become obsolete.[96] The main objective behind the principle of better regulation in the framework of the EU is to improve the quality of new EU legislation and to simplify already existing EU legislation. The seed for this process can be found in the Commission's White Paper on European Governance that called for reforms and improvements in the EU regulatory practices in order to attract more trust from the part of EU citizens.[97] According to the Commission, the EU should especially strive for better involvement and more openness, better policies, regulation and delivery, global governance as well as refocused institutions. With a view to a practical implementation of these objectives, the Commission introduced an Action Plan in 2002 on simplifying and improving the regulatory environment. In the plan, possible actions and their indicative timetables were sketched out.[98] What is noteworthy in this document is the expressed need for minimum standards in the consultation process and a consolidated impact assessment on the new policy and legislative initiatives. The aims envisaged in the White Paper and the action plan were further implemented and enhanced in 2003 in an Inter-institutional Agreement (IIA) on better law-making by EP, Council and the Commission.[99] Consequently, many EU legal instruments in several policy areas particularly refer to this IIA when highlighting basic principles of better regulation.[100]

The Commission also reports on an annual basis on the recent developments in the application of the principles of subsidiarity and proportionality.[101] These matters also cover the sector of better regulation. A positive result to be found in the reports is that consultation of interested parties has increased steadily during the last decade. In spite of this, the

[96] Although the Commission has its mechanisms to withdraw its proposals it has not been usually the case that the Commission draws back its newer proposals for EU legal instruments. In my opinion the Commission's initiative can be welcomed as a good sign. With these plans the Commission will evidently bring more transparency and reactiveness to its practices as a *primus motor* in the EU legislative process.

[97] See White Paper on European Governance. COM(2001) 428 Final.

[98] Communication from the Commission. Action plan "Simplifying and improving the regulatory environment". COM(2002) 278 final.

[99] European Parliament; Council; Commission: Inter-institutional Agreement on better law-making. OJ C 321/1, 31.12.2003. IIAs have been used in many policy sectors to formalize political agreement of the EU institutions on some important issue. IIAs are interesting instruments because they do not have a legal basis in the primary EU law which makes them different from the "official" EU legal instruments. It is clear that IIAs are legally binding but even today the level of their binding nature is a much debated topic. In the sources of this study IIAs have been placed under the heading "Legally binding EU instruments", even though there are similarly good reasons not to do this.

[100] It is worth noting that in spring 2015, in the context of the proposed EU better regulation agenda, the Commission issued a proposal for an inter-institutional Agreement on Better Regulation envisaged to replace the existing IIA. This proposal puts more emphasis on subsidiarity, proportionality and fundamental rights considerations than the previous IIA. See Communication from the Commission to the European Parliament and the Council. Proposal for an Interinstitutional Agreement on Better Regulation COM(2015)216 final, 19.5.2015 and particularly paragraph 20 thereof.

[101] Report from the Commission "Better Lawmaking 2006" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality. COM(2007)286 final.

number of the Commission's legislative proposals has been basically at the same level during the same time span. In light of these statistics, it is at least possible to identify a positive development in the way that the vast array of stakeholders has been integrated into the consultation process. A wide-ranging consultation process on draft EU legislation is an essential part in the preparation of new legislation. Particularly in the field of fundamental rights, several non-governmental organizations (NGOs), which focus on human rights issues, can be in a position to make a positive contribution to the preparation of new legislation.[102]

Better regulation can be seen as an emerging objective shared by all the institutions involved in the EU legislative process. One could even say that better regulation has broken through to the EU legislative process at the level of principle during the recent years. Nevertheless, more concrete actions aiming at making better regulation function in practical work would be welcome. Even though we should not underestimate that this principle has become an important objective in EU law-making, one should not ignore the reality in this process. As mentioned before, brokering political compromise may lead to poor quality legal texts. Sometimes EU legislators must phrase legal instruments ambiguously rendering them open to various interpretations in order, for example, to achieve a qualified majority and to get things moving. Nonetheless, recent developments in improving EU legislation seem to be very positive. Especially the Commission's concrete actions in putting more efforts on the preparatory phase of EU legislation are a good signal towards other institutions. Having been accused of lack of transparency and inadequate preparation of EU legislation, the Commission without a doubt improves its image in this regard. The Commission also has put increasing efforts into mainstreaming fundamental rights in activities in different policy sectors. Various decisions and initiatives have been taken in this regard over the years. The Commission as the guardian of the Treaties and initiator of EU legislation is perhaps in the most important position to make a significant contribution into this area.[103]

If we think about the recent trends in the Commission's work on better regulation, we should for example note the Commission's communication on

[102] The expertise and experience of these NGOs can bring added value to the preparation process even though NGOs, like any other stakeholders, have their own particular interests and stakes in the EU legislative process.

[103] The Commission has also undertaken to seek advice on issues in the field of better regulation from a Group of High-level National Regulatory Experts that was established in early 2006. Pursuant to the Article 2 of the Commission's Decision main tasks of the high-level group consist of assisting the Commission in improving the regulatory environment for key policy areas, contributing to the spread of best practices, strengthening the co-operation between the Commission and Member States particularly in transposition phase of EU law and monitoring as well as advisory functions. The strength in these kinds of high level groups puzzling with difficult issues is that usually their participants are highest level officials in national organizations in charge of the policy area concerned. On the other hand, advisory groups should be equipped with a great deal of independence in carrying out their work. This may not necessarily be the case with this High-level Group. However, this group can function as a think-tank and the Commission is entitled to take advantage of ideas presented during the meetings and possibly start making them real by proposing new EU legislation. Commission Decision of 28 February 2006 setting up a group of high-level national experts (2006/210/EC). OJ L 76/3, 15.3.2006.

smart regulation in the EU which was published in autumn 2010.[104] The Commission first considers that better regulation must become smart regulation and be strengthened in the Commission's working culture.[105] This has to do with aspects of better regulation internally, within the Commission. Nevertheless, the Commission also rightly points out that smart regulation is a shared responsibility of all the EU institutions and that all institutions must strive for this objective in all policy areas.[106] *Ex post* evaluation of legislation remains a key tool for achieving this goal.[107] In spite of this, we can detect an even a stronger focus in the paper, which has not been set on the existing legislation, but the legislation that is being prepared. The approach in this kind of method springs from evaluation that is of *ex ante* nature. This system culminates mainly in the impact assessments and the novelty in the Communication is one focus area that is wrapped up in reflecting the new legal status of the EUCFR.[108] In the impact assessment phase, significant attention has given to IAB.[109] We can clearly see that these aspects mainly concern the internal aspects of the better regulation that is carried out within the Commission. If we then turn to the Commission's views on how better or smart regulation should take place in inter-institutional terms, we can above all identify the utmost importance that the Commission has set on the need to integrate all the EU institutions in this work. The Commission reminds that although the other key players in the EU legislative process, namely the Council and the EP, have agreed to carry out impact assessments on the amendments that they make to the Commission's original proposal, this has indeed only rarely been the case. The Commission further encourages other institutions to make progress in this important area and offers possibilities for co-operation in this field.[110] The Commission finds that the EP and the Council should include impact assessments to a greater extent to their proceedings on EU dossiers.[111] What is interesting and generally well-founded in the Commission's Communication is the call for impact assessments for Member States' possible initiatives in the field of AFSJ.[112]

The Commission has traditionally possessed a heavy constitutional arsenal to launch *ex post* procedures in judicial control in the EU.[113] Verhoeven reminds that the Commission has an important but controversial role in the

[104] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Smart Regulation in the European Union. COM(2010) 543 final, 8.10.2010.

[105] Ibid., p. 2.

[106] Ibid., p. 3.

[107] Ibid., p. 4.

[108] Ibid., p. 7. According to the Communication "the Commission will reinforce the assessment of impacts on fundamental rights, and will develop specific guidance for this".

[109] Ibid., p. 6.

[110] Ibid., p. 8.

[111] According to the Commission also other EU bodies, such as European Economic and Social Committee and the Committee of the Regions should be involved more directly in the preparation of impact assessments. Ibid., p. 9. It might be preferable to increase the involvement of these advisory bodies especially because at this phase of legislative process the practical impact of statements and positions of these bodies may only have a minimal impact.

[112] Ibid.

[113] For the Commission's role in infringement procedures and actions for annulments see Arnull Anthony: European Union and its Court of Justice. Oxford University Press. Oxford 2006, pp. 47-51 and 53-56.

field of law enforcement, particularly because of its discretion whether or not to open infringement proceedings.[114] Quite recently, the Commission has intentionally tried to reinforce different internal *ex ante* control mechanisms. It is a general rule that the Commission will conduct impact assessments of legislation that is included in its annual legislative and work programme.[115] More exact steps in carrying out the impact assessments have been described in the Impact Assessment Communication of 2002, in the Commission Services Working Document dating back to 2004 and the Commission's internal impact assessment guidelines.[116] The Commission has increasingly launched impact assessments on its legislative proposals to be presented. The rationale of impact assessments is to analyse the probable effect that an EU instrument may have on a given policy area. In this assessment, attention will be paid to all relevant economic, social, political and juridical consequences that probably emerge after the adoption of the proposed piece of legislation. Impact assessment can thus be conceived as a useful tool at the disposal of EU institutions in their policy-making. With regard to the Commission and impact assessments, Rick Haythornthwaite reminds that during the last years the Commission has screened all its proposals that have been pending for a significant amount of time. Moreover, one third of these proposals have been withdrawn or returned for further impact assessments.[117] In fact, this represents quite a significant change in the Commission's attitude towards pending legislation.[118]

We now have the IAB in place and its role can be found in the quality assurance of impact assessments prepared by the Commission. Further to this, IAB ensures that a variety of policy options and their feasibility during the whole legislative process will be taken into consideration. The ultimate aim of the Commission is to turn IAB into a centre of excellence in this particular field.[119] During its years of operation, the IAB turned out to be quite a strict body in the evaluation of impact assessments of draft legislation. For example, in 2010 the resubmission rate of draft impact assessment reports was 42%. The IAB can request resubmission of draft IA when it has serious quality concerns that should be dealt with.[120] In this context, however, we should note that the quality standards applied by the IAB were strengthened in the previous years. The IAB seems to have adopted a more stringent approach towards the quality of draft impact assessment reports. In practical terms, the IAB has attained a powerful position within the Commission, thus the position of the IAB matters.

[114] Verhoeven, p. 231.

[115] Inter-Institutional Common Approach to Impact Assessment. November 2005.

[116] Ibid. See COM (2002) 276 Final and SEC (2004) 1377 as well as SEC (2005) 791.

[117] Haythornthwaite Rick: Better Regulation in Europe. In Weatherill Stephen (ed.): Better Regulation. Hart Publishing. Oxford and Portland, Oregon 2007, p. 26.

[118] Olivi Elisabetta: The EU Better Regulation Agenda. In Weatherill Stephen (ed.): Better Regulation. Hart Publishing. Oxford and Portland, Oregon 2007, pp. 192-193.

[119] Ibid., p. 8.

[120] Commission Staff Working Paper: Impact Assessment Board Report 2010. SEC(2011) 126 Final, 24.1.2011, p. 4.

A negative opinion by the IAB can be related to the core parts of the report that is usually linked to the problem definition, options and impacts, adequacy of consultation, subsidiarity and proportionality.[121] If an IA report receives a negative opinion from the IAB, the report has to be updated and the shortcomings revealed by the Board have to be worked on and corrected. The report can then be submitted for a second opinion. If the report receives a positive opinion, the service in charge of the report within the Commission does its utmost to integrate the comments and the necessary elements of the IAB to the report and then launches the inter-service consultation in order to obtain a green light for the impact assessment.[122] In this phase of the process, other services still need to be heard, but this will bring the quality check to an end. The next step then is the legislative procedure itself. From all this we can take it for granted that the Commission takes impact assessment and quality control of its legislative proposals very seriously. As former President Barroso has stressed: "in principle a positive opinion from the IAB is needed before a proposal can be put forward for Commission decision."[123] Despite criticism expressed sometimes by the Member States' legal experts towards impact assessments, one can well note that this criticism is often ungrounded. The Commission has moved from quite light impact assessment procedures to a systematic and more extensive one involving strict quality control and more transparency. This is not always the case at the national level in EU Member States when assessing impacts of national law.[124] In spring 2015, the Commission has introduced even higher level of ambition with regard to better regulation and impact assessments in the context of the EU better regulation agenda. This agenda entails a stronger and more independent role for the IAB, to be called 'Regulatory Scrutiny Board' in the future.[125]

What is the general scope of impact assessments? The Commission produces an unbelievable amount of legal proposals and all kinds of communicative papers every year. Nevertheless, not all categories of the Commission's preparatory papers require a formal impact assessment. A formal impact assessment is necessary for all items on the Commission's Work Programme. This includes all regulatory proposals, White Papers, expenditure programmes and negotiating guidelines for international agreements. Green papers and consultation with social partners are, however, excluded from impact assessments due to their consultative quality.[126] These general rules do not hinder the Commission to carry out an impact assessment on a dossier that is not included in its Work Programme. Concerning impact assessments, we can note that they will be carried out by each service of the Commission

[121] Ibid.

[122] Ibid., p. 7.

[123] According to Ibid., p. 9. See also COM(2010) 1100 "The Working Methods of the Commission 2010-2014", http://ec.europa.eu/commission _2010-2014/president/news/documents/pdf/c2010_1100_en.pdf.

[124] The Commission also has the challenging duty of trying to find one size fits for all solutions that is not always easy taking into account the plethora of legal orders and legal traditions of Member States.

[125] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Better regulation for better results - An EU agenda. COM(2015) 215 final, 19.5.2015. p. 7.

[126] See Impact Assessment Guidelines. Document of the European Commission SEC(2005) 791, p. 6.

responsible for the proposal. The weak point in this is that until recent times there has not been an expert body that could have had a deeper and longer-term expertise and understanding in the field of fundamental rights.[127]

Impact assessments will, without doubt, also increase the position of fundamental rights in the analysis. This is also due to the stronger status of the EUCFR in the EU law and hence in the legislative process. It can be expected that in the coming years the Commission analysis will draw inspiration to a greater extent also from the provisions of the EUCFR. Contents of the impact assessment reports and the outputs thereof, the contents of the provisions of draft EU legal instruments, will be more extensively reflected against the EUCFR and fundamental rights generally. Impact assessments should also aim at drawing the attention of those people in charge of preparatory phases of EU legislation to fundamental rights aspects of legislation under drafting.[128] My experience is that experts on some specific – usually quite narrow – policy area are not always sufficiently acquainted with certain constitutional law elements of the texts they are dealing with. Legal cross-checking may not always put the text on the right track afterwards.[129]

Some scholars have drawn the conclusion that the Commission mainly carries out the EU-wide impact assessment without engaging with IA processes at the national level, unless Member States actively draw the attention of the Commission to the diverging impacts at national level.[130] The Commission's impact assessment procedure consists of a series of analyses conducted at the administrative level. These include problem identification, definition of objectives, development of main policy options, impact analysis, comparison of the options in light of their impact and an outline for policy monitoring and evaluation.[131]

The fact that there is no single EU legislator, but different co-legislating institutions, can also be considered a problem from the point of view of impact assessments. This is especially the case when it comes to impact assessments as information tools meant for the legislator.[132] Some academics have made the observation that the EP has usually approached the issue of regulatory reform from the angle of its legislative powers. In spite of this, the idea that democratic accountability is possible only if the EP is sufficiently informed of

[127] See EU Network of Independent Experts on Fundamental Rights: Report on the situation of fundamental rights in the European Union in 2004, p. 28.

[128] See Impact Assessment Guidelines. p.18. In this document it has been reminded among other things that "…fundamental rights, as defined in the EU Charter of Fundamental Rights, may pose legal limits to the Union's right to take action on the problem".

[129] An interesting feature in the EU legislative process was that for a long time Member States' initiatives in the field of police and judicial co-operation in criminal matters were exempted from carrying out impact assessments. See Communication from the Commission to the Council, European Parliament, The European Economic and Social Committee and the Committee of the Regions. A Strategic Review of Better Regulation in the European Union. COM(2006) 689 final, p. 11.

[130] Chittenden Francis, Ambler Tim and Xiao Deming: Impact Assessment in the EU. In Weatherill Stephen (ed.): Better Regulation. Hart Publishing. Oxford and Portland, Oregon 2007, p. 280.

[131] Meuwese Anne C.M.: Inter-institutionalising EU Impact Assessment. In Weatherill Stephen (ed.): Better Regulation. Hart Publishing. Oxford and Portland, Oregon 2007, p. 288.

[132] Ibid., p. 290.

the impacts of draft legislation has gained more ground within the EP.[133] The problem with impact assessments is that proposals may significantly change during discussions in the Council framework and within the EP. This is obviously a price that has to be paid. In terms of co-operation between the institutions, the Commission has lent a helping hand towards the EP and the Council by expressing its preparedness to share methodology used in the impact assessments.[134] Sometimes it may also be the case that the Council and the EP have identified constitutional problems in legal texts that have been amended in a positive way from the point of view of fundamental rights. Paul Craig has also raised some concerns about the legal effects of the impact assessment reports and the extent to which they are subject to the EU courts. The problem is that the impact assessment is only a preliminary step in the decision-making process and the impact assessment will not become a part of the EU instrument itself and will thus not be subject to judicial review. A good example of this kind of important part of the impact assessment is linked with the analysis on subsidiarity that may become enforceable.[135] Here, the status of the impact assessment seems somewhat cumbersome.

It is possible to make the distinction between the two phases of securing compliance with fundamental rights in the preparatory phase of the legislation within the Commission. The first part of the process takes place in the context of the impact assessment of the legislative proposal. We should note that this stage is predominantly of preparatory quality as various policy options and their impacts are being analysed. The draft proposal does not yet exist. This work serves the purpose of the preparation of the draft legislative proposal and paves the way for the fundamental rights control phase that follows after the draft text comes into being. Both these stages can be seen to fall under the smart regulation umbrella. The Commission has provided with guidance for the practical examination of fundamental rights aspects of policy options.[136] The document from the Commission giving guidance to the assessment of fundamental rights aspects of policy options springs from the smart regulation initiative and the Strategy for the effective implementation of EUCFR. Its aim is to function as a guideline for the Commission's internal legal analysis on fundamental rights implications of EU legal and policy instruments under preparation. The key objective is to make sure that EU instruments take into account fundamental rights as set out in the Charter. It is the Charter that sets the preconditions for the legislative process in terms of observance of

[133] ibid., p. 294.

[134] Ibid. The EP and Council can be considered to be mainly responsible for carrying out impact assessments on the substantial changes introduced during the legislative process. There is quite a large of margin of appreciation to decide how a substantive amendment will be defined but once this has been made the Commission's impact assessments and the related methodologies can provide a significant help to the other institutions. Taking into account the necessary collaboration of the institutions it would be preferable to introduce common methodology that could possibly spring from the Commission's on-going work on the impact assessments.

[135] Craig Paul: Legal Control of Regulatory Bodies: Principle, Policy and Teleology. In Birkinshaw Patrick and Varney Mike (eds.): The European Union Legal Order after Lisbon. Kluwer Law International. Alphen aan de Rijn 2010, p. 107.

[136] Commission Staff Working Paper; Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final, 6.5.2011.

fundamental rights.[137] Furthermore, also the CJEU has in its case law confirmed that the EU institutions have to examine different policy options in light of fundamental rights as set out in the Charter.[138]

Consequently, the Commission strives to identify fundamental rights issues when planning and analysing policy options aiming at particular policy goals. In short, the idea is to pinpoint fundamental rights issues and thus to help the preparation process to exclude possible problems. The assessments may also bring options of including positive issues related to the topic. It furthermore helps to identify interrelations of various fundamental rights included in the policy instruments under consideration. The practical approach of the guidance paper is to reinforce the analysis on the impact on fundamental rights in its impact assessments. Similarly, it foresees to make fundamental rights aspects more prominent in the explanatory memoranda accompanying those legislative proposals with a significant link to fundamental rights. Most concretely, perhaps, the Commission commits itself to include in the legislative proposals recitals which refer to compliance with the Charter and identify the fundamental rights on which the proposal has repercussions.[139] Recitals will become a part of the final legal instrument. Recitals very often proffer background of the article text itself and provide guidance for the interpretation the article text that is of a different nature than the preamble.[140]

The operational guidance document also elaborates the fundamental rights check-list, which was introduced in the Charter Strategy.[141] The basic point of departure is an in-depth understanding of the meaning of the provisions of the Charter. In this interpretation exercise, the guidance document takes up the "explanations relating to the Charter of Fundamental Rights".[142] The next phase is to reflect the contents of the Charter on the policy options and later on substantive contents of the proposed piece of legislation. In this analysis phase, the interface of the Charter with the ECHR and international human rights conventions should be clear in the minds of those preparing the impact assessment. The same applies to the nature of rights and the possible conditions for their limitation, if we are not talking about absolute fundamental rights.[143] The operational guidance document does not merely aim to provide standard clauses that would on a business-as-usual basis be introduced in the legal texts. If anything, the approach of the Commission is

[137] Ibid., p. 4. As stated in the operational guidance document "Respect for fundamental rights is a condition of the lawfulness of EU acts".

[138] According to ibid., p. 4. See also CJEU joined cases C-29/09 and C-93/09 of 9 November 2010 (Schecke and Eifert).

[139] Ibid., pp. 5-6. In the legal process of the EU, the explanatory memoranda will not end-up in the final legal act but rather have the merit of explaining the various objectives and political and legal aspects of the legislative proposal.

[140] On the characteristics and features of recitals see Lasok K.P.E. and Millett Timothy: Judicial Control in the EU; Procedures and principles. Richmond Law and Tax ltd. London 2004, pp. 385-386. Lasok and Millett conclude that the preamble of the given measure may be of relevance to the interpretation of the provision in two ways. First of all it may function as direct aid to the construction of the provision and secondly, it may help in identifying the purpose of the provision itself.

[141] COM(2010) 573 final.

[142] Operational guidelines p. 7. See also OJ C 303, 14.212.2007, p. 17-35.

[143] Ibid., pp. 8-9.

holistic and the objective is an in-depth analysis of fundamental rights aspects. What the Commission is striving for is the promotion of a fundamental rights culture at all phases of preparation of EU law.[144] The operational guidance document is not the only exercise of its kind. The Commission has, for example, prepared a guidance document for assessing social impacts within the Commission impact assessment system.[145]

In the operational guidelines document the Commission subscribes to early-phase identification of fundamental rights in the consultations documents, such as green papers, communications and internet consultations.[146] As an example of this we can name the Communication on the Use of Security Scanners at EU Airports, in which such aspects have been addressed.[147] Additionally, the Commission seeks to expand the integration of various stakeholder groups in the field of fundamental rights into the consultations process.[148] The Commission has also intensively considered the need to address thematic fundamental rights issues. An example of this new thematic approach is the EU Agenda for the rights of the Child.[149] Despite the general amelioration of *ex ante* review within the Commission, the development has not happened without institutional hiccups.[150] It is often the case that the real problems emerge in the phase where the Council and the EP start to make amendments to the Commission's original proposals and the impacts of these changes will not be properly analysed and followed-up.

The Commission has also decided to contribute to the field of fundamental rights by financial means. One major part of this practical work is focused on promotion of fundamental rights culture.[151] In this context we should also make the distinction not only between horizontal and vertical EU issues (EU

[144] See ibid., p. 5.

[145] Ibid., p. 3. Particularly social issues are linked with larger fundamental rights issues and therefore this sectorial initiative is most welcome.

[146] Ibid., p. 8.

[147] Ibid., pp. 11-12.

[148] Ibid., p. 13.

[149] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child, COM(2011) 60 final, Brussels 15.2.2011. pp. 4-5. In this Communication the Commission interconnects the rights of the child with the endeavour to secure compliance of legislative proposals with fundamental rights and particularly the rights of the child. The apex of carrying out this objective is the Commission's strategy for the effective implementation of the EUCFR and the related fundamental rights checks in the implementation of the Charter. In addition to this general approach on controlling legislative proposals the Commission also identifies several sectorial actions in this field that would improve the position of children.

[150] Thinking about the EU institutions generally, it has been the Commission that has been the best pupil in the class in terms of better regulation. Extensive impact assessments have been carried out when preparing legislative proposals and this kind of ex ante review has become an integral part of preparation of EU legislation. I therefore find the criticism that has been addressed to the Commission not totally justified.

[151] Commission Decision of 3 December 2010 on adopting the 2011 work programme for the specific programme Fundamental Rights and Citizenship. COM(2010) 8378, see especially Annex Fundamental Rights and Justice Specific Programme "Fundamental Rights and Citizenship" Work programme 2011 paragraph 2, sub-paragraph 2.1. where it is stated that "in order to strengthen a shared culture of fundamental rights within the European Union, the Commission seeks to support training and awareness-raising activities aimed at improving the knowledge and understanding of legal, judicial and administrative authorities, legal professionals and practitioners of the principles laid down in the EU Charter of Fundamental Rights."

legislation), but also with internal and external EU affairs (international agreements that may have strong effects on fundamental rights).[152] This brings into play the impact assessments on the negotiating mandates that the Commission seeks from the Council and subsequent Council and EP decisions on the approval of the negotiated texts. With the negotiating mandates, some practical problems in the impact assessment may emerge. Probably the biggest issue relate to the restricted nature of negotiating mandates. These mandates that the Commission seeks from the Council will, if approved, serve as the basis for the Commission's negotiations with third parties. The planned or adopted EU positions thus include several confidential elements.

With reference to practice, the Commission Legal Service is extremely important in securing compliance with fundamental rights in the Commission internal preparatory processes. The core task of the Legal Service is to ensure conformity with the Treaties and coherence with existing EU legislation.[153] The Commission's Legal Service is thus involved in the preparatory phase of the Commission's legislative proposal. The important point is that the Commission's legislative proposal has to pass the scrutiny of the Legal Service, which can be considered as a "stress test" and quality check of the proposal.[154] The strengthened *ex ante* review of fundamental rights can also create added value as a confidence and credibility building exercise addressed to ordinary citizens. This would make clear that the Commission does not make contradictory legislative proposals and hence does not carry out the preparatory phase of legislation in an ivory tower.[155]

2. Consultation phase

The concept of consultation phase is applied here to define the next stage of the *ex ante* review of fundamental rights in the ordinary legislative process. The consultation phase cannot be strictly placed in this stage, as it is a continuous process and it can and should take place at various phases of the process. When executed ideally, consultation should and often is carried out by the Commission already at the early phases of its preparatory work. I have, however, positioned consultation phase after the Commission has presented its proposal for a legislation and consultation of most notably the FRA and the EDPS gets underway.[156] At this stage, and for the purposes of this study, FRA and EDPS are the most important bodies, but I should also mention in this

[152] Ibid., p. 11.

[153] Christiansen, p. 148.

[154] Another thing is that legal services of other institutions may take a different stand on legal aspects of the proposal. The same applies to national legal experts involved in the forthcoming phase of the legislative process.

[155] Even though the ex-post control of compliance with clearly fundamental rights remains at the core of the EU judicial review, new softer methods of review have emerged during the last decade or so. What is interesting is that the forerunner in this development has been the Commission that is often claimed to be the least democratic institution of the EU.

[156] As stated earlier, different phases are often overlapping and, for example, the consultation phase can take place during the Council or the EP handling phases if institutions wish to seek guidance of the FRA.

context the ground-breaking work of the EU Network of independent experts in the field of *ex ante* review of fundamental rights.

The issue of establishing an EU agency dealing with fundamental rights issues was taken up at the highest political level in the Cologne European Council in 1999.[157] The idea of an agency was further processed in a report prepared by Philip Alston and J.H.H. Weiler for the *Comité des Sages* responsible for drafting *leading by example: A Human rights agenda for the year 2000*. The main argument regarding the necessity of the FRA was that the EU should adopt a preventive approach towards fundamental rights, thus paving the way for a more pro-active role in this field in addition to the traditional judicial review remedy.[158] In the European Council meeting in Brussels on 13 December 2005, the Heads of States and Governments of the EU Member States decided that FRA should be established.[159] The Council adopted the Council Regulation establishing the FRA on February 15, 2007 on the basis of a compromise proposal put forward already during the Finnish Presidency of the Council.[160] The EU can take advantage of the Agency's expertise in different phases of its legislative process. It is quite evident that FRA can contribute to the preparatory stages in the EU legislative process and not the back end of it. Nevertheless, the Agency may also have a significant role in analysing the effects of EU legislation from the fundamental rights' point of view. As such, it is important to bear in mind that a prerequisite has been stipulated in Article 3 of the Council Regulation setting up the FRA, according to which "the Agency shall deal with fundamental rights issues in the European Union and in its Member States when implementing Community law". In the explanatory memorandum of the proposal for a Council Regulation establishing the Agency it was stated that "the objective of the proposal is to extend the mandate of the EUMC and to establish a European Union Agency for Fundamental Rights. It will establish a centre of expertise on fundamental rights issues at the EU level".[161]

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[157] In paragraph 46 of the Presidency Conclusions of the Cologne European Council held on 3 and 4 June 1999 it was stated that "The European Council takes note of the Presidency's interim report on human rights. It suggests that the question of the advisability of setting up a Union agency for human rights and democracy should be considered".

[158] Alston Philip and de Schutter Olivier: Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency. Oxford and Portland, Oregon 2005, pp. 1-2. For argumentation in favour of the creation of the Agency see Alston Philip and Weiler J.H.H.: 'An ever closer Union' in need of a Human Rights Policy: The European Union and Human Rights. In Alston Philip et al. (eds.): The EU and Human Rights. Oxford University Press. Oxford 1999.

[159] As a consequence of this political initiative the Commission presented its proposal for a Council Regulation that was to set up the agency on the foundations of the Vienna-based European Union Monitoring Centre on Racism and Xenophobia (EUMC). This important decision was not, however, a new idea of its kind although it came as a surprise to many at the time when it was adopted. See de Búrca Gráinne: New Modes of Governance and the Protection of Human Rights. In Alston Philip and de Schutter Olivier: Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency. Hart Publishing. Oxford and Portland, Oregon 2005.

[160] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L53/1, 22.2.2007.

[161] COM(2005) 280 final, p. 2. Furthermore, Article 2 of the Regulation adopted later stipulated that "The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take

The widely shared point of departure among the various institutions and stakeholders involved in the process was that FRA should have a pivotal role to play in monitoring and securing the realization of rights provided in the EU Charter of Fundamental Rights. The legal basis of the instrument establishing the FRA was Article 308 of TEC (currently Article 352 of TFEU). Although this catch-all Article was eventually selected as the foundation whence the creation of the Agency would derive there was also discussion on the possible inclusion of Articles 6 and 7 of TEU in the legal basis. This idea was, however, rejected. According to Gráinne de Búrca, these two Articles have proved a significant trigger for human rights activity, in particular, at the EU level. A good example is the establishment of the EU network of independent experts.[162] In the times before the Lisbon Treaty the legal basis used for the Agency Regulation restricted the scope of the Agency merely to the former Community pillar thus excluding the former third pillar of the EU from FRA competence.[163] The issue of possibly extending the coverage to this fundamental rights sensitive third pillar was simply left to Council Declaration that is only aspirational. Later, as a consequence of the Lisbon Treaty and the important Council Decision on multiannual framework for the FRA, this problem has been removed.[164] This has significantly increased the operational room for manoeuvre of the FRA.

It is relatively easy to conclude that the elevation of the Charter to the legal status of primary EU law has also strengthened the role of the FRA. The entry into force of the Lisbon Treaty and the subsequent change in the status of the EUCFR in practice means that the Charter is one of the starting points for the CJEU in fundamental rights cases.[165] The FRA and Charter could be considered to live in a symbiotic relationship – the reinforcement of either one ends up being a reinforcement of the other. As the FRA itself states "the Agency situates its work in the wider context of the Charter of Fundamental Rights of the European Union".[166] The Charter is hence at the very heart of Agency activities.[167] Very soon after its adoption in a legally non-binding form, the

measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".

[162] De Búrca, p. 30.

[163] See Scheinin Martin: Euroopan unionin perusoikeusvirasto. In Yksilön oikeusasema Euroopan Unionissa. Institutet för mänskliga rättigheter vid Åbo Akademi. Åbo 2008, p. 178. Scheinin found that the legal basis and the subsequent scope of the Agency constituted an inadequacy and consequently the scope of the Agency would need to be revised in the future.

[164] In 2011 the Commission presented a proposal for a Council decision establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2013-2017, COM (2011) 880 final. The proposal whose spearhead clearly was the inclusion of police co-operation and judicial co-operation in criminal matters into FRA tasks and functions, however, was faced with some resistance from the part of the Council. After quite lengthy negotiations the Council Decision was finally adopted in March 2013, see Council Decision establishing a multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights. OJ L 79/1, 21.3.2013.

[165] Senden Hanneke: Interpretation of Fundamental Rights in a Multilevel context. An analysis of the European Court of Human Rights and the Court of Justice of the European Union. Intersentia. Cambridge 2011, p. 31.

[166] Draft Annual Work Programme of the FRA 2014, April 2013. Available at http://fra.europa.eu/sites/default/files/annual_work_programme_2014_english.pdf. Visited on 20 August 2013.

[167] This becomes absolutely clear also in the Agency Regulation itself. In its recital 9 it is stipulated that "The Agency should refer in its work to fundamental rights within the meaning of Article 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental

Charter triggered wide-ranging Commission-led exercises dealing with compliance of legislative proposals with the Charter. The Charter was also reflected to a great extent in the activities of the European ombudsman.[168] More importantly, the CJEU took a positive stand already in European *Parliament v. Council* in 2006 on the Charter by re-stating its importance in the context of constitutional traditions and international obligations common to Member States.[169] In this case it is worth noting that the EP launched this process.

The powers of the EU Agencies are generally relatively circumscribed.[170] For the analysis of tasks and competence of EU Agencies, a key CJEU case is always the landmark ruling Meroni.[171] In this case, the court especially emphasized the importance of preserving institutional balance and the need to delegate competences only under clearly defined and limited circumstances. Whenever setting up new Agencies in the EU, the relation of the founding act of the Agency concerned with Meroni always comes into discussion sooner or later in the context of competences and tasks of the Agency. The common feature of the Agencies, despite the wide variety of their activities, are legal personality, certain degree of organizational and financial autonomy and regulations that set them up to perform specific tasks.[172]

Another important consultative EU body is the EDPS, which was established by the entry into force of the Regulation 45/2001 on the protection of individuals with regard to the processing of personal data.[173] The primary task of this independent supervisory authority is to ensure that fundamental rights and freedoms are respected by Community institutions and bodies. This applies especially to the right to privacy. The EDPS is also responsible for monitoring the provisions of this regulation and any other Community Act relating to the protection of fundamental rights with regard to the processing of personal data.[174] Furthermore, the EDPS obtains in this regulation various advisory functions.[175] In order to ensure the effective functioning of the EDPS, it has been provided with significant powers related to its field of work. Therefore, we can see that institutionally the EDPS is a major player in issues related to especially the right to privacy and the right to protection of personal data – two significant fundamental rights.

Freedoms, and 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".

[168] Craig and de Búrca, p. 417.

[169] C-540/03 European Parliament v. Council.

[170] See e.g. Craig and de Búrca, p. 79.

[171] C-9/56 Meroni v High Authority, Judgment of the Court of 13 June 1958.

[172] Hartley T.C. The Foundations of European Union Law. Seventh Edition. Oxford University Press. Oxford 2010, p. 36.

[173] Regulation (EC) No 45/2001 of the European Parliament and of the Council 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. OJ L 8/1. 12.1.2001. Chapter V of the Regulation deals with EDPS.

[174] Ibid., see Article 41 and particularly paragraph 2 thereof.

[175] For an exhaustive list of EDPS duties see Article 46 of the Regulation.

The new methods of constitutional control, i.e. *ex ante* review, are often non-binding and softer. The same goes for other tools aiming at a high level of fundamental rights protection and deeper co-operation in this field. During the last decade or so, new soft law-oriented mechanisms have emerged at the EU level.[176] Against this background, the EU Network of Independent Experts on Fundamental Rights should be noted, having been created in 2002 by the Commission in response to a recommendation in the EP's report on the state of fundamental rights in the European Union.[177] The network came into existence largely due to the inadequate time and resources of the LIBE Committee of the EP to carry out monitoring functions at that time.[178] The Network's main tasks were as follows: first, it was mandated to draft an annual report of the state of fundamental rights in the European Union and its Member States, assessing the application of each of the rights set out in the EUCFR. Second, it was given the task to provide the Commission with specific information and opinions on fundamental rights issues when requested to do so. Third, the Network was mandated to assist the Commission and the EP in developing EU policy on fundamental rights. Its objective was further to ensure a high degree of expertise in relation to each of the Member States and the EU as a whole. Martin Scheinin has argued that the mandate of the Network is typical for a human rights monitoring body, adjusted to the role of the EUCFR as the applicable set of standards. Furthermore, the Network has issued recommendations and identified best practices and taken forward their benchmarking.[179] Each year the Network produced a report on how fundamental rights are safeguarded in practice. It also published opinions on specific questions upon the request of the Commission. European citizens were also allowed to send information on safeguarding fundamental rights in the Union to the Network or the Commission. The Network attached in several reports particular importance to developing *ex ante* review mechanisms of compliance with fundamental rights at the level of the EU. The introduction in the Network's report for the year 2003 covers the essential issues in taking up "the need to integrate the concern for fundamental rights from the early stages of the elaboration of European law, according to an approach to fundamental

[176] One example of this group is the open method of co-ordination. It has aimed at bridging the social deficit gap by using increasingly non-coercive soft law instruments and other ways of increased co-ordination in such sensitive policy fields as social protection where more legally binding solutions would not probably have proved useful. The method of open co-ordination has also left quite a lot of say at the Member State level due to its resort to soft law instruments and cautious approach towards far-reaching harmonization. On the method of co-ordination see Christodoulidis Emilios: A default Constitutionalism? A Disquieting Note on Europe's Many Constitutions. In Tuori Kaarlo and Sankari Suvi (eds.): The Many Constitutions of Europe. Ashgate Publishing Limited. Farnham 2010, pp. 38-39.

177 See European Parliament resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI). In the Resolution's paragraph 9 the EP recommended that "a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, to ensure a high level of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down notably in the Charter, taking account of developments in national laws, the case law of the Court of Justice of the European Communities and the European Court of Human Rights and any notable case law of the Member States' national and constitutional courts".

[178] See De Schutter 2010, pp. 5-6.

[179] Scheinin Martin: Relationship between Agency and the Network of Independent Experts. In Alston Philip and de Schutter Olivier: Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency. Oxford and Portland, Oregon 2005, p. 84.

rights which must be more preventive, and not simply remedial".[180] The experts have further found that preventive control can offer better guarantees for legal certainty.[181] A certain type of preventive character has been high on the agenda since the beginning of the Network's work.[182] In addition to this, the Network has also approached these questions from the angle of comparison between different systems of EU Member States.[183] Later, the FRA overtook the place of the Network, as the Network's mandate expired in 2006.

According to Craig and de Búrca the mandate of the Agency was restricted to cover merely the collection of opinions, formulating opinions, highlighting good practices and publishing thematic reports.[184] This implies a rather pessimistic notion of the potential that FRA activity might offer, which may be applicable when relating to the monitoring of Article 7 of TEU. Nevertheless, this view overlooks the effect that FRA has already had on various fundamental right sensitive EU legal dossiers. The impact has often been of indirect nature, but clearly evident when reviewing final versions of EU legal acts. Taking into account the ubiquitous questions of division of competence at different levels in the domain of fundamental rights the most practical solution was to restrict the FRA's activities in matters in which EU Member States are, inter alia, implementing EU law. This seems to be the case, since any attempts to shift the balance between the tri-polar system of the EU, the EU Member States and ECHR-centric system have been likely to cause a counter-reaction from the party under pressure to cede some of its competence. In fact, this direction is most likely and the division of competence in this field will be maintained as it is.

The impact of the Charter on realization of fundamental rights in particular legislative dossiers has not always been positive. This was true, for example, in the case of the European Arrest Warrant. In this legal act, the legislator raised fundamental rights and the principles enshrined in the Charter as the leading principle of this legal instrument, while elsewhere in the text endangered the right to freedom from arbitrary arrest and the right to a fair trial.[185]

Some scholars find that legislative references to the Charter are predominantly *pro forma* statements that the piece of legislation is in line with

[180] EU Network of Independent Experts on Fundamental Rights: Report on the situation of fundamental rights in the European Union in 2003, p. 9.

[181] Ibid., p. 32.

[182] EU Network of Independent Experts on Fundamental Rights: Report on the situation of fundamental Rights in the European Union and its Member States in 2002, p. 25.

[183] See for example Opinion of the EU Network of independent experts in fundamental rights regarding the role of national institutions for the protection of human rights in the Member States of the European Union. March 2004.

[184] Craig Paul and de Búrca Gráinne: EU law. Text, Cases, and Materials. Fourth Edition. Oxford University Press. Oxford 2008, p. 404.

[185] De Búrca Gráinne and Aschenbrenner Jo Beatrix: European Constitutionalism and the Charter. In Peers Steve and Ward Angela (eds.): The European Union Charter of Fundamental Rights. Hart Publishing. Oxford and Portland, Oregon 2004, p. 33. In some legal documents that have been adopted also after the entry into force of the Lisbon Treaty one can see similar trend that fundamental rights and the Charter are being promoted for example in the recitals but the hard core of the text, the Articles, does not take into account fundamental rights in a sufficient manner. The promotional aspects of recitals are in fact hollowed or in practice removed by substantive operational provisions of the text.

the Charter.[186] Some danger is also evident, but sectorial legislation should be considered in order to see that the cloud of references to the Charter has a silver lining: bringing the EUCFR into play, especially in the negotiations on issues other than those falling under the AFSJ, has clearly strengthened the presence of fundamental rights in the discussion and has helped to reveal possible fundamental right problems that may not have been detected if formal references to the Charter did not exist. In spite of the fact the Charter does not create new competences or alter them, for example Paolo Carrozza has in the same line with Alston and Weiler highlighted the eventuality that legislative action could increasingly be justified by fundamental rights, as recognized especially in the Charter.[187] This finding is particularly important. It is possible to see that fundamental rights are creeping into policy areas previously considered as somehow fundamental rights neutral despite the fact that nothing really is. Furthermore, Carrozza links to this discussion the ECHR and the jurisprudence of the ECtHR in terms of affirmative or positive obligations.[188] This positive obligation that derives from the idea of taking positive action in order to guarantee for the individuals an effective enjoyment of certain right may have an indirect but important effect on fundamental rights in EU legislation, despite the current division of competence.

One could approach the role of the Agency through the overarching institution-specific questions of this study that deal with, on the one hand, the promotion of fundamental rights in draft legal texts and, on the other hand, the restriction of fundamental rights in the law-making process. These positive and negative obligations are essential for tackling the issue of *ex ante* review of fundamental rights in the EU law-making process. The Agency clearly has much to offer for discussion on both of these aspects. In light of the evidence of this study, it seems that FRA has taken on a particularly high profile, especially in the promotion of fundamental rights in the various opinions on draft legal instruments. In several EU legislative dossiers, the Agency has brought into the discussion important elements that very often spring from the Charter and the CJEU interpretation practice. In practical terms, the FRA seeks more references to the Charter and aims at a higher level of alignment of secondary EU law under preparation with the phrasing and the spirit of the Charter. Legislative dossiers that have been analysed in this study suggest that most often it has been the EP that has taken FRA opinions into its positions on draft EU legislation.[189] The FRA has also been instrumental in intensifying the discussion on the limitation of fundamental rights when new EU legislation is being drafted. Very often the FRA has turned against the Commission in stating that the Commission goes too far in limiting fundamental rights and stretches the limits of the allowed restriction

[186] See for example Carrozza Paolo: The Member States. In Peers Steve and Ward Angela (eds.): The European Union Charter of Fundamental Rights. Hart Publishing. Oxford and Portland, Oregon 2004, p. 47.

[187] Ibid., p. 48.

[188] Ibid., p. 49.

[189] See draft legal instruments on Passenger Name Record and in the margins of the security scanner file.

criteria.[190] Political back-up for FRA views has also often emerged in these cases from the EP.

Who triggers the interventions of the FRA in certain draft legal instruments is interesting to observe. This can happen either at the Agency's initiative or at the request of one of the institutions.[191] In the initiating phase, it seems to be the EP that has taken most of the advantage of FRA expertise in launching the scrutiny of the Agency. Own-initiative opinions form another important category of FRA opinions.

According to Article 4 paragraph 2 of the Agency Regulation "The conclusions, opinions and reports referred to in paragraph 1 may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d). They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty". This provision was without a doubt designed to preserve the delicate institutional balance and to keep the Agency away from the core area falling within the competence of the CJEU, namely interpretation of the EU law.[192] The legal basis for the Agency's work can be found in the Agency Regulation, but there are good reasons to claim that during its years of operation the FRA has been able to hold a more important role than could be expected on the basis of the regulation. The FRA has also carried out some self-evaluation by analysing impacts of its opinions on some legislative dossiers in its annual reports.[193] As always with the EU agencies, the tasks and competence of the FRA tend to increase. Relatively heavy political pressures already encourage the revision of the remit of the FRA in the course of the strengthening of particularly the fundamental rights aspects of the AFSJ. Although reverse pressures exist, too, one can foresee reinforcement of the Agency during the next few years, even though FRA regulation is still quite fresh. From an institutional angle we can note that of all the EU institutions, the EP has probably been the strongest supporter of a powerful Agency. The

[190] See proceedings on EU data protection package and the European Investigation Order.

[191] Pursuant to Article 4 paragraph 1 d to meet the objectives of the Regulation and within the competences laid down in the Regulation it shall "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission". The content of this provision has been further elaborated in Recital 13 stating that "The Agency should have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty. Nevertheless, the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned".

[192] The role of the FRA is actually wider than being an actor in the ex ante review of fundamental rights in the legislative process. In addition to submitting opinions on draft legislation, the FRA also conducts studies on thematic fundamental rights issues, liaises with EU institutions and relevant national authorities and acts as an interlocutor in fora dealing with fundamental rights.

[193] See e.g. brief evaluation of impacts of the FRA opinion on EU data protection reform package, FRA Annual Activity Report 2012, p. 10. Available at http://fra.europa.eu/sites/default/files/annual-activity-report-2012_en_0.pdf. Visited on 20.8.2013.

EP has always called for the need to take advantage of the expertise of the Agency and to extend its practical work also to fundamental right-sensitive policy areas.[194]

In its opinions, the FRA has repeatedly made concrete drafting proposals to legal texts under preparation, stressing the content of the EUCFR. Various FRA text proposals emphasizing the role of the Charter suggest that the FRA has placed the Charter at the apex of its opinions. How FRA positions have found their way into final legal acts is a different story. In light of concrete EU legal dossiers, it seems that the FRA has most often gained support, particularly from the EP, while Member States, i.e. the Council, has had a more reserved position on FRA opinions. The FRA opinions have been reflected particularly in the position of the EP, while the Council have a rather different line.

The research material used for this study indicates that there has been quite a lot of tension between the FRA and the Commission in the restriction of fundamental rights. In many EU legal dossiers the Commission has approached the restriction of fundamental rights from a rather flexible point of departure, underscoring the nature of fundamental rights being subject to limitations. Nonetheless, we can note that point of departure of the FRA has often been quite the opposite – a lot of emphasis has been placed on the need to fulfil the criteria for limiting fundamental rights. This has led to occasional criticism of the Agency towards Commission legislative proposals. In the centre of these arguments has often been Article 52 of the EUCFR setting out the allowed grounds for limitations to fundamental rights.[195]

Clear developmental focal points are evident when summarizing the impact of the FRA. The FRA has paid a lot of attention to both promotion of fundamental rights and the limitation of fundamental rights. The FRA has been very keen to push for texts in the legislative phase that bolster fundamental rights aspects of the legal texts. In these views, the FRA has received a lot of political support from the EP. Similarly, the FRA has also taken a high profile as a loud critic of the Commission, especially in relation to too far-reaching limitations of fundamental rights. Also in this case, FRA opinions have been backed by the EP. On various occasions both the Commission and the Council have been forced to back down with their positions. The FRA can be considered to be a very special Agency among other EU Agencies that have executing functions. One could see that the FRA could even evolve into a *primus inter pares*. This is mainly due to the position of the FRA in the supervision of fundamental rights in the EU legislative process. Before an EU act is formally adopted, the FRA may intervene and try to remedy the flaws identified in the piece of draft EU legislation concerned. This kind of

[194] See for example Report of 12 February 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring. 2005/2169(INI), A6-0034/2007, "The Voggenhuber Report". Committee on Civil Liberties, Justice and Home Affairs. See particularly paragraphs 14, 17 and 18.

[195] For the background of the Article 52 see Liisberg Jonas Behring: Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law? 38 CML Rev 1171, 2001. This analysis is still to a great extent valid despite changes in the legal status of the Charter.

weak form control, in this case preview, can be regarded as significant although the impact of the FRA materializes in the law-making process mainly indirectly through positions of EU institutions. What makes FRA interventions remarkable is their inextricable link with fundamental rights – the hard core of European constitutional law. Unfortunately, the FRA has thus far not been utilized as much as would have been beneficial for the overall good of EU fundamental rights.

3. Council proceedings

The Council is above all the institution of the EU in which the Member States are represented. After consecutive enlargements of the EU, the number of Member States now counts altogether 28 EU countries.[196] The Council, being a playground of the Member States, is thus the forum where diverging positions of the Member States clash and where national interests most visibly find their way to the EU debate. Although the Council is one institutional entity, its work is organized hierarchically between different levels. The first level is the Council Working Group level that is usually characterized as technical. Sectorial Council Working Parties deal with legislative and policy initiatives falling within their remit under the Council structure. Most of the preparation of legislative work takes place in these groups.

The discussion in the working group often ends in a deadlock. In this situation, the dossier under discussion will be taken to the Coreper level. This Committee of Permanent Representatives of Member States, the committee consisting either of Permanent Representatives (Coreper II) of Member States or their Deputies (Coreper I), is a kind of compromise factory of the EU. The outstanding and often more political issues of political and legislative files will be handled in Coreper in order to find a compromise between various positions. With the constitutional tendency to make decisions in accordance with the ordinary legislative procedure, the role of the Coreper is paramount especially in preparing negotiating mandates for the rotating Presidency of the Council for trialogue meetings with the EP.[197] Very often, the Coreper may find a way out, but sometimes this attempt may be in vain and in this case the problem needs to be taken to a higher political level. The Coreper also has an important role to play in ensuring the consistency of EU policies and actions and overseeing that the principles of legality, subsidiarity and proportionality are observed.[198]

[196] This is bound to change due to the Brexit. The impact of the UK leaving the EU has been excluded from the scope of this dissertation.

[197] What remains intact after the entry into force of Lisbon Treaty is the rotating Presidency of Council. In the new constitutional framework the European Council, which is now a formal institution chaired by the permanent President of the European Council, has diminished the role of the Member State holding the Presidency of the Council. The main tasks of the Presidency have been summarized as follows: previously, the Presidency used to function as a business manager, manager of foreign policy, promoter of initiatives, package broker, liaison point and collective representative. See Hayes-Renshaw Fiona and Wallace Helen: The Council of Ministers. Second edition. Palgrave MacMillan. Basingstoke 2006, pp. 140-154.

[198] Article 19 of the Rules of Procedure of the Council. Council decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU). OJL L 325/35, 11.12.2009.

Sectorial Councils organized at the ministerial level are the highest point of the Council architecture. Ministers of EU Member States discuss unresolved issues trying to find solutions acceptable to everyone around the Council table. It should be noted, nevertheless, that usually the way has been paved for the decisions at a lower level with involved political guidance all the way throughout the process. In addition to solving the most important political problems, the essential role of the ministers is to provide input to political discussion relating to dossiers under discussion and also to give the Commission guidance on how to proceed with future legislative work. This can take place, for example, in the form of Council Conclusions. The last instance and institutionally separate institution is the European Council that steers the work of the different Councils and may decide on policy issues that have not been solved by the ministers.[199] At all the levels described above, the Commission is also represented. The aim of this chapter is to perform a legal analysis on different forms of *ex ante* control of fundamental rights in the context of different legislative proposals in the Council structure. The objective is to answer the question of how the Council, at its different levels, seeks to ensure the compliance of the legislation with EU fundamental rights?

Ex ante control can be considered to take place at all levels of the Council preparation. We should however distinguish different types of control according to different actors involved in the legislative work. It is possible to identify the essential role of the Council Legal Service which is organizationally a part of the Council Secretariat. The Council Legal Service is the body that supervises the legality of legislative texts under preparation. It is present at all levels, from the working group to the ministerial level. It presents comments and views on the discussed texts and their conformity with the *acquis communautaire*. In addition to its spontaneous role during Council meetings at different levels, it may also present written opinions on legal problems. Usually the demandeur of these written contributions is the Presidency.[200] The first stage initiative frequently comes from the interested delegations, the Member States. In addition to the task of helping the Council to respect the rule of law, it defends it in cases before the CJEU.[201] It is therefore very neutral in the legislative process but has representative functions on behalf of the Council (which is not always unanimous) in court proceedings. The Council Legal Service therefore offers a counterweight to Legal Services of other EU institutions.

The Council Legal Service is in a key position to react to the Commission's original proposal and to propose amendments made to it by the delegations

[199] For the reasons of work economy and the relatively general level guidance that the European Council provides, I have decided not to deal with the European Council exhaustively in this thesis. Despite its growing role and formally institutionalized character the European Council is unlikely to go in-depth with *ex ante* review should the file concerned not become a large political issue.

[200] The usual practice at the working party level or in the Coreper is that one of the delegations in the Council seeks legal advice on some particular issue. In the negotiations this request is channeled to the Council Legal Service by the Presidency. Some "critical mass" is therefore needed to back up these individual requests by delegations.

[201] Bishop Michael: The Council's Legal Service. In Westlake Martin and Galloway David (eds.): The Council of the European Union. Third edition. John Harper Publishing. London 2006, p. 357.

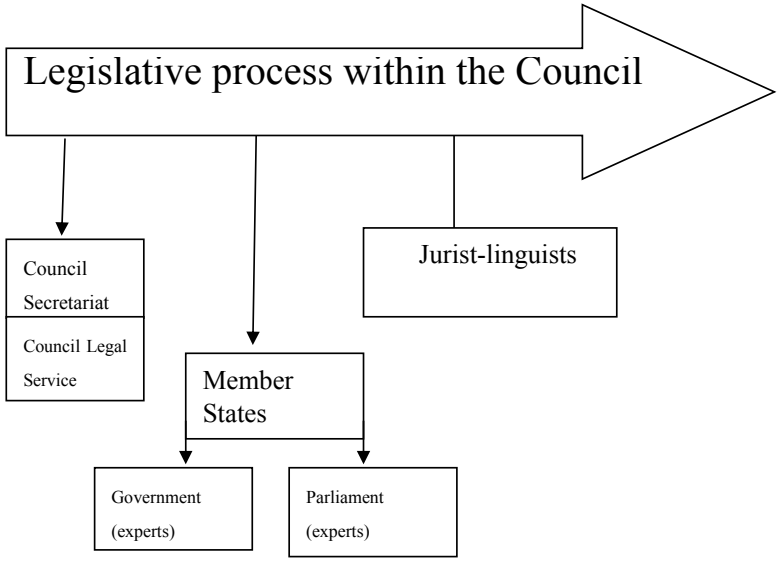
within the Council. This is important because preceding matters such as legal basis, general principles of law and statement of reasons, all constitute grounds for the annulment of a Court act by the CJEU. As Bishop observes, this is why the advice of the Legal Service must be professional and independent.[202] As for the possible grounds for annulment by the CJEU, attention should be drawn to general principles of law, which according to the interpretation practice of the CJEU also include fundamental rights. The Legal Service therefore has a significant task of also ensuring compliance with fundamental rights in the legislative phase. In very practical terms, the Council Legal Service can make a positive contribution to this work by pushing forward better quality in drafting.[203]

Most of the first-stage preparatory work of legislation is carried out in various working parties of the Council. The most important for Council Working regarding fundamental rights is the Working Party on Fundamental Rights and Citizenship (FREMP). It has a significant role above all in the work on fundamental rights scrutiny. Another key working group of the Council is the Human Rights Working Group (COHOM), but the work of the COHOM is mainly focused on the external dimension of EU fundamental rights policy. All other Council sectorial working groups deal with fundamental rights issues, but it is fair to say that very often the fundamental right focus is not that remarkable in everyday work. Sectorial working groups handle legal dossiers from their angle of expertise and probably the most extensive expertise can be found in working groups dealing with AFSJ, because mostly fundamental rights issues are probably most common in these dossiers. Another channel of *ex ante* control in the Council is offered by the Member States. All the Member States have in place their national preparation mechanisms of EU affairs at the national level. These systems are very different from each other. Some national systems empower national parliament with a strong say on EU affairs while the others maintain most of the control functions at the governmental level.

[202] Ibid., p. 358.

[203] Pursuant to Article 22 of the Council's Rules of Procedure "the Legal Service shall be responsible for checking the drafting quality of proposals and draft acts at the appropriate stage, as well as for bringing drafting suggestions to the attention of the Council and its bodies." Council decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU). OJ L 325/35, 11.12.2009.

Graph 2. Physical assessment of fundamental rights within the Council



Despite these possibilities to control conformity of legislation with fundamental rights we can see that the real Achilles' heel in the legislative process is the non-existence of formal impact assessments. This relates to the common practice during the legislative process where the original proposals of the Commission will be significantly changed. As considerable changes to the Council texts will be introduced, no impact assessments will be carried out. The Commission and the legal services of both the Commission and the Council are at the disposal in securing that draft legal texts are in line with the EU law but this fails to satisfactorily compensate for the lack of impact assessments because changes may often have strong implications on fundamental rights as well. The jurist-linguist phase at the very end of the legislative process is rather technical, but in this phase terminological problems may still emerge. In this connection we should note that if a group of Member States takes the legal initiative in the AFSJ there is no obligation to carry out impact assessment.

One practical problem related to the Council proceedings is the limited access to *travaux préparatoires* of the Council that are usually not public. This is especially true with regard to first reading legislative files. These are hard to follow because no "official" Council positions are available as is the case with second reading files. This creates a practical problem in reflecting the final outcome of the legislative process, the legal act, against the Council positions and thus determining what the real impact of the Council was in the legislative

process. Today, a first reading agreement takes place in about ¾ of EU legislative dossiers.[204] The Council begins its proceedings at the working party level on the legal text and usually after rounds of negotiations the EU dossier in question is ripe for Coreper to decide. The Council Presidency aims to take the text forward and the crucial issue is to avoid the blocking minority in the Council that can block the decision-making altogether.

Here the Council conclusions on the role of the Council in ensuring the effective implementation of the EUCFR should be discussed more closely.[205] In the conclusion the Council recalled the need set out in the Stockholm programme that EU institutions and Member States should ensure that legislative initiatives are and remain consistent with fundamental rights in the course of the legislative process.[206] The Stockholm programme emphasized the need for a systematic and rigorous monitoring and hence the Council invited the FREMP to elaborate in cooperation with the Council Legal Service methodological guidelines dealing with the main aspects of fundamental rights scrutiny.[207] The Council considered that these guidelines should be above all short and pragmatic and should address how to identify and solve problems of their own proposals for amendments in relation to their compatibility with fundamental rights.[208] This goal was deemed necessary to be shared by all the preparatory bodies of the Council. In the conclusions, the idea was apparently to promote having a fundamental rights label for Council legislative acts. It seems that this was closely linked with an objective to endorse a fundamental rights culture at all levels of the Council when drafting legislation. This kind of promotion would certainly be important especially for awareness-raising among the drafters of sectorial EU legislation.

When considering the Council as the co-legislator we should keep in mind that in the AFSJ a group of Member States is still entitled to put forward legislative proposals. Although we seem to have moved towards Commission right of initiative also in this domain, it is extremely important to carry out evaluation of impacts of proposals by a group of Member States. The Council conclusions also attach great importance to proposals originating in this way. The same is true with amendments made to the legislative texts during the legislative proceedings.[209] These are obviously the biggest gaps in the *ex ante* review within the Council. An interesting feature in the Council Conclusions is the reiterated call for using the FRA and reinforcing co-operation with it.[210] Although the pivotal role of the Council Legal Service has been underscored on many occasions and the importance of national legal experts as the first line of defence against insufficient sensitiveness towards fundamental rights in the

[204] In the EP this has given rise to discussion on the possible democracy gap with a dominating role of rapporteurs in first reading files.

[205] See Draft Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 6387/11, Brussels 11 February 2011. The Justice and Home Affairs Council adopted the Council Conclusions on 24-25 February 2011.

[206] Ibid., paragraph 1.

[207] Ibid., paragraph 16.

[208] Ibid., paragraph 15.

[209] Ibid., paragraph 4.

[210] Ibid., see paragraphs 18-20.

legislative process, it is important that also the Council seems to be willing to provide a strong role to the FRA in the *ex ante* review of fundamental rights.

As mandated in the Council Conclusions, the FREMP prepared guidelines document for carrying out the fundamental rights identification and ensuring that legal texts are in line with the Charter.[211] The guidelines approved by the Council are legally non-binding and can be used for several purposes. For instance, guidelines often aim at helping in the very practical and technical application of legal instruments. They can also be adopted when there is a need to establish a code of conduct for procedural reasons. The purpose of the guidelines can be summarized very briefly. It has to do with identifying and dealing with fundamental rights issues that are arising during the discussions on legislative proposals in the Council.[212] It becomes quite evident in the guidelines that the EUCFR functions as a yardstick in the assessment of fundamental rights, with particular attention being given naturally to the CJEU as the interpreter of the EU primary law.[213] For the expert bodies to be consulted, the guidelines emphasize notably the Council Legal Service, the national legal experts in the capitals as well as the FREMP.[214] Additionally, the expertise of the FRA has been underscored.[215] What is likely to be important for the practical work on the basis of the guidelines is related to limitation of fundamental rights. The guidelines offer guidance on what basis fundamental rights can be restricted. The annex of the guidelines aims at shedding some light on the questions related to the requirement to be provided by law and the necessity and proportionality.[216]

For many years there has been discussion under the auspices of the Council on the need to enhance better regulation, or smart regulation as this initiative is currently called. Unfortunately, there has not been that much action and practical measures in this field. The development with impact assessments that can be regarded as a practical tool to strive for better regulation has been modest.[217] Efforts in this area have mainly concentrated on political messages on the importance of impact assessments, such as with various Council conclusions on the topic. In December 2011, the Competitiveness Council adopted Council Conclusions on impact assessment. With these Council Conclusions, the Council tried to tackle the issue of impact assessments within the Council. After acknowledging and taking into account of the Commission's key role in the field of impact assessments and the recent developments within the EP the Council turned its attention to the Council's tasks.[218] First, the Council committed itself to improving the practice of discussing the

[211] Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies. 10140/11, Brussels 18 May 2011.

[212] See Guidelines, preamble.

[213] Guidelines, p. 5.

[214] Ibid., p. 4.

[215] Ibid., p. 4.

[216] Ibid., see p. 6 and Annex IV, pp. 16-18.

[217] A proof of this can be found for example in the case C-236/09 Test Achats, in which the CJEU found that Council Directive 2004/113/EC is in violation with Articles 21 and 23 of the EUCFR.

[218] On the work in this area see Council Conclusions on impact assessment, 3133rd Council meeting, competitiveness (internal market, industry, research and space), Brussels 5 and 6 December 2011, paragraphs 5 and 6.

Commission impact assessments during the legislative process. Also the need to strengthen the cooperation with the Commission was underlined.[219] Furthermore, the relevant information prepared by the Member States was reflected.[220] Much of the responsibility for managing and providing opportunities for discussion on such data was addressed to the Presidencies and consequently in practical terms also to the Council Secretariat. Moreover, the Working Party level of the Council was encouraged to make use of the possibility to invite the Commission to complement its original impact assessments.[221] What is probably the most important issue in these quite routine-like Council Conclusions is paragraph 13 that underlines the importance of embedding effective use of impact assessments in the EU legislative process. It also recalls the commitment of the Council to prepare, if deemed necessary, impact assessments on its own substantive amendments. Here, the important role of the General Secretariat of the Council was underscored together with the co-operation between Member States' and the Commission's expertise.[222]

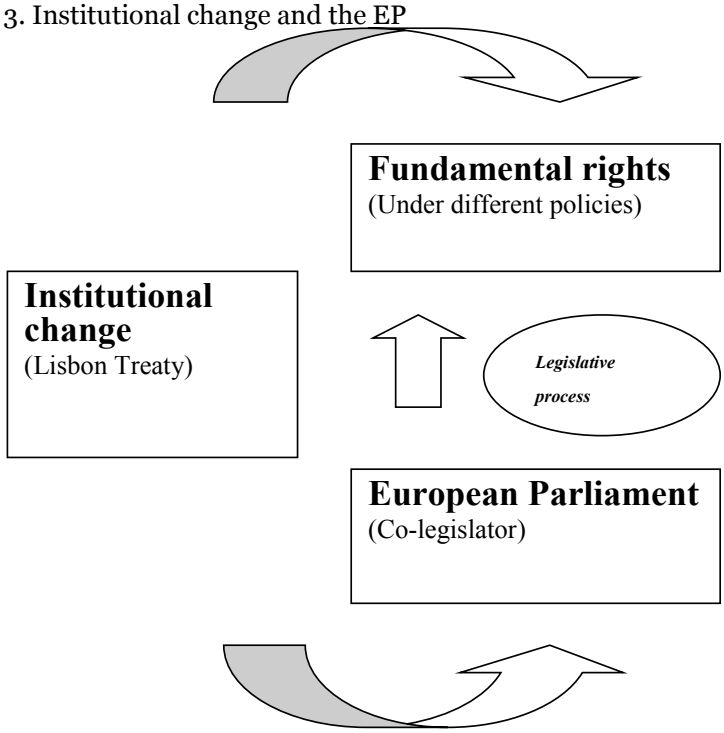
With the extremely long processes in amending the Treaties over the last decade or so, engaging in such far-reaching changes may not be a very popular idea. However, if a reform of the Treaty will take place sometime in the future, it should be considered if Member States could be given a similar option of giving the Commission a "yellow card" for neglecting fundamental rights in the draft legal instruments. This would be a similar mechanism to that of the submission of objections, the reasoned opinions, in subsidiarity. This might lead to a closer involvement of the Member States already in the preparatory phase of legislation. In this kind of arrangement lies the danger of the mechanism being used for political purposes, like trying to block politically sensitive proposals of the Commission.

[219] Ibid., paragraph 9.
[220] Ibid., paragraph 10.
[221] Ibid., paragraph 12.
[222] Ibid., paragraph 13. Taking into account the rather restricted resources of the Council Secretariat this may in practice be easier said than done. Without sufficient resourcing the professional level carrying out *ex ante* control may become a mere Potemkin facade.

4. EP proceedings

Draft legislation enters EP proceedings as Council proceedings are underway. The competence of the EP has significantly increased in the field of *ex ante* review of fundamental rights as a consequence of the institutional changes introduced in the Lisbon Treaty. The figure below illustrates this change.

Graph 3. Institutional change and the EP



In order to bring some clarity on the institutional position of fundamental rights within the EP, we should turn to the document establishing the rules of the game for the EP to internally handle fundamental rights issues, namely the rules of procedure. According to the rules of procedure, respect for fundamental rights is one of the key principles in the functioning of the EP. The Rules of Procedure (RoP) attach utmost importance especially to the EUCFR.[223] Furthermore, the RoP foresees a process according to which a particular subject matter can be brought to the EP committee responsible for interpretation of the Charter by a political group or by a certain number of MEPs if a legislative proposal or parts of it do not comply with EUCFR. Fundamental rights are present also in other parts of the RoP and the need for

[223] See Rule 36 of the EP Rules of Procedure, respect for the Charter of Fundamental Rights of the European Union.

conformity has been re-iterated several times.[224] The new legal framework established in this field by the Lisbon Treaty was highlighted on many occasions before the entry into force of the new Treaty.[225] Claims from the EP have also often emerged on putting the EP and the Council on an equal footing in the law-making process.[226]

The competence of the EP regarding provisions of Title V of TFEU is explicitly stated in various provisions of this Title. First, in accordance with nearly all the Articles falling under Title V of TFEU, the EP is guaranteed with the powers of co-legislator. With these Articles reaching from 67 to 89, the EP will be involved in ordinary legislative procedure in the fields of policies on border checks, asylum, immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters as well as in police cooperation. Taking into account the very concrete link of these policy areas to the very heart of constitutional law, we can note that we are talking here about an extremely substantial change.[227]

It seems that probably the most interesting position that the EP itself has taken on its role in the AFSJ is the resolution of 25 November 2009 on the Stockholm Programme.[228] The Stockholm Programme has been the most important political guideline for the development of AFSJ. In the Stockholm program, adopted during the Swedish Presidency in 2009, political guidance is provided for the development of the former area of justice and home affairs, the European Council very clearly gives the EU institutions and the Member States the task of securing consistency of fundamental rights in the legislative process.[229] The fact that this issue has been taken up at the highest political level hints at the growing importance of ex ante review.

It should also be noted that the position of the EP is quite strong and ambitious when it comes to objectives of the Stockholm program. The new role of the EP in the new constitutional framework is highlighted to a great extent. In many respects, the need to set the bar higher as regards the level of ambition of this policy program has also been underscored. Once again, the EP in several

[224] See for example rule 43 (paragraph 4), rule 103 (paragraph 1) and Annex XV (paragraph 2),

[225] See e.g. paragraph 2 of the Report on the draft Council Decision determining the list of third States and organizations with which Europol shall conclude agreements. A7-0069/2009. 16.11.2010.

[226] Paragraph 1 of Draft opinion of the Committee on Constitutional Affairs for the Committee on Legal Affairs on better lawmaking in 2007 and 2008 pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality. 2009/2142(INI). 25.2.2010.

[227] The Lisbon Treaty also contains provisions on the possibility of enhanced co-operation. Sometimes enhanced co-operation has been criticized because it can be understood as providing *à la carte* solutions to question related to European integration. In my opinion, enhanced co-operation can be a good instrument in the former third pillar of the EU because it can help to overcome deadlocks in negotiations on legal proposals. Member States' absolute red lines and no go-zones can be taken into account by using the possibility of enhanced co-operation to move forward.

[228] European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm Programme.

[229] The European Council invites the EU institutions and the Member States to ensure that legal initiatives are and remain consistent with fundamental rights throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the Convention and the rights set out in the Charter of Fundamental Rights. The Stockholm Program – An open and secure Europe serving and protecting the citizens. 17024/09, p. 12.

paragraphs of the resolution takes up the need to strengthen parliamentary control in initiatives related to AFSJ.[230] Furthermore, the EP finds, quite interestingly and also in many parts of the resolution, that another important feature of reinforcing parliamentary control is the involvement of national parliaments. Here, in paragraph 11, the EP calls for a more transparent law-making process. Particularly the access to documents and information in cases with a link to the rights of the individual has been raised.[231] What is even more significant is the idea of establishing "of a concrete monitoring and evaluation system, notably in the area of justice, which focuses on the quality, efficiency, and fairness of existing legal instruments, of the administration of justice and of the protection of fundamental rights, closely involving the European Parliament and the national parliaments".[232] What does this mean in practice? The EP indeed further refines the idea by condensing it to development of evaluation systems. First, the EP takes note of the existence of various evaluation systems in this policy field. What the EP is after, is a consolidated and coherent framework with better co-ordination for these activities. This should cover the wide range of phases of evaluation, including ex ante - evaluation.[233] It is evident that a stronger role is foreseen for the EP and also national parliaments. What might be interesting in the future is the possible partnership of the EP and national parliaments in this field and their contribution to better law-making.[234] Nevertheless, the need to strengthen parliamentary scrutiny – both at national and supranational levels – can be identified as a general feature of the EP view.

Ex ante review emerges again in the resolution, in paragraph 21. In this paragraph, the EP stresses that impact assessments are needed with regard to every new EU policy, legislative proposal and programme. Similarly, these impact assessments should identify fundamental rights that are affected by these new initiatives.[235] The interesting thing in this statement is that the EP would very much like to see stronger involvement of the FRA throughout the policy cycle of each legislative proposal having fundamental rights implications. This is no wonder because the EP has always been a strong proponent of Union and supranational dimension of EU policies. Similarly, the EP has welcomed giving more tasks and competence to EU agencies. This can certainly take EU policies in an increasingly harmonized direction. The EP goes even further in its call for better legislation by requiring impact assessments in the field of justice and deploring that in the past no proper impact assessments were conducted in this field.[236] This can be considered as a major criticism towards the practices of the Commission. The same trend continues later with a further request monitoring the quality of opinions delivered by the IAB. For the purpose of carrying out quality checks, the EP proposes a panel of independent experts.

[230] See for example Resolution, paragraph 5, p. 3.
[231] Ibid., paragraph 11.
[232] Ibid., paragraph 13.
[233] Ibid.
[234] See Priestley Julian: Six Battles that shaped Europe's Parliament. John Harper Publishing. London 2008, pp. 204-205.
[235] See Resolution, paragraph 21.
[236] Ibid., paragraph 102.

In the Resolution, the EP also touches upon the external dimension of fundamental rights.[237] The promotion of fundamental rights, democracy and the rule of law has been one of the cornerstones of EU external relations and with the entry into force of the Lisbon Treaty, the EP has a strengthened position vis-à-vis international agreements. As a consequence of the possibility to accept or reject texts of international agreements, the EP also has more say on the fundamental rights related matters included in these agreements. The increase in the powers of the EP after the entry into force of the Lisbon Treaty can also be seen in the back-end of the legislative cycle such as delegated acts.[238] Similarly, as stated before, the EP now has more competence in international issues, such as when concluding international agreements.[239] These are areas where the EP can also keep fundamental rights issues on the agenda. As a consequence of its increased competence, the necessity to obtain the EP's consent will now reach also to the international agreements on police and judicial co-operation in criminal matters.[240]

In its vote in November 2010, the EP LIBE committee adopted a report on the situation of fundamental rights in the European Union.[241] This report can be considered as an EP response to the Commission Communication on the strategy for the effective implementation of the EUCFR by the EU. The EP report very much follows the same line with the views expressed in its report concerning the Stockholm program. In many parts of the text, the EP calls for a stronger fundamental rights policy, both internal and external, for the EU. In addition to general messages on reinforcing the fundamental rights dimension, the EP also pays attention to ex ante review of EU legislation. First, the EP reminds the Commission to monitor all new legislative proposals for compliance with the EUCFR and also to check existing instruments in this respect. Furthermore, the EP underlines the need to include impact assessments that would ensure the compliance of the proposal with the Charter.[242] Here the EP also attaches importance to the work conducted by the IAB under the Commission.[243] The EP also sends a similar message to the Council.[244] What is even more interesting in terms of ex ante review is the commitment of the EP to strengthen its own ex ante review in the legislative process.[245] It seems that the EP is really taking fundamental rights seriously in

[237] The EP stresses in paragraph 151 that "contrary to what was stated in the Presidency's draft Stockholm Programme, when fundamental rights are at stake EU external policy should comply with the EU's internal legal framework and not the reverse".

[238] Pursuant to Article 290 (2 b) of the TFEU "The European Parliament or the Council may decide to revoke the delegation". In terms of institutional balance of power this is a major difference to the implementing acts, the so-called comitology, under Article 291 of the TFEU.

[239] Lenaerts Koen and Cambien Nathan: The Democratic Legitimacy of the EU after the Treaty of Lisbon. In Wouters Jan, Verhey Luc and Kiiver Philipp (Eds.): European Constitutionalism beyond Lisbon. Intersentia. Antwerpen 2009, p. 187.

[240] Ibid., p. 188.

[241] Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161 (INI)). A7-0344/2010.

[242] Ibid., paragraph 18.

[243] Ibid., paragraph 23.

[244] Ibid., paragraph 27.

[245] See ibid., paragraph 26. Accordingly, the EP "highlights that also the European Parliament should strengthen its autonomous impact assessment on fundamental rights in relation to legislative proposals and amendments under examination in the legislative process to make it more systematic, notably by

its law-making and is ready to take into account the comprehensive need to reinforce ex ante review. The EP also considers that the FRA should be strengthened in providing expertise and inputs to the decision-making process. According to the EP, this includes reviewing the mandate of the Agency.[246] Finally, the EP also calls for the institutions involved in the EU decision-making process to use the data provided by the FRA in the preparatory stage of legislative activity.[247] This is a clear signal that the EP wishes to give a strong status to the Agency in law-making, which includes a fundamental rights dimension. The involvement of the FRA is in the preparatory phase of legislation.

In the Stockholm Program, the European Council invites the EU institutions to make full use of the expertise of FRA in the legislative work.[248] A strengthened role for the FRA could contribute to pulling the institutional threads of ex ante review together and ensuring sufficient neutrality in the preview. The only thing that might be somewhat problematic is that the empowerment of the Agency may strengthen the position of the Commission and, as a consequence, shift the institutional balance of power.

The EP also has a key role to play with regard to the positive obligation to promote fundamental rights, both in legislation and policy documents. Let us take the report on the fundamental rights situation in the EU as an example. It is of particular interest that in November 2012, the LIBE Committee produced a report on the fundamental rights situation in the EU. This report contained a great number of interesting insights and calls for EU actions in the field of fundamental rights. The findings of this report are important for this study, chiefly for two reasons. The first important point highlighted in the report is about securing compliance of draft legislation with fundamental rights. The report approaches this issue from an institutional angle. Regarding the role of the Commission in this screening process, the EP welcomes the actions taken by the Commission to ensure that draft legislation is in conformity with the EUCFR but also considers that there is still a lot of room for improvement: The EP finds that there are still legal proposals that do not take into account effects on fundamental rights.[249] When it comes to practical measures, the EP urges the Commission to make sure that the effect of legislation on fundamental rights and its implementation by the Member States will be a part of the Commission's evaluation reports on the implementation and application of EU law.[250] More concretely the EP requests the Commission to revise the impact assessment guidelines. What is noteworthy is the request to widen the guidelines to include UN and CoE

enlarging the possibilities currently foreseen by Rule 36 of the Parliament's Rules of procedure on the respect for the Charter and to ask to the Legal service opinions on legal issues in relation to fundamental rights issues in the EU".

[246] Ibid., paragraphs 32 and 33.

[247] Ibid., paragraph 34.

[248] See p. 12 of the Stockholm Programme.

[249] Report on the situation of fundamental rights in the European Union (2010-2011), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Monika Flasiková Benová. A7-0383/2012, PE489.625v03-00, 22.11.2012, paragraph 2, p. 6.

[250] Ibid., paragraph 3.

human rights standards.[251] This constitutes an interesting change towards a wider framework for ex ante review of fundamental rights.

The EP then turns its attention to the Council. The spearhead of the EP position is the need of "the Council to ensure effective implementation of its commitment to check both its proposed amendments to Commission proposals and proposals put forward on its own initiative with the Charter".[252] In this case the EP obviously focuses on legal initiatives initiated by a group of Member States and also policy initiatives encapsulated in policy documents, such as Council conclusions. The EP does not spare itself from criticism either, so the EP statement is not about bashing the other institutions. The EP considers it necessary to strengthen its impact assessment on fundamental rights in relation to legislative proposals and proposed amendments made during the law-making process.[253] The EP therefore seems to be ready to take the hit for not having yet reacted adequately to the necessity of reinforcing ex ante review. The EP also very much underscores its role as the bastion of democratic and parliamentary oversight and in the text refers especially to the case of ACTA.[254] In terms of delving into the deeper substance of fundamental rights, the EP finds that tensions between economic freedoms and fundamental rights should be handled already at the legislative phase.[255] The second important reason has to do with the role of the FRA. Again, in its report the EP calls other institutions to make use in a systematic manner of the independent expertise of the FRA.[256] Later on in the report, in the context of PNR proposal, the EP once again reiterated the need to take account of concerns expressed by the FRA.[257] We can, with good reason, conclude that the EP considers it extremely important to involve the FRA in the legislative process, especially when fundamental rights issues are concerned.[258]

Finally, let us put forward the decisive question concerning the realism of all this: How to merge a high level of ambition with the notion of realism and how to integrate the outcome with a high quality of legal texts? This is a challenge that the EU has to face in the field of fundamental rights. One obvious conclusion is that ex ante review must be an extensive and a continuous process and has to involve all the institutions. Consequently, the EP has to contribute as well and without a doubt it will do. In order to guarantee that it can act responsibly within its new competence, the EP will obviously take its new role very seriously and put a great deal of effort on ensuring that files have a link to constitutional issues.[259] In order to conclude

[251] Ibid.
[252] Ibid., paragraph 5, p. 7.
[253] Ibid., paragraph 8, p. 7.
[254] Ibid., paragraph 16, p. 8.
[255] Ibid., paragraph 14, p. 8.
[256] Ibid., paragraph 6, p. 7.
[257] Ibid., paragraph 123, p. 22.
[258] This is not only the case with this report, but this is a general finding of various policy documents produced by the EP. We can hence see that of all institutions, it has been the EP that has been the driver of a stronger role of the Agency.
[259] For instance Westlake argues that the EP has not afforded to be seen as behaving "irresponsibly" when exercising its new powers. See Westlake Martin: "The Style and the Machinery". The Role of the European Parliament in the EU's legislative Processes. In Craig Paul and Harlow Carol (Eds.): Lawmaking in the European Union. Kluwer Law International. Dordrecht 1998, p. 143.

from an institutional point of view, we should try to answer the following question: Can the EP be seen as an institutional gambler longing for more competence in the AFSJ or as a responsible co-legislator *par excellence*. In light of recent evidence, we can conclude that the EP has opted in for the latter option. This conclusion can be drawn from preparation of legislation, which also includes analysis of fundamental rights. This is the case in spite of the relatively strong rhetoric that the EP used after the entry into force of the Lisbon Treaty. Practice can at first glance appear to be quite different from the rhetoric. It seems nonetheless that the EP is taking the ex ante review of fundamental rights seriously at the level of political aspiration and commitment, as well as at the level of legal-technical preview. The hybrid model of constitutional preview involving extensively the EP can function as significant boost for taking fundamental rights more seriously in the EU legislative process. We should note that the EP has on various occasions pushed very hard for a robust ex ante review of fundamental rights at the EU level. The EP has, in particular, seen the EUCFR as the vital basis for this ex ante review and the calls for strengthening the system of preview have been addressed to all the EU institutions.[260]

All the practical work on EU legislation within the EP is carried out in specialized parliamentary committees. The handling of the dossier starts in the EP when the responsible Committee begins the discussion on the topic. Rapporteur and shadow-rapporteurs will be nominated for the file and the report of the rapporteur will be voted in the Committee and later in the plenary.[261] This represents the EP position. The amendments that are presented later on to the plenary are discussed and dealt with in these committees.[262] In this work, a considerable political power is attached to the rapporteur of the respective legal file. According to Voerman, the EP tries to enter into a dialogue with electorate through its contribution to legislative process. Practically, this happens with the means of the amendments.[263] As stated previously, the rapporteur of the file has a central role to play. He or she can introduce amendments when the piece of draft legislation is being dealt with in the parliamentary committee. In the committee phase ,also individual MEPs can table amendments. It is clear, however, that already at this stage there is a need to broker a political package of the amendments that the majority can accept. The next stage after the committee phase is the plenary. If the handling of the EP text has already progressed all the way to this phase, it is much harder to enter new amendments into the EP text. At least a much larger political mass, such as a political group, is needed to make an

[260] See for example "The Voggenhuber Report" of LIBE Committee, recitals D and E and paragraphs 5, 6, 7, 12, 15 and 21.

[261] The political groups of the EP "buy" different EU dossiers with "points". The overall amount of these points depends on the size of the political group in question and political groups prioritize files on certain policy areas when considering the use of points. It is usually the case that for example Greens may wish to use a great deal of points in getting the responsibility of rapporteur in an important piece of environmental legislation while socialists may wish to use a lot of points and go for trade-offs in order to get an important dossier touching upon social policy.

[262] Angel Benjamin and Chaltiel-Terral Florence: Quelle Europe après le Traité de Lisbonne. Bruylant. Bruxelles 2008, p. 120.

[263] Voerman Wim: The Coming Age of the European Legislator. In Kinneging Andreas (ed.): Rethinking Europe's Constitution. Wolf Legal Publishers. Nijmegen 2007, p. 185.

amendment to pass on to the text in the plenary. Furthermore, the role of the President of the EP is very strong in deciding which amendments tabled in the plenary will be given the green light.

Probably the most important parliamentary committee exclusively dealing with human rights issues is the Sub-Committee on Human Rights (DROI). This sub-committee structurally functions under the Committee on Foreign Affairs (AFET). Hence, the focus of the sub-committee has been mainly on the external dimension of fundamental rights, i.e. relations with third countries. We are obviously now witnessing, however, a change in the role of the DROI as the EP is taking a much stronger role in fundamental rights issues than previously. Nevertheless, it becomes quite obvious later in this presentation that the dichotomy between internal and external fundamental rights policies still exists. This is not to say that the EP has lacked political will to be more active in internal fundamental rights issues. Quite the contrary, the EP has consistently showed great interest in the internal fundamental rights policies, but it has simply been short of legislative competence and hence of practical means to carry out more wide-ranging policies and initiatives in this field. When issues are dealt with by the EP they are usually first debated in the committees and the reports of the committees will form the basis for plenary discussion.[264] Only time will tell to what extent issues related to ex ante review will be handled in the committees of the EP and in the plenary. Nevertheless, it seems quite difficult to integrate ex ante review elements to plenary discussions. Other committees than the DROI could however hold an important role also in issues related to fundamental rights, although the primary responsibility clearly lies within the competence of the DROI, especially regarding the external dimension of fundamental rights.

In relation to internal fundamental rights legislation, one should be aware of the importance of especially the Committee on Civil Liberties, Justice and Home Affairs (LIBE).[265] Now, as the LIBE Committee is responsible for "the protection within the territory of the Union of citizens' rights, human rights and the fundamental rights, including the protection of minorities, as laid down in the Treaties and in the Charter of Fundamental Rights of the European Union" it is crystal clear that LIBE is the major interlocutor in fundamental rights issues.[266] This applies particularly to the internal dimension of fundamental rights in the Union, i.e. preparation of EU fundamental rights legislation, which is the more important part of fundamental rights work from the angle of this study. The LIBE is also in charge of the establishment and the development of the AFSJ, which will serve as a springboard and not a gravedigger of various legal and political initiatives that will become increasingly important. Similarly, the overall link to fundamental rights related topics as well to institutional bodies, such as FRA and Eurojust, highlights the LIBE in the spectrum of fundamental rights. It

[264] See Hartley T.C.: The Foundations of European Community Law. An Introduction to the Constitutional and Administrative Law of the European Community. Sixth Edition. Oxford University Press. Oxford 2007, p. 30.

[265] The LIBE committee has also been identified as a key parliamentary committee in monitoring fundamental rights implications of legislative proposals, see "The Voggenhuber Report", paragraph 15.

should also be noted that LIBE annually undertakes the report on the situation of fundamental rights in the European Union as set out in the Annex 1 of the RoP.

In practical terms the role of LIBE becomes very concrete when one asks who is the pen in the EP. The MEPs of LIBE will manage the drafting of the reports on fundamental rights issues within the EP.[267] Moreover, it will be a team of members of LIBE who will conduct the practical negotiations on fundamental rights legislation in the trialogues with the Council and the Commission. We should bear in mind that the EP is organized internally in a consensus-oriented way, with a considerable role being given to the rapporteur, who seeks broad support from political groups to his proposals in order to secure smooth handling in the plenary.[268] The rapporteur of the respective legislative file is also in a central position in the phase of trialogues, in which the positions of the institutions will be merged, usually in a series of inter-institutional negotiations.[269] Some scholars have identified a problem in this process in terms of transparency and democratic accountability due to fact that in trialogues very important dossiers will be negotiated "behind closed doors".[270]

A very important Committee in the EP that has very close links to fundamental rights issues is the Committee on Constitutional Affairs (AFCO). The last years have borne the testimony of a large number of the previously known third pillar initiatives touching directly upon the very constitutional core of the EU and consequently that of the Member States. A good example of this is the European Arrest Warrant, which in its implementation phase raised considerably constitutional concerns and even resistance from the part of Member States.[271] One could even talk about a new wave of constitutional patriotism.[272]

With the empowerment of the EP in the former third pillar of the EU, the EP will also become an increasingly attractive target for lobbyists and all kinds of interest groups to present their stake on issues, which the EP will handle.[273]

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[267] For a deeper analysis of LIBE it would have been interesting to study the composition of the Committee, e.g. which parties do the members of the LIBE come from, which social backgrounds are they from and which nationalities do they represent. Similarly, it would have been intriguing to further tackle the variety of the committee statements by asking which topics have these statements or positions dealt with: division of competence, fundamental rights, and which substantial fundamental rights and so forth.

[268] Priestley, p. 125.

[269] We should note, however, that each legislative dossier has so called "shadow rapporteurs" who are nominated by the political groups in order to ensure that political views of the given political group will be taken sufficiently into account when preparing the EP position on the file concerned and when conducting practical negotiations thereon. Hence, the idea of seeking compromise between political views becomes reality already in this phase.

[270] See Héritier Adrienne: Explaining Institutional Change in Europe. Oxford University Press. Oxford 2007, p. 99-100.

[271] For a wide-ranging discussion on this topic see Guild Elspeth: Constitutional Challenge to European Arrest Warrant. Wolf Legal Publishers. Nijmegen 2006.

[272] On the concept of "Verfassungspatriotismus" see Habermas Jürgen: Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats. Suhrkamp. Frankfurt am Main 1992, pp. 632-660.

[273] Banchoff Thomas and Smith Mitchell P.: Legitimacy and the European Union. The Contested Polity. Routledge. London 1999, p. 147.

This trend should not be seen as some kind of a bogey-man lurking in the legislative process, but rather as a process promoting transparency with the active involvement of various stakeholders. Having these actors more deeply involved in the legislative phase could have the merit of more forceful attention to fundamental rights already in the early phase of drafting legislation. Without undermining the possible problems of lobbying an added value to fundamental rights legislation may spring from NGOs in this field.

The Legal Service of the EP is the major player in ensuring consistency of legal drafts for fundamental rights. In organizational terms, the Legal Service belongs to the Secretariat. It consists of high-level legal professionals that participate in the legislative process throughout the EP legislative work. The importance of the Legal Service grows as we are moving towards the core legislative process of the EP, namely the ordinary legislative procedure. Especially in the phase of trialogues, the legal assistance of the Legal Service proves its mettle.[274] Moreover, the presence of the Legal Service of the EP institutionally balances the involvement of the respective Legal Services of the Council and the Commission.

5. Trialogue

The next phase is the stage of the ordinary legislative procedure of utmost importance but rather unknown to many despite its impact on the final text. It is called trialogue, which consists usually of rounds of negotiations between the Commission, the Council and the EP. Trialogue is all about trying to strike a balance between different views of the institutions and to provide a text that can be accepted by the qualified majority of the Council and a majority of the EP votes. In the trialogue key players on the Council side are the Presidency and on the Commission side the rapporteur and the shadows.[275] Coreper has a key role to play in the preparation of the Council positions at this stage because the Presidency seeks negotiation mandates for the negotiations in the Coreper.[276] High level Commission officials represent the Commission in the trialogue negotiations and the Commission defends the spirit of its initial proposal.[277] Each institution ought to make compromises and concessions during the negotiations.

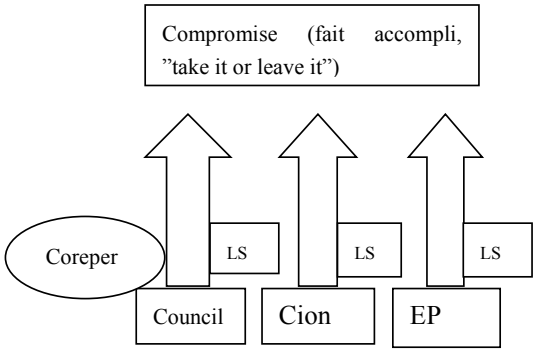
[274] See Annex XX Code of conduct for negotiating in the context of the ordinary legislative procedures, in particular paragraph 7, of the RoP of the EP.

[275] The Council delegation in the negotiations is usually led by the Permanent Representative (in Coreper II matters) or the Deputy Permanent Representative (in Coreper I matters).

[276] In bigger legislative initiatives, the Presidency usually divides the piece of legislation into thematic negotiation blocks that will be tackled one by one. The key task of the Presidency is to try to achieve a qualified majority to back up the Council position and to avoid the blocking of a minority of votes, currently 93, out of 352. This means that in order to achieve a qualified majority there has to be 260 votes cast in favour of the proposal out of total of 352 votes. As of 1 November 2014, the Council has applied double majority voting rules.

[277] The Commission negotiation team is usually headed by the Director General of the Directorate General responsible for the file. It should be noted that there are no strict rules on the level of participants in informal trialogues, which are the most common method of carrying out the negotiations. Conversely, formal trialogues require, for example, ministerial representation on the Council side.

Graph 4. Ex ante control in trialogue phase of ordinary legislative procedure



The figure above illustrates the inter-institutional negotiation in the ordinary legislative procedure that covers most of the AFSJ. From this picture it becomes clear that in the trialogue a large responsibility has been given the legal services of the institutions in checking the compliance of compromise texts. This is yet another weak-form layer in the ex ante control of fundamental rights complex in the EU. As a consequence of the negotiations, a final compromise text will be submitted for the approval of the institutions, which is more or less a “take it or leave it” situation. This is the case especially with first reading agreements that are nowadays increasingly important due to the fact that about three quarters of all legislation under the ordinary legislative procedure becomes adopted in the first reading. At this stage, the co-legislators will consider the compromise package as a whole and fundamental rights aspects are clearly one part of the consideration. If the text is green lighted and will be adopted, possible problems appear in the context of the implementation as happened with the European Arrest Warrant. It is quite often the case that political pressure to reach a compromise between the institutions is overwhelming. In this case, the practical possibilities of legal services to have an effect on minor issues relating to the quality of the legal text are scarce. Only bigger legal conundrums can be raised at this stage.

Should the institutions fail to find an acceptable compromise that can be supported by all the institutions, the legislative file goes to the second reading.[278] This is where deadlines come in. Whereas the first reading

[278] Second reading
7. If, within three months of such communication, the European Parliament:
(a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
(b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;

procedure is not restricted by any mandatory time frames, the deadline for the second reading is three months, which can be extended by one month. In this case the Council will adopt its formal position and the Presidency will then negotiate with the EP on the basis of this position. Once again, the Coreper will prepare negotiating mandates for the Presidency, which normally has a much more restricted room for manoeuvre in the negotiations due to the Council position. The role of the Commission is somewhat different in this second reading phase. It will be more like a facilitator striving for a compromise between the Council and the EP. If the proposed instrument is not adopted in the second reading, it goes to the third reading, generally known as the conciliation committee, although these are formally separate procedures.[279]

It is rare that a legislative proposal ends up in conciliation committee. All the 28 Member States are represented in the Conciliation Committee. If the legal instrument will not be adopted in the third reading it means the end of the instrument. In these cases there is insufficient political will to adopt the EU legislative act in question. If the legal instrument fails, the Commission has at its disposal a certain mechanism for withdrawing the legislative proposal but in case the proposal has been a priority of the Commission, this is unlikely. In these cases, the proposal will simply fade away but the Commission may return to the issue, for example in the form of revised proposal if the political tide changes in the future.

This shift in the institutional balance of power will probably not take place without practical problems. EU Member States that are accustomed to regulating fundamental rights issues mainly by themselves will obviously face

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(c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

(a) approves all those amendments, the act in question shall be deemed to have been adopted;

(b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

[279] Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

difficulties with the EP, the institution that usually strives in other policy sectors for extended Union competence and more ambitious targets. These clashes very often occur in the context of inter-institutional negotiations on legislative files, i.e. the trialogues. Fundamental rights will not make an exception to this rule.[280] In spite of this, a paralysis of decision-making in this field cannot be expected.[281] In very similar situations, with a considerable change in the constitutional setting of the decision-making, the interaction between the institutions has not proved too rigid. The Commission, as the guardian of Treaty, usually defends the Union approach and wider competence and tasks for the Commission. Therefore it can be estimated that EP is likely to find an ally in the Berlaymont building. The Commission and the EP can together form a strong counter-pole for Member States' driven Council also in the field of fundamental rights.

Taking into account the development that has led to a shift towards the EP as regards competence in the field of fundamental rights, it is easy to draw the following conclusions: First, Member States will have to adjust themselves to the fact that the EP now has a significantly greater say on fundamental rights issues. In the decision-making four-column documents indicating also EP position will now form a basis for taking the decision also in this very sensitive sphere. The shift to ordinary legislative procedure and thus towards the EP that the limited right of initiative for legislation that is reserved for a group of at least seven Member States, does not preserve the balance of power from the point of view of Member States. The right of initiative of a certain amount of Member States probably offers an interesting flavour to the trialogues, as it is likely to provide tension, especially in the axis Council – the EP will increase and make the striving for the compromise in the ordinary legislative procedure difficult for the Presidency. The role of the Commission in this case will obviously be somewhat of the nature of a mediator like in the second reading of the previously known co-decision procedure.

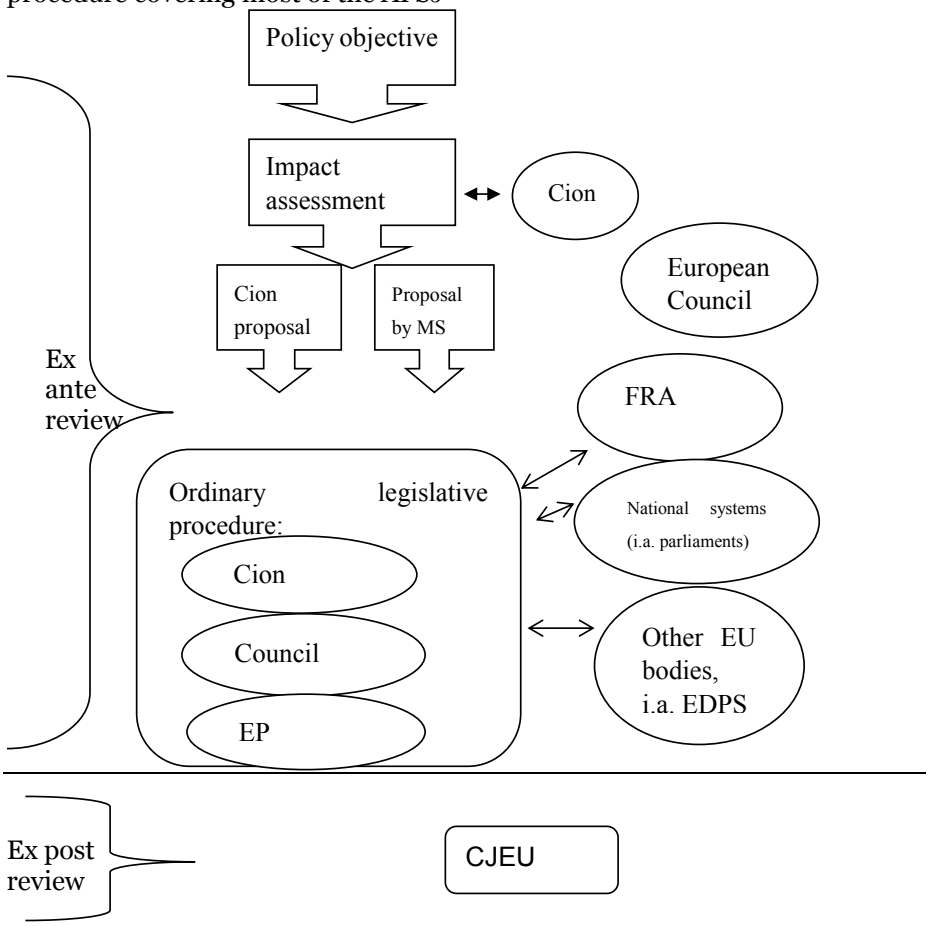
In practical terms the trialogue concludes the legislative process, with only formalities remaining. In the trialogue phase, the EU institutions are at the final stage in the ex ante review. At this phase, however, political issues are predominant. In other words, ex ante review does not have a very natural role in this phase because most often game-changers and show-stoppers are political issues and not legal ones. After the formal adoption of the EU legal act, we are approaching the application and with regard to certain EU instruments the implementation phase. This is when *ex post* review as presented in the figure below comes in and simultaneously ex ante review comes to an end.[282] One can squeeze the ex ante review of fundamental rights into the figure below (Graph 5).

[280] See Priestley, p. 204. "The area of greatest conflict will inevitably be Justice and Home Affairs, where Parliament has already demonstrated that on the liberty/security spectrum it has tended towards a greater sensitivity towards the concerns of the civil libertarians than either the Council or the Commission".

[281] See Banchoff and Smith, p. 141.

[282] Nevertheless, when transposing for example an EU Directive into national law *ex ante* review of fundamental rights occurs at least in some Member States. Therefore, the point where the *ex ante* review stops in the EU legislative process is not absolutely determined.

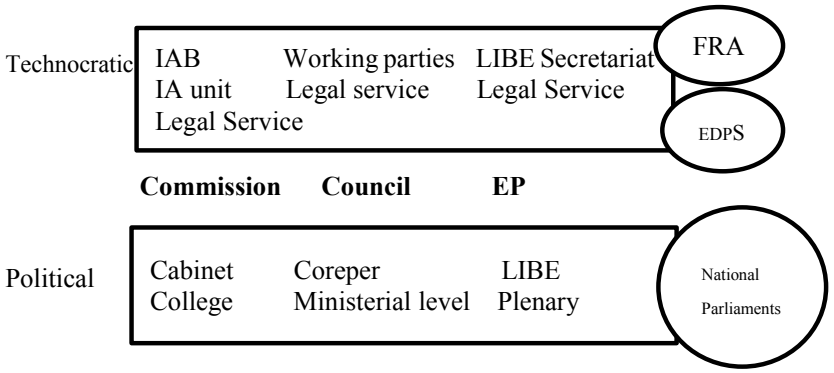
Graph 5. Ex ante review of fundamental rights in the ordinary legislative procedure covering most of the AFSJ



Graph 6 below connects the hands-on *ex ante* review with the legislative work of the institutions and other actors. I have illustrated the typology of review by dividing the review in two main categories. The first type of review consists of technocratic review, which is conducted for example in the legal services of the institutions, IAB and impact assessment unit — both located in the Secretariat General of the Commission, working groups of the Council, FRA and the EDPS. With technocratic, I refer to scrutiny, which requires deep legal technical and substantial expertise. Another class of review is mainly political-oriented and it is carried out for instance in the EP parliamentary committees, notably LIBE. The same applies to review at Coreper level and ministerial level

of the Council. An effective rights-based review at these levels, however, represents a daunting challenge, even though legal services of the institutions are involved in the decision-making process.

Graph 6. Execution, positioning and nature of *ex ante* review within the frame of EU law-making



IV Ex ante review of proposals for EU legislative measures in light of the Charter: the constitutional and institutional framework

1. General remarks on ex ante review as a mechanism of constitutional review: mainstreaming intermediary models

Two categories of constitutional review can be discerned. The first category is 'preventive control' that can also be called '*ex ante* review'; the second is 'repressive control' which is a synonym for '*ex post* review'. Preventive norm control is review executed *in abstracto* and the objective is to hinder the adoption and the entry into force of legislation that is in breach with the constitution. Repressive norm control for its part aims at revocation of legislation that infringes the constitution or legal implications stipulated pursuant to lower level norms in breach with the constitution.[283] Repressive control can therefore take place *in abstracto* or *in concreto*. With the notion of *ex ante* review I refer to conformity control exercised in the preparatory phase of legislation i.e. before the legal act concerned is formally adopted. This kind of control is of *ex ante* nature and it differs significantly from the legal review of the courts. If we take the idea to the sphere of fundamental rights, which very often has a clearly visible link to constitutional issues, at national level we can identify at least semi-judicial bodies vested with powers to analyze in advance if a proposed legal act conforms to constitutional provisions. Probably the purest example of this is the *Conseil Constitutionnel* of France, which does not exercise judicial review, but previews the constitutional compliance before the act concerned has been formally adopted. This is the case although there are some signs that the French system is taking steps towards increased *ex post* review.[284]

One can also distinguish between positive and negative control. Positive control means that what has been provided to happen, happens. Negative control on the other hand means that what has been provided not to happen, does not happen.[285] This dichotomy is also present in this study when it comes to two forms of *ex ante* control, which are related to promotion of fundamental rights and limitation of fundamental rights. With regard to limitations, it is of utmost importance to define permissible limitations to fundamental rights.

[283] See Riepula Esko: Eduskunnnan perustuslakivaliokunta perustuslakien tulkitsijana: Valtiosääntötutkimus eduskunnan perustuslakivaliokunnasta perustuslakikontrollia ja perustuslakien tulkintaa harjoittavana toimielimenä vv:n 1907-1972 valtiopäiviltä. Suomalainen lakimiesyhdistys. Helsinki 1973, pp. 4-6.

[284] This is the case although there are some signs about the French system taking steps towards increased *ex post* review. With the Constitutional law of 23 July 2008 the *ex ante* review system of France was complemented by reinforcing also the *a posteriori* review elements of the French system.

[285] Hidén Mikael: Säädösvalvonta Suomessa. I eduskuntalait. Suomalainen lakimiesyhdistys. Helsinki 1974, p. 6.

With permissible limitations, I simply refer to the set of criteria which have to be met in order to be able to limit fundamental rights stipulated in constitutional law or constructed by the case-law of the (constitutional) courts.

It is possible to divide countries roughly into two categories according to the form of constitutional review that they exercise. First, we have the control system of judicial review, in which the task of controlling the constitutionality of legal acts has been vested into the judiciary.[286] In this system, the key player is the court, with a minor role being given to the legislator in the constitutional review. Control of the courts is naturally of *ex post* nature, i.e. the conflict of a legal act only becomes evident after the legal act has been enacted and it scrutinized by the court either *in concreto* as a part of a court case or under some circumstances *in abstracto*.[287] On the other hand, we have the system that springs from the doctrine of the sovereignty of Parliament. This form of control stresses the strong role of the legislator in securing compliance with constitutional rights. In this system, very much attention has been given to the parliamentary assembly as an incarnation of *volonté générale* to put the issue in words of Rousseau. The legislator can pass legislation and the courts' room for manoeuvre in interpreting the constitutionality of legislation is very limited or even non-existent. The Parliament is expected to carry out this kind of constitutional review already in the phase of preparing legislation and the position of the Parliament is crucial in determining what the spirit of the constitution is. With respect to timing, this can take place also *ex ante*, before the act has been approved.

The situation is, however, not black and white and systems that can be positioned somewhere between the two extremes do exist. In between these two counter-poles, often characterized by the sovereignty of the parliament doctrine and judicial review we can also identify hybrid models that have features of the both main systems of constitutional control.[288] Some ten years ago Stephen Gardbaum raised the issue of the Commonwealth Model of Constitutionalism that highlighted the shift of some British Commonwealth countries, most notably the UK, towards a stronger role of the courts in constitutional review, although these countries still very much can be characterized with strong features of sovereignty of Parliament. This new third model of constitutionalism stands between the two polar models of constitutionalism and aims to create a middle ground between them rather than adopting a wholesale transfer from one pole to the other.[289] Gardbaum's point was to flag up the emergence of hybrid systems of constitutional control

[286] This form of constitutional control originated in the United States as result of the landmark ruling Marbury v Madison. The US Supreme Court has the task of reviewing the conformity of laws with the US constitution and the court can strike down the contradicting legislation by declaring the acts in breach with the Constitution as null and void.

[287] See Gardbaum, p. 717.

[288] One interesting discussion in this regard on changes at the national level see Young Alison L.: Parliamentary Sovereignty and the Human Rights Act. Hart Publishing. Oxford and Portland, Oregon 2009, pp. 174-175. This study deals with the UK Human Rights Act and the discussion on continuing parliamentary legislative supremacy vs. the courts' power to override legislation where this contravenes human rights. In this research, Young presents a strong case in favour of continuing parliamentary legislative sovereignty. In this context the Human Rights Act has also been defended as a compromise facilitating dialogue between the legislature and the judiciary.

[289] Gardbaum, p. 709.

with elements stemming from both traditional systems of constitutional review.[290] In fundamental rights issues we can detect a possible source of conflict between two poles, on the one hand that of integrationist and on the other hand that of sovereigntist. The points of departure of these two camps are biased at the outset and Walker felicitously describes this as constitutional myopia. [291] Indeed, the key measure of Union competence is legislative and the whole ideological debate between intergovernmental and supranational positions is centered namely on the legislative act.[292] This is why the legislative process of the constitutionally-sensitive AFSJ is of paramount importance for whole European projects and the division of competence therein. With a partial depletion of grand ideas of times prior to the European integration process, the AFSJ can even be considered to be one by some EU policy circles.[293]

The constitutional legislators also act in a judicial way in many respects, for example when deliberating and passing judgments on the constitutionality of legislation.[294] As Stone puts it "the spectre of constitutional censure hovers over the legislative process".[295] This means in practice the awareness of the legislator that the legal instrument concerned is subject to a judicial review and if found unconstitutional it can be invalidated by the constitutional court. The logic also works in reverse: the legislator also fixes, in constitutional decision-making process the parameters of the court's exercise of constitutional review.[296] The legislator thus keeps molding the environment for the court's functioning. Keeping in mind the focus on fundamental rights, it is beneficial to analyze the effect of these constitutional rights in the functioning of the legislature. This has a clear impact on the output of the legislator. The impact of this form of review is mainly different from that deriving from the courts. In the following we need to address both strong and weak forms of judicial review with a focus on the importance of weak form patterns of review. The weak form review often contains varying constellations of review of fundamental rights emanating from both the legislator and the courts.

One way of approaching the position of an international legislator is that of the classic dichotomy of monism and dualism. This conceptual toolbox has traditionally been used to illustrate the interface of national and international law. In short, those national legal systems that have chosen to transpose with separate acts international obligations arising mainly from international agreements have opted for dualism. Monism, on the other hand, considers that

[290] According to Gardbaum "the Commonwealth model suggests the novel possibility of a continuum stretching from absolute legislative supremacy to the American model of a fully constitutionalized bill of rights with various intermediate positions in between that achieve something of both". Ibid. p. 710.

[291] See Walker Neil: In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey. In Walker Neil (Ed.): Europe's Area of Freedom, Security and Justice. Oxford University Press. Oxford 2004, p. 29.

[292] Ibid., p. 21.

[293] See for example ibid., p. 13-14.

[294] Stone Sweet Alec: Constitutional Politics: the reciprocal Impact of Lawmaking and constitutional Adjudication. In Craig Paul and Harlow Carol (Eds.): Lawmaking in the European Union. Kluwer Law International. Dordrecht 1998, p. 111.

[295] Ibid., p. 113.

[296] Ibid., p. 131.

international obligations, that the country has signed up to, are automatically a part of the country's legal system. For a monist country, separate implementing action is thus not necessary. In the context of the EU, we should first note that some Member States have a dualist legal system while others have monist tradition of perceiving the interrelationship between national and international law. Here again, we must be aware that the EU legal system has blurred this classic dichotomy somewhat with such fundamental notions of EU law, such as the direct effect and supremacy of the EU law.[297] The trend has been pointing towards increased monism with all the levels and instruments of regulation, be they national, international or European. The impact of this change has probably been stronger on the dualist systems and the reason for this has been the mixing of borderlines between various interacting legal systems. One could thus argue that we have moved far away from the national norm-centric legal system whose main feature was the architecture of hierarchy of norms (the so-called *Stufenbau*): the old system that can be categorized as Kelsenian in a traditional sense.[298] The new situation can rather be characterized as legal pluralism, which contains political elements.[299] The experience so far from the activities of an international or supranational legislator is quite scarce. We can however tackle the topic by reflecting the functioning of a national legislator to this particular situation. In the legislative process the legislator is bound by fundamental rights and the essence of these rights steers the functioning of the legislative body. Fundamental rights can function as a restriction to the actions of the legislator but they can also reinforce positive obligations of the legislator in the legislative process.

Martin Scheinin presents an interesting pattern for the impact of international human rights norms on the national legislative process in his study concerning the status of human rights in the Finnish law.[300] First Scheinin divides international instruments according to their legal status, to internationally legally non-binding instruments on one hand and to internationally legally binding instruments on the other. International non-binding instruments can be either irrelevant for the legislative dossier or they may have a certain standard effect. In the latter case, the international instrument, which is not binding on a country concerned, can be used as an external yardstick when drafting a national law.[301] This means that a given non-binding instrument penetrates into the sphere of standards, although the

[297] Case C-26/62 Van Gend en Loos and Case C- 6/64 Costa v ENEL. Regarding the doctrine concerning supremacy of EU law over national law, Ola Wiklund argues that this principle should not be regarded as an absolute rule according to which EU law always prevails over national law. Instead of this, the principle should be formulated so that every legal norm, in this case norm of the EU law, is supreme in relation to a norm of the national legal order within its scope of application or its sphere of competence, Wiklund Ola: EG-Domstolens tolkningsutrymme. Om förhållandet mellan normstruktur, kompetensfördelning och tolkningsutrymme I EG-rätten. Juristförlaget. Stockholm 1997, p. 173 and 221.

[298] For Kelsen's theory of hierarchy of norms in which a lower status norm derived its validity from a higher status norm see Kelsen Hans: Reine Rechtslehre. Zweite Auflage. Wien 1960. p. 196.

[299] As Anderson puts it "Legal pluralism reveals the political character of our prevailing definitions of constitutionalism and demonstrates how state-centred accounts prevent us from asking questions of accountability with regard to all forms of political power. Legal pluralism accordingly shows the importance of effecting a paradigm shift in the field of constitutional law". Anderson Gavin W. Constitutional Rights after Globalization. Hart Publishing. Oxford and Portland, Oregon 2005, p. 4.

[300] Scheinin Martin: Ihmisoikeudet Suomen oikeudessa. Suomalainen lakimiesyhdistys. Jyväskylä 1991, p. 331.

[301] Ibid., p. 315.

fact that the instrument is non-binding leaves quite a lot of leeway to the legislator. According to Scheinin, an international legally-binding instrument can have either an effect of principles or that of rules on the legislative solution to be adopted. The former case is usually related to situations of collision between two human rights norms.[302] In this situation, the legislator weigh and balance between the two norms in order to find out which norm prevails in the legislative deliberation. The second form of hard impact on the legislative process is focused on legally binding international norms, which exist as rules. In this case, the rule effect may appear when national law is in breach with an international legal instrument, which is binding on the country.[303] Scheinin's theoretical approach can also be useful when dealing with the EP as a European co-legislator. Making a distinction between the effect on Alexyan terms to those concerning dichotomic either/or-situations with rules and more flexible situations involving *Abwägung* between principles is worth considering.[304]

If we think about the case law of the CJEU concerning limits of the competence of the EU legislator, we can easily pinpoint the significance of the case Mulder.[305] Wyatt concludes that this case was important especially because it highlighted that a democratic political process is not always sufficient and the Commission and the Member States have to bear in mind the rule of law.[306] At the time, with the EP excluded from legislative powers in the field of agricultural policy, like in this milk quota related *Mulder*, it is obvious that the Commission and the Council were in the line of fire. However, the present important co-legislator EP is bound by the same case law. When it comes to the principle of subsidiarity we can see that EU legislation has been challenged in the CJEU by some Member States due to claimed disregard of the legislative act of subsidiarity issues. Member States in turn have not necessarily been very coherent and consistent on these issues when proposals for EU legislation are voted in the Council.[307]

Anderson very correctly points out that the constitutional ideas have been transferred to post-national bodies, such as the EU, and that economic globalization has had significant effect on the erosion of the interstate system and the consequent strengthening of transnational regimes.[308] With this change, the traditional liberal legalism has lost much of its ability to explain the constitutionalism that we are now facing. Instead of this, legal pluralism has proved to be an advantageous approach in illustrating the nature of the

[302] Ibid., p. 316.

[303] Ibid., p. 305.

[304] For probably the most concise legal theoretical study on rules and principles see Alexy Robert: Theorie der Grundrechte. Nomos Verlagsgesellschaft. Baden Baden 1985.

[305] C-104/89 Mulder.

[306] Wyatt Derrick: Is the European Union an Organisation of Limited Powers? In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, p. 11.

[307] See Wyatt Derrick: Is the European Union an Organisation of Limited Powers? In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, p. 17.

[308] Anderson, p. 7.

current paradigmatic transition in constitutionalism.[309] This approach takes more consistently into account the fact that today's law-making process is shaped increasingly by international elements, interacting legal systems and a greater number of progressively powerful players, such as multinational corporations, NGOs and other relevant stakeholders. The greatest merit in legal pluralism is probably the revealing of power relations in the constitutionalism. The power relations can be found everywhere within the sphere of law, although the way that power relations may appear can vary.[310] It seems to be a good way of tackling the shrinking state-centric constitutional issues.[311] One should, however, be aware that the state, and hence the constitutional law of the state, are likely to maintain their key positions in the world system.[312]

It has been argued that judicial review has been an option for political elites losing their grip of the power to maintain the *status quo*.[313] In this case, it is the losers of the political and thus of legal power who want to transfer power to the courts from the legislature. Anderson considers "constitutionalism is best understood as an artefact in the struggle between hegemonic and counterhegemonic forces".[314] This argument can be tested also in the context of the legislative process of the EU. We only need to identify hegemonic and counterhegemonic forces. This is where EU institutions come into play. It should be borne in mind that political actors are likely to favour the establishment of institutional structures most beneficial to them.[315] Within the EU, the struggle for power and competence is fierce between the institutions, particularly in the aftermath of Treaty amendments. Each and every EU institution fights tooth and nail to maximise its competence and the best way of tackling this topic would be to use rational choice and game theories that are usually used in social and political science.[316] Our analysis is not limited to dealing with the question of who gets the most, but to provide an explanation to the emerging *ex ante* review mechanism at the EU level. Nevertheless, this analysis cannot be carried without due attention being given to the pursuit of institutions to fashion the constitutional and institutional framework in a way that would be beneficial to them. From all this we can see that the introduction of an *ex ante* review mechanism is highly political, although it has to do with

[309] See ibid., p. 145.

[310] Ibid., p. 107.

[311] On the issue of the features of legal liberalism see ibid. pp, 40-44. For legal pluralism see pp. 44-49.

[312] Ibid., p. 100.

[313] See Hirschl Ran: Towards Juristocracy. The Origins and Consequences of New Constitutionalism. Harvard University Press. Cambridge, Massachusetts, 2004, p. 49 and pp. 213-214. In light of concrete examples from Canada, Israel, New Zealand and South Africa Hirschl very well illustrates that the introduction and strengthening of judicial review at the expense of certain extent of the sovereignty of Parliament has not been carried out in isolation of the surrounding social and political change.

[314] Anderson, p. 119.

[315] Hirschl, p. 39.

[316] Much has been written about game theory and the role of "the rational economic man" in politics. Most often references are made to the works of Howard Raiffa and Martin Shubik. Game theory has been applied also on EU decision-making procedure by several scholars. For a concise study on game theory see Binmore Ken: Fun and Games. A Text on Game Theory. Lexington 1992. For a good example of applying rational choice theory on EU decision-making see Laruelle Annick and Widgrén Mika: The Development of the Division of Power among the European Commission, the Council and the European Parliament, CEPR Discussion Papers 1600, C.E.P.R. Discussion Papers 1997.

the very core of legal functioning of the EU. The current trend points towards greater legislative activism, especially by the EP.[317] The discussion about judicial activism may soon be replaced by the discussion about legislative activism. As for judicial activism, judicial self-restraint or judicial deference and possible arguments in favor of resorting to judicial deference in the face of democratic institutions making sounder or fairer decisions, one can only draw attention to constitutionalism.[318]

From the definitions of the two main mechanisms of constitutional control we can detect the clearly visible link between democracy and fundamental rights. It is evident that the sovereignty of Parliament model takes as its point of departure the paradigm of an elected assembly expressing the will of the *demos*. The Parliament has been elected by the people and it can thus depart from the will of its predecessor parliaments and have a deep impact also in the sphere of constitutional control. The judicial review for its part transfers the role of the ultimate umpire in constitutional matters beyond the legislator, namely to the courts. As has become evident, systems trying to integrate these elements are also in place in some countries. However, the balance in some countries tends to change; lately this development has been in favour of the judicial review.

The interaction and the constitutional dialogue at the national level is already a multi-layered phenomenon but we can add another layer to this complexity by putting the EP at the centre of our analysis. Can the EP be considered as an expression of the *volonté générale* of the European *demos*? In terms of democracy, the EP is without a doubt the only directly-elected political body although we should not forget that the Council also consists of Member States whose governments have been democratically elected. This is nevertheless of a more indirect nature in the context of the EU. In spite of the democratic nature of the EP, I carry doubts on the representativeness of the EP as the will of the European people, because the European *demos* hardly exists.[319] We should nonetheless not undermine the role of the EP as it can offer democratic control to the preparation of legislation.[320] The EP is currently the best possible way of involving democratic control at the European level and there is simply no way of denying it. The greater

[317] On the judicial activism exercised by the CJEU see Rasmussen Hjalte: On Law and Policy in the European Court of Justice. A Comparative Study in judicial Policymaking. Nijhoff. Dordrecht 1986. According to Rasmussen judicial policy-making is all about to "to designate courts' contribution to creating, conserving or changing public policies, or existing priorities among them, in areas of public policy which are subject to some sort of governmental regulation by binding rules of law". Ibid., p. 4. The same study also illustrates cases too hot to handle by the Court. A recent interesting example of this case C-573/12 Ålands vindkraft, in which the Court ruled the case against the opinion of AG Bot thus avoiding the revolution of renewable energy subsidy schemes in the EU.

[318] On the related discussion in a different context see Dworkin Ronald: Taking Rights Seriously. Gerald Duckworth Co. Ltd. London 1978, pp. 140-142.

[319] On the related discussion see for instance Weiler Joseph: The Constitution of Europe. "Do the new Clothes have an Emperor?" and other essays on European Integration. Cambridge University Press. Cambridge 1999.

[320] For example Lavapuro considers in his remarks concerning the Constitutional Law Committee of the Finnish Parliament that "as a democratic organ it (the Constitutional Law Committee, KF) creates for the legitimacy of whole system an essential counterweight to the case-by-case review exercised by the courts". Lavapuro Juha: Uusi perustuslakikontrolli. Suomalainen lakimiesyhdistys. Helsinki 2010, p. 238.

involvement of the EP in the legislative control of fundamental rights can be seen by using Gardbaum's model as a way to achieve institutional balance, joint responsibility and deliberative dialogue in fundamental rights issues.[321] Furthermore, the penetration of this new model of constitutionalism into the European sphere of fundamental rights protection can be regarded to provide a solution to the old dilemma of democracy and fundamental rights.[322] This may happen by giving a stronger say in deciding on fundamental rights to democratically elected bodies rather than the courts carrying out judicial review. As regards the position of FRA as an actor in the EU *ex ante* review, one should tackle especially the issue of democratic legitimacy. The starting point is the fact that FRA is an EU Agency whose officials are basically civil servants who have been hired because of their expertise and professionalism. For the high-level positions in the hierarchy of the Agency, political lobbying from the part of Member States can be hard but generally FRA is an expert body whose political linkages should not be overdone. Therefore, from an institutional point of view, FRA does not have similar democratic legitimacy as elected EU institutions that have to go through on varying intervals a public scrutiny.[323]

Juha Lavapuro has in his dissertation in a distinguished manner elaborated the forms of constitutional review.[324] Lavapuro focuses in his thesis especially on change in constitutional control practices in Finland. He identifies certain advantages that the intermediary constitutional control system can provide. One of these is the involvement of democratic control in the interpretation of fundamental rights. This interaction is lacking to a great extent in the systems whose main feature is a strong position of e.g. constitutional courts. Tension between fundamental rights principles and democracy principles may emerge in concrete legal practice. According to Lavapuro, this is the case typically when the outcome of democratic procedures, the legal act, can in a given court case be considered to lead to a conflict with those substantial requirements that are set by the fundamental rights to democratic procedures.[325]

From this complexity we can draw the practical conclusion that the judicial review by the CJEU is of utmost importance. It is the ultimate authority in interpretation of EU primary law and because of the multi-layered legislative process, we need this kind of coherent force that enforces the uniform application of EU law. The problems related to democratic control can in this sense be largely overcome by judicial self-restraint that the CJEU often must also resort to. In this context we should also note that the position of the ECHR and the ECtHR is strong in the EU legal order and particularly in fundamental rights issues. We can conclude by stating that there probably is no exhaustive explanation that can be provided to the on-

[321] See Gardbaum, p. 710.

[322] Ibid., p. 748.

[323] FRA is nonetheless obviously better placed as an expert body exercising quite neutral *ex ante* review of draft EU legislation. In this connection we can rather observe that the democratic legitimacy comes into play indirectly when EU institutions take into their positions FRA views on draft EU legislation. Political institutions of the legislative process filtrate legal expert opinions at the political level.

[324] See Lavapuro.

[325] Ibid., p. 86.

going tug-of-war between the school emphasizing the supremacy of the parliament and the school stressing the supremacy of the courts. Intermediary theories that underscore the importance of constitutional dialogue can offer the best ways forward.

The next step is to focus at the Member States level, with a view to examining how selected Member States undertake to ensure compliance with fundamental rights of EU legislative proposals at the national level. This takes place, for example, in Member States' Parliaments.[326] In Finland, Parliament has a relatively strong role in national preparation of EU affairs. Pursuant to the Finnish Constitution, the involvement of the Parliament in the national preparation of EU affairs will be secured in several ways. The level of involvement of the Finnish Parliament in EU affairs has been stipulated in Sections 96 and 97 of the Constitution. The *raison d'être* of these provisions is to enshrine the adequate involvement of the Parliament in EU affairs.[327] The Grand Committee of the Finnish Parliament has a pivotal role in dealing with EU affairs. Furthermore, the Speaker of the Parliament or the Grand Committee, depending on the nature of a given file, forwards EU dossiers sent by the Government further to Parliament's special committees for a detailed discussion. In fundamental rights related proposals for EU legislation, the CLC of the Finnish Parliament is extremely important.

Finland has a peculiar system of *ex ante* control of compliance of draft legislation with fundamental rights that dates back to the era of autonomy under the Russian regime in the 19th and early 20th century. The CLC has always occupied a central role in the constitutional review of Finland.[328] In this system, the preview of compliance with fundamental rights of bills, usually originating from the Government, has been vested in one Parliamentary Committee, namely the CLC. At this point it is necessary to clarify that Finland has no Constitutional Court nor has broadly taken a judicial review system that exists in several other countries and is responsible for *ex post* evaluation of compliance of already passed legislation with fundamental rights.[329] As Antero Jyränki very well summarizes, the Finnish control mechanism of acts is as regards laws at least in principle and formally purely legislator's self-control,

[326] For a snapshot of the differing positions of Member States' parliaments in handling EU affairs, see Grabenwarter Christoph: National Constitutional Law relating to the European Union. In Von Bogdandy Armin and Bast Jürgen (eds.): Principles of European Constitutional law. Second revised edition. Hart Publishing. Oxford 2010, pp. 83-131.

[327] For comments on participation of the Finnish Parliament on the basis of Sections 93 (2), 96 and 97 see Ojanen Tuomas: The Impact of EU Membership on Finnish Constitutional Law, pp. 554-557. Article in European Public Law. Vol. 10, Issue 3, Sept. 2004. See also Boedeker Mika and Uusikylä Petri: Interaction between the Government and Parliament in Scrutiny of EU Decision-Making. Finnish Experiences and General Problems. In National Parliaments and the EU – Stock-taking for the Post-Amsterdam Era. Eduskunnan kanslian julkaisu 1/2000.

[328] For the position and the development of the CLC at the apex of constitutional review in Finland see particularly Riepula, pp. 49-53. Although Riepula's dissertation dates back early 1970s it is still the most comprehensive presentation of CLC ever made.

[329] It should be noted that the European integration process and Finnish Accession to the EU in 1995 has in many respects increased awareness of judicial review as a result of interpretation practice of CJEU. The same applies to some extent to ECtHR, too.

which means *ex ante* control of procedural order of legislation process of legal acts.[330]

The CLC's main task in the Finnish constitutional system is to deal with constitutionally-significant legislative issues. This also includes *mutatis mutandis* EU affairs. Submitting a legislative issue to the examination of the Committee can be decided upon in the Parliament. The CLC is also entitled to do this independently at its own request. As to the composition of the Committee it should be noted that Members of the Committee are Members of the Finnish Parliament. Legal experts, mainly distinguished legal scholars such as university professors, also have a crucial role in the work of the Committee. In the CLC, the institution of expert hearings holds an esteemed role and the recommendations of the most often heard constitutional legal professionals have usually been followed.[331] Although these experts' opinions do not formally bind the Committee in its decisions, the Committee usually follows the main lines of these views.[332] On the possible negative aspects of *ex ante* review carried out by the parliamentary organs, when analyzing the CLC in the 1970s Hidén already observed that such a system may also be susceptible to political pressures.[333] The statements and views presented by the Committee have a great impact on draft legislation concerned. As for the case of national legislation, the Committee also deals with draft EU legislation on the basis U and E letters submitted by the Government. This brings into play the question of whether EU legislation is in accordance with fundamental rights guaranteed by the Finnish Constitution. A similar discussion is apparently underway in all EU Member States. However, according to Ojanen, EU law has not seriously challenged constitutional rights provided in the Finnish Constitution until quite recent times.[334]

The Committee has emphasized in its statements that the reinforcement of the fundamental rights dimension of the EU does not change the role of the Committee as an organ practising control and interpretation of fundamental rights, both in the national legislative process and national

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[330] Jyränki Antero: Valta ja Vapaus. Lakimiesliiton kustannus. Helsinki 1994, p. 213. This observation is closely linked to another peculiarity of the Finnish system, exceptive enactments. This means that it is possible to adopt legislation that is not in harmony with provisions of the Constitution. A prerequisite for this procedure is that such acts are approved in the order of amending the Constitution. These acts, however, have a status similar to ordinary acts of Parliament. After the entry into force of the new Constitution in 2000 the number of exceptive enactments has significantly decreased due to a very clear target of reducing the number of those enactments.

[331] See Riepula, p. 319.

[332] It should be noted that "in practice, review by the Constitutional Law Committee takes place during the progress of the bill through Parliament, and the findings of the Committee are statements on the constitutionality of the bills and other matters submitted to it, as well as on their relation to the international human rights treaties (Section 74 of the Constitution of Finland of 2000)". Ojanen Tuomas: From Constitutional Periphery toward the Center. Transformations of Judicial Review in Finland. Nordic Journal of Human Rights. Nr. 2 2009., p. 195.

[333] Hidén, p. 335. For Hidén this was not only because the members of the CLC are MPs and therefore directly within the sphere of political effects but because it is in practical terms difficult to isolate the interpretation on the constitutionality of interpretations concerning desirability of the act becoming approved. In this context we must, however, bear in mind that this notion was mainly linked to the procedures of adopting the law (as an ordinary parliamentary act or in the order of a constitutional amendment) in Finland.

[334] Ojanen 2004, p. 544. Ojanen goes on stating that until 2003 in practically all cases it has been possible to implement EU law without having to limit the reasonable observance of constitutional rights.

handling of EU affairs.[335] In the latter statement the Committee further held that it is a task of the Committee to assess from the angle of fundamental and human rights provisions also bills aiming at national implementation of EU law.[336] It can thus be concluded that Finland is no exception among those EU Member States which find that the ultimate authority in the field of fundamental rights should continue to rest within the competence of the Member States.

We should note that in Finland the courts can, on a limited basis, control the constitutionality of the laws pursuant to Section 106 of the Finnish Constitution.[337] In practice, this means that in Finland there is a certain kind of hybrid system of constitutional review, which links together *ex ante* review by the CLC and the *ex post* review by courts with all the different actors.[338] As Ojanen highlights, the role of judiciary is now stronger in the Finnish system than some decades ago, but in spite of this development judicial self-restraint still takes place and the *ex ante* review of the CLC remains the primary mechanism of reviewing the constitutionality of legislation.[339] This change can thus be characterized rather as an evolution and by no means a revolution.

Lavapuro has argued that the constitutional review model adopted in Finland is an expression of a kind of an intermediary theory. Instead of institutional authority that can be returned to the hierarchy, the constitutional control has been reformed in Finland by developing side by side with the earlier parliamentary control, different models of constitutional control that are in interaction with each other.[340] Lavapuro's new constitutional review thus derives from a multiplicity of actors that exercise the constitutional review and thus contribute to the realization of fundamental and human rights.[341] Finland can hence be regarded as an example of pluralistic intermediary model of rights-based *ex ante* review falling somewhere between two extreme poles of review:

1) Model of centralized review with a great deal of powers vested in a constitutional court (Germany)

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[335] This interpretation was raised as a reaction to the Government's report on the results of the Convention and preparation for the IGC in 2003 and it was re-stated when dealing with the Government's bill concerning ratification of the Constitutional Treaty. See PeVL 7/2003 and PeVL 36/2006. In the following a reference to statements by the Constitutional Law Committee will be made by using abbreviation PeVL. All the statements can be found on Parliament's web-pages at www.eduskunta.fi

[336] PeVL 36/2006. For a concrete example of this see e.g. PeVL 15/2003 which concerned Government's bill on amending nature conservation act. It can thus be concluded that Finland is no exception among those EU Member States which find that the ultimate authority in the field of fundamental rights should continue to rest within the competence of the Member States.

[337] See Ojanen 2009, pp. 205-206.

[338] See Tuori Kaarlo: Kombination aus theoretischer *ex ante*- und konkreter ex post-Prüfung: Das finnische Modell. In Haller Gret, Günther Klaus, Neumann Ulfrid (Hg.): Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormunde der Demokratie? Campus Verlag GmbH, Frankfurt am Main 2011, pp. 284.

[339] Ojanen 2009, p. 207.

[340] Lavapuro, p. 28.

[341] Ibid., p. 285.

2) Model of sovereignty of Parliament with significant parliamentary powers in the review (the UK, or rather the UK before the Human Rights Act)

The government's EU policy, as any other policy area, is subject to parliamentary control. In other words, the Government's conduct of EU policy may in extreme cases lead to testing whether the Government enjoys the political trust of the majority of the Parliament, according to the principle of parliamentarism. In this way, the Finnish Parliament enjoys quite a unique position within EU architecture, if one were to compares its role with that of its counterparts, the Parliaments of other EU Member States. This is the case especially with EU affairs under the AFSJ. Having a quasi-judicial control mechanism in place that reviews the constitutionality of EU legislation already at the preparatory phase can be considered a great advantage for the Finnish system. This is by no means to say that Finland's EU partners would be ignorant towards the constitutional aspects of draft EU legislation. It is simply the status of the CLC that makes the difference.[342]

For some time there has been vivid discussion in Finland on the need to establish a Constitutional Court.[343] This debate springs mainly from the role of the CLC and the claim of it being and becoming politicized. This idea has gathered momentum during the last few years and it remains to be seen how the future political masters react to this discussion in concrete ways. This discussion will not be pursued in depth, it is noted that the Constitutional Court could bring added value to the current Finnish regime of protection of fundamental rights. A strong *ex ante* review does not exclude a stronger review of *a posteriori* nature.

It is possible to claim that EU level *ex ante* review cannot be juxtaposed with the *ex ante* review at the national level. However, in the absence of any comparable supranational fundamental rights-based *ex ante* review mechanism, a researcher who wants to draw inspiration for the analysis has no other choice but look at developed *ex ante* review mechanisms in some Member States. The EU is a unique legal order, *sui generis*, in the true meaning of the expression, and undoubtedly it is impossible to disengage a national *ex ante* review mechanism from its legal, political and cultural setting and to perfectly fit it to the EU level. Nevertheless, this should not prevent us from identifying common features across different levels despite differences. After all, national *ex ante* review mechanisms do deal with many similar issues

[342] As this kind of *ex ante* review mechanism exists we can realize that with this arrangement Finland is more likely to avoid problems regarding compatibility of already adopted EU legal instruments with the national Constitution.

[343] For Kelsen, for example, the solution was that of control exercised by a constitutional court, an independent judicial organ reviewing legality of acts. In his critique towards Carl Schmitt's position on the crucial role of the sovereign, Reichspräsident, Kelsen characterized the features and the tasks of the constitutional court by separating it sharply from the influence of the legislator and the executive. Kelsen found that "Nur ein vom Gesetzgeber verschiedenes, von diesem und daher auch von jeder staatlichen Autorität unabhängiges Organ muss berufen werden, die verfassungswidrigen Akte des Gesetzgebers zu vernichten. Das ist die Institution eines Verfassungsgerichtes". Kelsen Hans: Wer soll der Hüter der Verfassung sein? Mohr Siebeck. Tübingen 2008, pp. 23-24. For further elaboration of the role and the functioning of the constitutional court see ibid., pp. 23-27.

which are present in EU review. These include, for example, involvement of parliamentary institutions, expert bodies and the role of the courts in the constitutional review just to mention a few institutional aspects. It would be too easy to simply state that EU *ex ante* review is one of its kind and to treat it in isolation of international and national developments in the fundamental rights protection. Similarly, it would be too easy to simply forget about national *ex ante* review mechanisms, not least because of the importance of constitutional traditions of Member States for European fundamental rights as recognized by the CJEU. In addition to the fact that national level systems of *ex ante* review provide interesting food for thought for the analysis of EU level developments, it would not be sustainable to omit one of the key pillars of the EU fundamental rights doctrine.[344]

The Finnish experience from *ex ante* review is important because Finland has a long tradition in the *ex ante* review of fundamental rights in the Parliament. Over two decades of Finnish membership to the EU, the CLC, in particular, has in a flexible manner also taken on the review of EU legislative proposals entailing interference with fundamental rights. The choice for the basis for comparisons and lessons learned could have also been some other EU Member State, which has a system of relatively strong *ex ante* review of legislation.

1.1. Democracy and legitimacy of rights-based review

The relationship between fundamental rights and democracy can either be described as instrumental or intrinsic depending on whether democracy is instrumental for the protection of human rights. It is intrinsic if human rights and democracy are closely inter-dependent. In fact both options are possible.[345] Democracy is the rule of the people without doubt. What form democracy may take in particular time and space is another issue. The most fundamental feature of democracy is the access of an individual to a decision-making process at different levels of society. In liberal democracies, the most important aspect of individual access is the right to cast a ballot in elections. Further, the right for political activity and the right to run for political position are significant in this respect. These rights are secured by legal rules. These legal rules on governance form a considerable part of the legal notion of democracy. As is the case concerning government, broadly taken, at a state level these legal provisions can be found at the highest level of legal norms – usually at the constitutional level. We should, however, see that democracy is an ambiguous and essentially controversial concept. Furthermore, the conceptions of democracy in the political theory are different from democracy standards intrinsic to positive law.[346] We should not restrict ourselves to

[344] I do not see a reason for limiting the Court's interpretation to substantive fundamental rights and not to understand constitutional traditions in a wider sense.

[345] Besson Samantha: Das Menschenrecht auf Demokratie - Eine moralische Verteidigung mit einer rechtlichen Nuance. In Haller Gret, Günther Klaus, Neumann Ulfrid (Hg.): Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormunde der Demokratie? Campus Verlag GmbH. Frankfurt am Main 2011, p. 73.

[346] Jääskinen Niilo: Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia. Helsinki 2008, p. 133.

analysing the concept of democracy purely through the prism of the formalistic theory of law. Democracy also includes the realization of the rule of law and respect for fundamental rights, and it cannot function without the rule of law which aims at safeguarding that preconditions for democratic government are fulfilled. Additionally, fundamental rights can well be considered to fall within the essence of democracy.

If we further think about democracy within the EU framework, we may discuss the very foundations of the division of competence between the Union and the Member States. It is not necessary to deal with such questions as *Kompetenz-Kompetenz*, but only to refer to one particular case of the German Constitutional Court, namely the so-called *Maastricht Urteil*.[347] In this case, the Constitutional Court ruled that it was within its jurisdiction to review the actions of the EU institutions in order to ensure that they remain within the limits of their competence. According to the Karlsruhe Court, it was required to guarantee the protection of fundamental rights of the German citizens. The question of who is the ultimate authority, the final enforcer of law in Europe, remains unsettled, as does the question of democracy.

The Anglo-American concept the rule of 'law' has often been used as a synonymy of the continental concept of '*Rechtsstaat*'. Both these concepts express the idea of justness in a modern state.[348] Although these concepts may have different emphases for constitutional and historical reasons, they basically mean the same thing. The notion of the rule of law includes the principles of justness, legality, legal certainty, respect for fundamental rights and even democracy. The rule of law should thus be construed in a broad sense. [349]

As Ely puts it "Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."[350] In the same vein, Ely also discusses the issue that in practice a lot of power in the legislature has been vested on unelected administrators.[351] Ely finds that in a representative democracy, value determinations are to be made by elected representativeness and if the people disapprove them they can be voted out of office. For Ely, appointed judges are comparative outsiders in the governmental system and need to worry about continuance in office only very obliquely. This does not necessarily put them in a special position with regard to value determinations,

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[347] Brunner v. Maastricht Vertrag, BVerfGE 89 (1993). On the issue of competence-competence see also the so-called cases Solange I 37 BVerfGE 271 (1974) and Solange II 73 BVerfGE 339 (1986).

[348] Hallberg Pekka: The Rule of Law. Edita. Helsinki 2004. p. 13. I believe that probably the biggest difference between for example the British and German understanding of the two concepts is the stronger attachment of the German perception to the Constitution, *die Verfassung*.

[349] The rule of law hence touches upon some very comprehensive legal principles. According to Hallberg there are fundamental elements of the rule of law which are legality, separation of powers, the protection of fundamental rights and the rule of law as a functional entity. Ibid., pp. 70-90.

[350] Ely John Hart: Democracy and Distrust. A Theory of Judicial Review. Harvard University Press. Cambridge, Massachusetts 1980. pp, 4.-5.

[351] Ibid., p. 131. For Ely the crucial issue is that these administrators are neither elected or re-elected and are controlled only spasmodically by officials who are.

but rather puts them in a position to objectively assess claims "that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are".[352]

If we place the EU institutions against a backdrop of representative democracy, it is quite obvious that the democratic legitimacy is somewhat hollow in one sense or another. This goes back to the system of checks and balances that is different from national level constitutional arrangements. This is also because of the lack of a truly European *demos* to which the democratic legitimacy of the institutions could be returned to. The most visible feature of representative democracy is anchored to the system of democratic elections through which the will of the people will be expressed. In the context of the EU, we can identify two kinds of representative democracy that can be considered either as direct or indirect when seen from the EU angle. Both of these models have their pros and cons in terms of democratic involvement. The EP, despite its apparently feeble link to the local level, is a representative body whose democratic legitimacy at the EU level springs from direct elections although different election systems are applied depending on the political system of the Member State. Thus, emphasis should be placed on the words *at the EU level*.

EU Member States' governments can be regarded at the EU level as indirect, although they are directly elected. The Member States' governments carry out their political tasks and functions under the supervision of national parliaments in the spirit of parliamentarism, but the will of the people comes to the EU level only indirectly, through the Council. In spite of this, the government of a given Member State is more closely tied to the will of the local people than the EP for many obvious reasons. Nonetheless, this does not erase the fact that the most advanced attempt at the EU level to incorporate the direct will of the people to the decision-making process is the EP. This raises the topic of the role of national parliaments.[353] The Lisbon Treaty introduced elements to the primary EU law that clearly reinforce the possibilities of national parliaments to obtain information on topical EU issues, if this does not already happen through the Member States governments. The Treaty also strengthens the possibilities of national parliaments to have their voice to be heard directly.[354] This is a remarkable improvement in linking national parliaments, the true local level element engaging the people, with the EU policy and legislative processes. Nonetheless, the shortcoming here is the

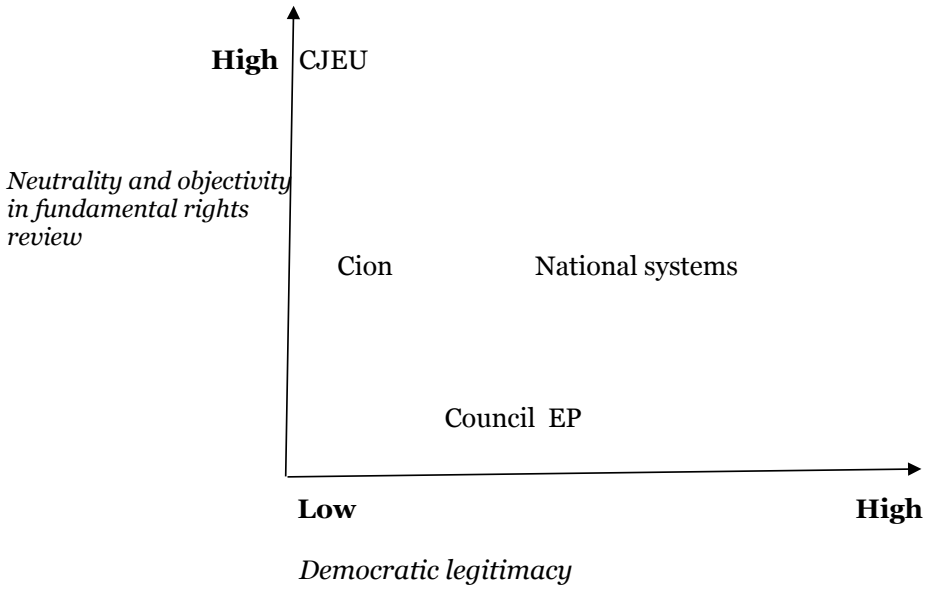
[352] Ibid., p. 103.

[353] Traditionally, national parliaments have often been described as the loser of the European integration process as a consequence of transfer of legislative power from the national to the EU level and simultaneously from parliaments to the Member State governments. Auel Katrin: The Europeanisation Parliamentary democracy. In Auel Katrin and Benz Arthur (Eds.): The Europeanisation of Parliamentary Democracy. Routledge. New York 2006, p. 5.

[354] For recent high-quality discussion on the role of national parliaments in the EU policy-making see a joint paper by leading think-tanks on EU policy: Legitimising EU Policymaking. What role for national parliaments? Prepared by Stratulat Corina, Emmanouilidis Janis A, European Policy Centre (EPC), Fischer Thomas, Bertelsmann Stiftung and Piedrafita Sonia, Centre for European Policy Studies (CEPS). 2014. Available at http://www.epc.eu/documents/uploads/pub_4101_legitimising_eu_policymaking.pdf. Visited on 20.2.2014.

rather scarce powers of national parliaments to provide effective inputs to the legislative process, although advancements are being made in a positive direction. Finally, let us turn to the Commission that, of all the EU institutions involved in the legislative process, has the weakest tie-in to the democracy. This is not, however, non-existent and during the last decades also democratic elements of the Commission have been strengthened, particularly due to the fact that it is politically responsible to the EP. The Commission can thus be considered to have a double legitimacy.[355]

Graph 7. Institutions and bodies involved in the *ex ante* review of fundamental rights in the EU legislative process. Interface of objectivity and democratic legitimacy.



Graph 7 illustrates the interrelationship between neutrality and objectivity, vis-à-vis democratic legitimacy when it comes to different actors involved in control of fundamental rights. All these bodies, except the CJEU, are involved in the legislative process and the related *ex ante* review. As can be seen in the figure in the case of the EP, it may be that a high democratic legitimacy may not be a silver bullet in securing compliance with fundamental rights in the legislative process.

[355] Firstly, there is the responsibility to the EP that finds its concrete form when nominating the new Commission. On the other hand, the EP can force the Commission to resign. Secondly, the Commissioners are nominated by the Member States governments and therefore the political situation of the particular EU Member State is reflected in this selection process. The link to democracy is, however, extremely thin and in practice Member State governments have free hands to propose the candidate for the position "of the Member State's" commissioner.

It is also important to introduce a certain kind of system of judicial checks and balances with the development of *ex ante* review in all the key institutions, namely the Commission, the Council and the EP. Eventually, improving the quality of legal texts and contributing to the fulfillment of this objective already in the preparatory phase, is in the interests of legal certainty and thus the interest of an individual. The current situation in which the EP is involved in the ordinary legislative process and the CJEU in enforcement enhances the system of checks and balances in the EU.[356] Furthermore, according to van Gerven each of these institutions monitors the others to ensure that they do not impinge on its powers and may bring the respective case to the CJEU.[357] This is increasingly the normal way of doing business, also within the sphere of AFSJ. If we consider the internal dynamism of the EP in fundamental rights issues, we can note that there seems to be an internal shift in interest from external or international fundamental rights issues to internal fundamental rights issues that form the hard core of EU legislation. This trend is probably unavoidable and it also greatly contributes to the EU competence in external fundamental rights issues.[358]

A certain kind of logic of complementarity justifies the legitimacy of the EU by pointing to the systematic differences between European and national institutions arguing that their specific capacities supplement each other in an effective way. For example, the Commission, which is independent from electoral pressures, can act in general interest.[359] In the EU, there is in fact no way of throwing the government out. Dismissing the Commission by the Parliament cannot be considered as its equivalent.[360] This is a clear gap, because citizens should always have the possibility to "throw the scoundrels out". It has been a clear objective to link the Commission's appointment to more democratic and open procedures. This has found its expression especially in terms of the role of the EP. The Santer Commission had to resign in 1999 due to withdrawal of the EP's support from the Commission. Furthermore, the EP has exercised democratic control when appointing the Commission. This has happened, for example, in the form of hearings in the EP and in some cases the Commissioner-to-be has been forced to change the foreseen portfolios or even to withdraw.[361]

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[356] See Lenaerts Koen and Cambien Nathan: The Democratic Legitimacy of the EU after the Treaty of Lisbon. In Wouters Jan, Verhey Luc and Kiiver Philipp (Eds.): European Constitutionalism beyond Lisbon. Intersentia. Antwerpen 2009, p. 199.

[357] Van Gerven Walther: Wanted: More Democratic Legitimacy for the European Union. Some Suppositions, Propositions, Tests and observations in light of the Fate of the European Constitution. In Wouters Jan, Verhey Luc and Kiiver Philipp (Eds.): European Constitutionalism beyond Lisbon. Intersentia. Antwerpen 2009, p. 156.

[358] See case C-22/70 Commission v Council (ERTA).

[359] Hurrelmann Achim: Multilevel Legitimacy: Conceptualizing Legitimacy Relationships between the EU and National Democracies. In Democratic Dilemmas of Multilevel Governance. Legitimacy, Representation and Accountability in the European Union. DeBardeleben Joan and Hurrelmann Achim (Eds.): Democratic Dilemmas of Multilevel Governance. Legitimacy, Representation and Accountability in the European Union. Palgrave MacMillan. Basingstoke 2007, p. 24.

[360] Weiler J.H.H.: Why should Europe be a Democracy: The Corruption of Political Culture and the Principle of Toleration. In Snyder Francis: The Europeanisation of Law. Hart Publishing. Oxford 2000, p. 215.

[361] With these examples I refer particularly to cases of László Kovács, Rocco Buttiglione and most recently Alenka Bratusek.

Verhoeven takes up the interrelationship between the Commission and the EP as the one ensuring the accountability and political responsibility of the Commission. Furthermore, she sees the national parliaments' role mainly in the democratic control of the Council.[362] This is in many respects true, just to start with the nomination of the Commission and the key position of the EP in this process. We should not however forget that the Lisbon Treaty has moved the accountability of the Commission also towards the scrutiny of national parliaments. If one important goal with the Treaty amendment is to reinforce the role of the national parliaments, generally one concrete example of the increased role of national parliaments in controlling the Commission is the possibility to "show the Commission a yellow card" for not complying with subsidiarity principle in draft legislative acts.[363] Already in the context of the wrecked Constitutional Treaty Walker drew attention to the fuller operationalization of subsidiarity through the early involvement and the monitoring function of national parliaments in the law-making process and the effect of the EUCFR in this.[364] The focus on controlling the Commission through the EP has likely been focused on for too long. Even though examples exist of the control exercised by the EP, such as demission of the Santer Commission, the real added value in providing democratic down-to-earth control could be found in national parliaments that clearly are placed both physically and mentally closer to ordinary citizens. This new control function of the national parliaments is interesting and important, and this kind of approach could provide a partial remedy to the democracy deficit.[365]

For the use of this new yellow card procedure, for the reasons of subsidiarity for example, Wyatt has argued that a sufficient amount of yellow cards by national Parliaments – if neglected by the Commission – could initiate a process of the CJEU to request the Commission to demonstrate that the national Parliaments had made an error of appraisal in objecting the draft act on subsidiarity grounds.[366] In this case, yellow cards meeting the threshold would function as procedural requirement to review the validity of act. For the role of national parliaments in the control of subsidiarity in the legislative process we can at least say that it has brought transparency to the legislative process. Discussions on subsidiarity often take place in very early phases of the legislative process and opinions of legal services of EU institutions have been

[362] Verhoeven, p. 238.

[363] See Protocol No 2 of the TFEU on the application of the principles of subsidiarity and proportionality. Pursuant to Article 6 of the protocol "any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers".

[364] See Walker Neil: The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU. EUI Working Paper LAW, No 2005/04. Department of Law. European University Institute. Florence 2005, p. 14.

[365] It is interesting to note that nowadays the EP has often called for a pragmatic strategy in functional co-operation with national parliaments. Neunreither Karl-Heinz: The European Parliament and National Parliaments: Conflict or co-operation? In Auel Katrin and Benz Arthur (Eds.): The Europeanisation of Parliamentary Democracy. Routledge. New York 2006, p. 165.

[366] Wyatt Derrick: Is the European Union an Organisation of Limited Powers? In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, p. 22.

criticized for limited access of the public and for being dealt with behind the closed doors. Opening control of subsidiarity to the national parliaments means also opening the processes and contents to a greater extent to the public. The crucial issue to be solved is the question of subsidiarity as the law-making process raises the issue of democratic accountability and regulation at different levels of the EU.[367] A good step forward was taken in the Lisbon Treaty with the introduction of the above-mentioned yellow card procedure that strengthens the democratic surveillance in the legislative phase at exactly the right level, the national Parliaments to which EU citizens feel most attached and find the expression of their will more closely than the distant EP. The Lisbon Treaty enables the EU legislator, the Council and the EP, to use the so-called 'orange card' procedure if the Commission maintains its proposal after the yellow card. Orange card means that the legislator will not give any further consideration to the legislative proposal if it considers that the proposal is incompatible with the principle of subsidiarity. However, even if the orange card procedure did not exist, Member States can form blocking minorities for whatever reasons and the threshold for a blocking minority is even lower than that required for "showing the orange card".[368]

According to von Bogdandy, the basic building blocks of democracy in the in the primary EU law springs from two sources, which are: the peoples of the Member States and the Union's citizens.[369] This leads us to the notion of the EU resting on double legitimacy and we can also identify EU institutions representing the peoples of Member States, the Council and Union's citizens, the EP.[370]

At the current stage of European integration, there is no real European *demos*. Member States are still the Masters of the Treaties and therefore the *pouvoir constituant* can be found at the Member State level.[371] As the figure below suggest the involvement of Member States' *demoi* is of indirect nature although direct involvement has played a significant role especially in the referenda organized by some Member Stets when ratifying Treaty

[367] Waldron considers that the rationale of a legislative assembly is to represent the main factions in the society and to make laws that takes their differences seriously rather than ignores or altogether omits them. Waldron Jeremy: Law and Disagreement. Clarendon Press. Oxford 1999, p. 27.

[368] Another feature that is interesting when looking the Commission through the prism of democracy is the lobbying. As all the other EU institutions the Commission also is subject to heavy lobbying by the plethora of stakeholders and interested parties. Van Schendelen considers that one issue of key importance in terms of democracy is the openness of the decision-making system, see Van Schendelen Rinus: Macchiavelli in Brussels. The Art of Lobbying the EU. Second fully updated Edition. Amsterdam University Press. Amsterdam 2005, pp. 314-315.

[369] Von Bogdandy Armin: Founding Principles. In Principles of European Constitutional law. Second revised edition. Von Bogdandy Armin and Bast Jürgen (eds.). Hart Publishing. Oxford 2010, p. 49.

[370] On the one hand citizens of the EU are represented directly through the EU. As we can recall the citizenship of the EU was one of the novelties of Maastricht Treaty. In the beginning it was supposed not to replace national citizenship and this principle is still going strong in Article 9 of the TEU. On the other hand, the representation of Member States has been underscored when referring to the European Council, the Council and the role of national parliaments.

[371] We can also identify basically classical ideas in the times of erosion of the sovereign states emphasizing that it is the people who are the ultimate lawmaking authority in a democratic community – hence its *pouvoir constituant*. On the other hand we can regard the legislative, the executive and the judiciary as *pouvoirs constitués* – receiving powers from the people. Lindahl Hans: Sovereignty and Representation in the European Union. In Walker Neil (ed.): Sovereignty in Transition. Hart Publishing. Oxford and Portland, Oregon 2003, p. 91.

amendments. The positive issue with the legitimacy springing from EU citizens is its direct nature that is clearly visible especially in the EP elections. Nonetheless, turnouts in the EP elections are still too low and for example the lack of sufficient level of media interest and coverage as well as the basically negative attitude towards the EP are still practical problems do not bring the EP closer to a citizen. We should however give this part of democratic legitimacy of the EU more time to develop.[372]

The CJEU has also taken a stand in the case *International Fund for Ireland* in favour of double democratic legitimacy.[373] At stake in this case was the legal basis chosen for the financial contributions of the Community to the international fund for Ireland. The CJEU in its ruling found in favour of the EP that co-decision was required and that a mere consultation of the EP was not sufficient.[374]

In this context we also need address democracy deficit in the Council legislative proceedings. The Member States' governments represented in the Council are elected democratically and the Governments' behavior also draws further legitimacy in terms of democracy due to involvement of national parliaments.[375] The role of national parliaments in EU affairs may differ significantly from one country to another but the Lisbon Treaty provisions aim at the strengthening the role of national parliaments by and large in EU issues. One key task of national parliaments in the more direct democratic control is bridging the democracy gap but is not always problem-free in terms of efficiency of negotiations bearing in mind especially the always present time limits.[376]

However, the Council has often been accused of insufficient transparency and of making decisions behind closed doors without adequate democratic control or disclosure of the preparatory work for discussion in the media. This is the case although the legal framework governing decision-making has evolved into a more transparent and open direction as a consequence of subsequent Treaty amendments and the introduction of related secondary EU legislation.[377] Another source of criticism arises from pre-negotiations conducted at the level of Government and institution officials not elected for their posts and thus escaping sufficient democratic control.[378] Stefan Oeter,

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[372] Even if a *Volksgeist* in a Hegelian sense hardly ever develops within the EU, more interest in EU affairs and an increased legitimacy could for example be expected as a consequence of the overall negative experience of the crisis of the euro.

[373] See Sharpston Eleanor and De Baere Geert: The Court of Justice as a Constitutional Adjudicator. In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, pp. 140-141.

[374] See CJEU case International Fund for Ireland C-166/07.

[375] In this connection we should note diverging impacts of the European integration on the status of national Parliaments in the course of time. See Kassim Hussein: The Europeanization of Member State Institutions. In Bulmer Simon and Lequesne Christian (eds.): The Member States of the European Union. Oxford University Press. Oxford 2005, p. 298.

[376] Hayes-Renshaw, p. 241.

[377] See Bauer Martin Transparency in the Council. In Westlake Martin and Galloway David (eds.): The Council of the European Union. Third edition. John Harper Publishing. London 2006, pp. 367-372.

[378] Hayes-Renshaw and Wallace, p. 68.

basing his arguments on traditional Weberian notions of bureaucracy, highlights that bureaucracies at the European level are not under same kind of parliamentary control as at the national level. Political responsibility therefore becomes diluted or vanishes altogether.[379] The vision of technocrats running the Union is still going strong in the EU folklore.

Against this background we should define the role of the Council within the EU structure. The most important thing to remember is that the Council is above all a legislator representing the political will of the Member States. Nowadays, the Council must increasingly function more in tandem with the EP in the legislative work. Even though we have witnessed the extension of the EP competence to policy areas traditionally under the control of the Member States, such as justice and home affairs and agriculture, the Council still occupies a pivotal role in the preparation of EU legislation. Even today, some political questions have been left for the Council to decide with a mere consultative role reserved for the EP.[380] This does not undermine the fact that the Commission is also in a strong position in the legislative process of the EU. The Council also carries out some executive functions. In one sense, this is closely related to providing political leadership and serving the purposes of policy-shaping, policy-initiation, as well as crisis management.[381] These powers are clearly shared with other EU institutions, which underlies the big picture of the EU lacking general separation of powers in a classic state-centric sense. Furthermore, the EU legislation has to be implemented by the Member States that constitute the Council.[382]

These far-reaching changes in the legislative environment, with a much stronger involvement of the EP, certainly increases the democratic nature of the EU.[383] As the EP has now gained a very strong role in the field of fundamental rights It is useful to link this development with increased democratic control. This is even truer when we look at the past of the EP as strong supporter of human rights especially in relations with third countries.[384] Furthermore, the empowerment of the EP can be seen as a viable option to strengthen democracy in the complex system of EU policy-making.[385] This is correct, but one could offer counter-arguments regarding

[379] See Oeter Stefan: Federalism and Democracy. In Von Bogdandy Armin and Bast Jürgen (eds.): Principles of European Constitutional law. Second revised edition. Hart Publishing, Oxford 2010. p. 73.

[380] An example of this is the legislation based on the Euratom Treaty.

[381] Westlake et al, p. 10.

[382] For implementation of EU policies at the level of Member States see Wallace Helen: Exercising Power and Influence in the European Union: The Roles of Member States. In Bulmer Simon and Lequesne Christian (eds.): The Member States of the European Union. Oxford University press. Oxford 2005, pp, 34-36.

[383] Douglas-Scott Sionaidh: Constitutional Law of the European Union. Pearson Education Limited. Harlow 2002, pp. 134-135.

[384] For example Banchoff and Smith remind that the EP has during recent years used its right to block financial protocols with Turkey, Israel, Morocco and Syria for human rights reasons, Banchoff and Smith, p. 142.

[385] For instance Bellamy and Castiglione argue that "the democratic deficit can only be addressed in ways that will resolve the EU's current crisis of political legitimacy, therefore, if the proposed democratic regime matches the mixed character of the European polity". See Bellamy Richard and Castiglione Dario: The Uses of Democracy: Reflections on the European Democratic Deficit. In Eriksen Erik Oddvar and Fossum John Erik: Democracy in the European Union. Integration through Deliberation. Routledge. London 2000, p. 83.

aristocratic nature and the relative lack of transparency and the direct control by the media, to mention a few examples.[386] The system of producing EP positions on legislative proposals and policy issues, which is centered on individual MEPs – the rapporteurs – can also be contested from the point of view of democracy. MacCormick has correctly commented on the nature of the EP by highlighting that it is not a state Parliament, nor a legislature of a federal state, but a Parliament of a new kind of commonwealth. This commonwealth is a non-sovereign confederal commonwealth constituted of post-sovereign Member States.[387] At the state level, parliaments can be conceived as supreme legislative authorities with their legislative – in other words, rule-making power. These legislative authorities are able to make general rules of universal and uniform application in the state's territory and therefore they have a central place in the institutional normative order.[388] We can easily see that compared with national parliaments at the state level, the EP has a kind of shared responsibility with other EU institutions, most importantly with the Council.[389]

An example of critique presented on criticism on review exercised by the courts has been raised for instance by Juha Lavapuro. It has been mainly addressed at Jeremy Waldron's approach that attaches democratic procedures in the context of representative institutions, thus omitting, for example, public discourses in connection with court rulings that involve fundamental rights.[390] I try to transfer this idea to the EU level. The legal system of the EU includes several important actors and a multitude of legitimation bases. Therefore the critique presented by Lavapuro proves very useful.

It is absolutely impossible to return the legislative organs exhaustively and sustainably to democratic foundations. The democratic deficit is always present in the EU legislative process. Compared with national legal systems, the democratic gap exists in various phases of the EU legislative process, depending on the angle of the observer. For this reason, it is crucial that the definite legal control in the EU legal system is anchored into the judicial review carried out by the CJEU. Nonetheless, as out of vogue as it may seem, it would also be important to tie the legislative institutions of the EU more closely to the analysis of contents of fundamental rights present in the pieces of legislation being drafted. As a consequence of widening of the competence to the AFSJ of the EP, the *ex ante* review of legislative institutions needs to be strengthened. The same goes for empowerment of national Parliaments in the

[386] See Cuyvers Armin: The Aristocratic Surplus. In Kinneging Andreas (ed.): Rethinking Europe's Constitution. Wolf Legal Publishers. Nijmegen 2007, p. 127.

[387] See MacCormick Neil: Questiong Sovereignty. Law, State and Nation in the European Commonwealth. Oxford University Press, Oxford, 1999. p, 156. Although MacCormick does not seem to belong to the advocates of EP providing a clear-cut answer to issues around EU democracy deficit he is in favour of giving more legislative powers to the EP. Meanwhile, the EU has undergone constitutional reforms taking it to a more federal direction with increased legislative competence of the EP but still, MacCormick's concerns seem to be valid even in today's situation.

[388] MacCormick Neil: Institutions of Law. Oxford University Press. Oxford 2007, p. 50.

[389] In addition to the previously mentioned aspects especially direct democracy has been attempted to be strengthened by the so-called citizens' initiative as set out in Article 11 paragraph 4 of the TEU. So far experiences of these initiatives launched by at least one million citizens from a significant number of Member States are scarce.

[390] See Lavapuro, p. 111.

context of the Lisbon Treaty. After all, the EP is the only elected institution at the EU level.[391] Furthermore, national parliaments draw their legitimacy directly from the people of the Member States thus represent the closer link to national level legitimacy. In this situation of empowerment of parliaments and their involvement in the key value choices of the Union, it is important to have a strengthened preview of fundamental rights carried out by these institutions. Parliaments need to go to the mainstream of fundamental rights control in the preparatory phase.

2. Parameters of rights-based review

For a deeper analysis needed for dealing with fundamental rights in different legislative dossiers, some key parameters must be employed. In this research, these key parameters consist of a test of permissible limitations to fundamental rights and the different effects of fundamental rights. Therefore, the approach is two-fold.

The first set of parameters can be divided into a permissible limitation test, drawing inspiration above all from the test of permissible limitations derived from the limitation provision of the Charter, namely Article 52(1). I would deem the Charter provision - with the key dimensions like the essence of fundamental rights - more interesting for concrete cases but the Finnish case - that will be discussed briefly - is also intriguing as an example of limitation practices of an intermediary model of rights-based review. Permissible limitation tests form an important operational framework for the analysis. This is because many fundamental rights are subject to limitations under the Charter.

The second bulk of parameters include the functions of fundamental rights and here we must make a distinction between positive and negative obligations. In the framework of parameters, the key issues of proportionality and balancing will be discussed.

2.1. The permissible limitations test as a general framework of review

It is stipulated in Article 52 (1) of the EUCHR

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general

[391] Some observers have also paid attention to the reluctance of some constitutional courts, most notably the German Constitutional Court to consider the EP as a source of adequate democratic legitimacy of EU legislation. The legitimisation provided by the EP has rather been considered as a complementary one by the Constitutional Court. See Pernice Ingolf: Does Europe need a Constitution? Achievements and Challenges after Lisbon. In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, p. 95.

interest recognised by the Union or the need to protect the rights and freedoms of others.

Article 52 (1) can be regarded as an extremely progressive limitation provision in many respects. It is a general limitation provision, which in an explicit manner sets out the preconditions for limiting fundamental rights. With its current strong status, the Charter including this provision reflecting clear and modern legal thinking on limiting fundamental rights functions as a useful tool for the CJEU in its interpretation practice. The provision is indeed beneficial for fundamental rights protection and it should not only be the Court, but also the EU legislature, to take it duly into account when introducing new EU legislation.

The permissible limitations to fundamental rights enshrined in the Charter can be summarized in the following catalogue[392]:

1) provided for by law
2) legitimate aim
3) inviolable essence
4) necessity
5) proportionality

In this context it is also important to notice that Article 52 (2) links the criteria for limitation assessment enshrined in Article 52 (1) with the rights in the Treaties.[393] Furthermore, due attention must also be paid to the level of protection as set out in Article 53 of the Charter. When we are discussing the level of protection and particularly the scope of this EUCFR provision, we come across recent case law of the CJEU and most notably cases Åkerberg[394] and Melloni[395], which very much highlight the supremacy of EU law. This does not mean that the relation of the Charter rights with fundamental rights of the Member States is irrelevant. Also Member States' fundamental rights as an expression of "constitutional traditions" can be conceived as having a value in the EU legislative process. As such, it must be recognized that permissible limitations and position of ECHR rights as minimum standards are inextricably linked under Article 52(3).[396] In practice, this means that the ECHR rights function as a minimum level of protection and that EU law can go beyond this level. Having regard to the position of the CJEU and the ECtHR praxis on fundamental rights as the backbone of the EU fundamental rights regime, we should have a close look at the case law of the courts particularly on limiting fundamental rights. From the point of view of legislative cases

[392] This builds on the categorization presented by Ojanen in Ojanen Tuomas: Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter. European Constitutional Law Review 2, 2016.

[393] It is set out in Article 52 (2) of the Charter that "Rights recognized by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties".

[394] C-617/10 Åklagaren v Hans Åkerberg Fransson.

[395] C-399/11 Stefano Melloni v Ministerio Fiscal.

[396] It is set out in Article 52 (3) that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

chosen for this study, the limiting of fundamental rights is the crucial question. We should therefore ask how the courts have considered the criteria for limiting fundamental rights in practice. The basic status of case law of the courts has already been discussed in the previous chapters of this study. For example in the ECtHR case S. and Marper v. the United Kingdom the court ruled the case in favour of applicants stating that in this case in which retention of DNA of persons suspected but not convicted of offences constituted a disproportionate interference with the applicants' right to respect of private life. Consequently, the ECtHR found that this interference was not necessary in a democratic society and therefore concluded that there was a violation of Article 8 of the ECHR.[397] When discussing the issue of limiting fundamental rights, we should bear in mind that some of the fundamental rights are absolute. These fundamental rights are not subject to limitations under any conditions. This has been reaffirmed in concrete court cases by the ECtHR.[398] In Finland, based on the Finnish practice, a test of permissible limitations to fundamental rights has been applied. It has been developed by the interpretation practice of the CLC, which is in a highly authoritative position in *ex ante* review of compliance with the Constitution of the Finnish law.[399]

As for the *provided for by law* requirement, we can first identify some problems in the EU, especially in the case of comitology and delegated acts. We cannot deny that legal acts passed through the comitology procedure or delegated acts are legitimate EU acts. I find it, however, problematic to restrict fundamental rights with such acts because in these cases the EU legislator has delegated the act promulgating competence to a lower level. For example, when it comes to delegated acts we should note that according to the Treaty delegated acts can only be utilized to amend non-essential elements of the basic act.[400] This rules out the possibility that delegated acts could be used for the purpose of limiting fundamental rights. Nor do delegated acts, for the same reason, qualify in accordance with law criterion, even though delegated acts are legally binding EU instruments. The same also goes for the implementing acts.[401] Should the EU legislator leave some issues in the context of the basic act to be decided upon in the comitology, or as a delegated act it cannot be the will of the legislator to enable the restriction of fundamental rights with such acts. In this sense, comitology acts and delegated acts should be considered in

[397] Paragraph 125 of ECtHR case of S. and Marper v. the United Kingdom, Applications nos. 30562/04 and 30566/04, 4.12.2008.

[398] See e.g. ECtHR case of Saadi v. Italy, Application no. 37201/06, 28 February 2008, paragraph 149.

[399] The background of this test can be found in the fundamental rights reform of the Finnish Constitution in mid-1990s and in the overall reform of the Finnish Constitution at the turn of the Millennium. Although this list of criteria for permissible limitations includes the most common ground for restrictions it should be noted that the CLC has stated that this list is not an exhaustive list. Veli-Pekka Viljanen has on the basis of the practice of the CLC analysed the test, which consists of seven restriction criteria. The prerequisites for restriction of fundamental rights are requirement of parliamentary legislation, requirement of precision and definition, requirement of legitimacy, requirement of proportionality, requirement of non-violation of the core of a basic right, requirement of due protection under the law and the requirement of compliance with human rights obligations. Viljanen, pp. 37-38

[400] Article 290 of TFEU.

[401] Article 291 of TFEU.

the case of restriction of fundamental rights as lower level secondary EU law, although such strict hierarchy does not exist.

The requirement of *legitimate aim* at the EU level is difficult to tackle. It is hard to grasp what could constitute such a social need that might justify limitations. We do have at our disposal the interpretation practice of the ECtHR on the "pressing social need" that, nevertheless, corresponds more to the requirement of necessity of the limitation than to finding out whether there is a legitimate reason for limitation.[402] Having such a great variety of social interests and values in Europe, the margin of appreciation doctrine of the ECtHR has proved highly useful. Given the above-mentioned differences in Member States, the question of legitimacy can indeed be the hardest to answer.

The *inviolable essence* of fundamental rights has also been increasingly emphasized in very recent case law of the CJEU. In the major data protection ruling in case Schrems, the court expressed serious concerns about right to private life as guaranteed in Article 7 of the Charter. The same conclusion was drawn in relation to the right to effective remedy, as set out in Article 47 of EUCFR.[403] Basing its arguments on fundamental right concerns, the Court annulled the Commission's US Safe Harbour Decision 2000/520/EC. This requirement of non-violation of the core of a fundamental right means that the core of a fundamental right cannot be interfered with by legislation that would in practice make empty the core elements of the fundamental right.[404] Already within the framework of other requirements for limiting fundamental rights, we have encountered problems in defining what is meant by such precondition. Likewise, it can sometimes be difficult to identify what is the core. Some help in this difficult task can be found in the international human rights agreements that define minimum levels of protection.[405] We can also conclude that it would be problematic to limit the core of those fundamental rights that have been formulated in the form of an absolute prohibition.

In relation to *necessity*, Rivers distinguishes between different types of discretion. He introduces policy-choice discretion and considers that proportionate decisions have to pass the test of legitimate aim, capable or suitable means, least necessary limitation of rights and fair balance.[406] According to Rivers, the necessity test requires that there are no avoidable fundamental rights sacrifices. If a particular aim can be accomplished by less interfering means, the decision-maker must go for this option.[407] This is especially important when tackling the issue of limiting rights in the legislative process. Policy-choice discretion comes into play when there is a policy that

[402] Viljanen, p. 184.
[403] See in particular paragraphs 94 and 95 of C-362/14 Schrems v Data Protection Commissioner.
[404] For example in the German tradition both in statutory as well as judicial terms the essence of fundamental right has a significant impact. See Rytter Jens Elo: Domstolenes fortolkning og kontrol med lovgivningsmagten. Forlaget Thomson. København 2000, pp. 258-261.
[405] See Viljanen, p. 244.
[406] Ibid., p. 114.
[407] Ibid., p. 114.

satisfies both of these tests.[408] It is, above all, a power of choice of the legislature or the executive between two or more policy-options which are all necessary and balanced. It is then up to the courts to determine at which points necessary policies become unbalanced.[409] Rivers concludes by stating that traditionally "the job of the legislature is to be the gatekeeper to collective limitations on rights, and only sporadically intervene in the private and criminal law of relations between individuals. Surely a legislature is less likely to 'get it right' when seeking to uphold collective interests than when adjusting the balance between individual interests. It is precisely in the former case that the courts need to protect the individual and in the latter in which the courts can accept the legislature as the mouthpiece of a new social consensus around a rebalancing of interests."[410]

Article 52 (1) is particularly important because it highlights *proportionality*. In many fundamental right related cases, the CJEU has been pushed to take a strong stand against disproportionate political aspirations of the EU legislature entailing breaches of fundamental rights. This provision is also important due to its emphasis on necessity requirement. Proportionality is an important principle in the criminal law. It is essential also with regard to fundamental rights and especially when considering limitations to such rights. The CJEU has in many rulings taken a stand on the issue of proportionality. One of the first cases, where the Court positioned itself with regard to proportionality was case Fedechar.[411] Later on in case Fedesa it held: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question".[412]

[408] Ibid., p. 115. For Rivers, in addition to the policy-choice discretion, the other types of discretion include cultural discretion and empirical discretion.

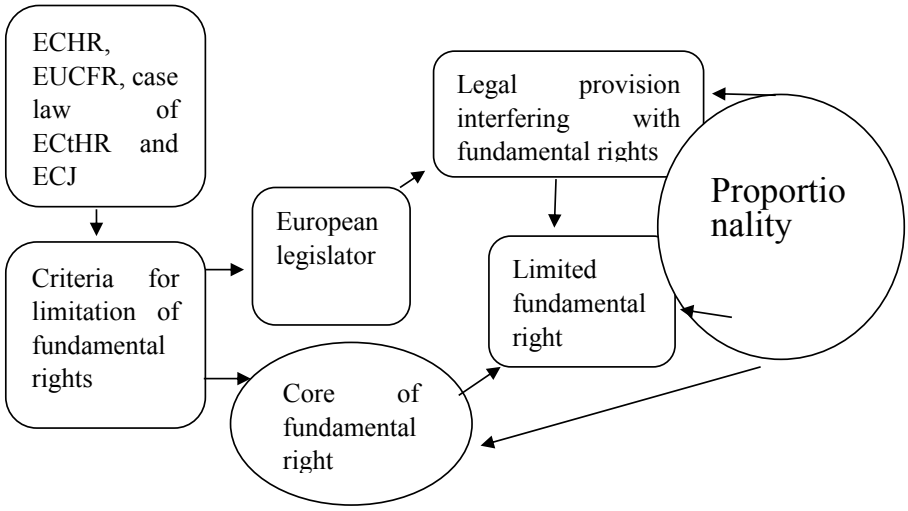
[409] Ibid., p. 129.

[410] Ibid., p. 131.

[411] C-8/55 Fedechar.

[412] C-331/88 Fedesa, paragraph 13. The court further specified: "When there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

Graph 8. Limiting fundamental rights in the legislative process



In Graph 8, an attempt has been made to illustrate the process of limiting fundamental rights in the EU legislative process. As we can see, proportionality is the key aspect when curtailing fundamental rights and it has to be taken into account throughout the limiting exercise.[413] In the law-making process, it is the primary EU law, especially the EUCFR, which sets out requirements for the limitation. Furthermore, limitations are based on ECHR, which has an important position in the legal environment of the EU. It is clear that the courts, namely the CJEU and the ECtHR, mold their interpretation practice with the setting against which the limitation under the European law should be considered.

According to Sheldon Leader one can identify three requirements for proportionality. These are the conditions under which a state is entitled to override the exercise of fundamental rights:

"(a) that the means chosen are suitable for achieving an objective which competes with the requirement that one respect the fundamental right in question;

(b) that the object be a legitimate one; and

(c) if (a) and (b) are satisfied, that the means chosen, and/or the objective as interpreted, impinge on the exercise of a fundamental right no more than is necessary.[414] These three elements can be found in the CJEU case law Bilka-Kaufhaus GmBH v Weber von Hartz."[415]

[413] For useful discussion on proportionality in Europe see Ellis Evelyn (ed.): The Principle of Proportionality in the Laws of Europe. Hart Publishing. Oxford 1999.

[414] Leader Sheldon: Proportionality and the justification of discrimination. In Dine Janet and Watt Bob: Discrimination law: Concepts, Limitations and Justifications. Longman. New York 1996, p. 111.

[415] C-170/84 Bilka-Kaufhaus. This case was about indirect discrimination. In this context see also C-149/77 Defrenne v Sabena.

Sadurski considers that proportionality assessment focusing on the relationship between the means and ends seems to be paradigmatically a legislative function, as the aim of the legislation is a legislative task. This is also the case with the limitation of rights when analyzing proportionality – in Sadurski's terms reasonableness – of those limitations. For him, the legislators have the democratic legitimacy to carry out weighing and balancing and making compromises about competing values, interests and preferences.[416] Julian Rivers has, although mainly concentrating on the review of the courts, found that proportionality should deliver the correct answer for primary decision-makers but should also admit a range of answers to the court.[417] Even though both the legislature and the judiciary use proportionality as a standard, there is nevertheless a slight difference in its usage. The doctrine of proportionality is closely linked to fundamental rights. However, the question is: which limitations of fundamental rights may be considered legally acceptable? As differentiated by Rivers "such limitations must pursue a legitimate aim, the means adopted must be capable of achieving that aim, they must be the least intrusive means (they must be 'necessary'), and there must be a fair and acceptable relationship between the aim pursued and the cost to rights ('balancing' or 'proportionality in the narrow sense')".[418] In other words, we could ask if the measure is suitable to achieve a legitimate aim. We could also ask if the measure is necessary to achieve the aim or are there less restrictive measures available for achieving the same aim?[419] In spite of this, we should not forget, when talking about balancing, that each right has a core and essence that should never be infringed.[420] If we take the ECtHR case law as our point of departure we can see that its problematic feature is the tendency of the court to put necessity and balancing into a single test even if academic society discerns them.[421]

International human right obligations are also important in this respect. Regarding the requirement of compliance with human rights obligations, we only need to refer to the quintessential role of the ECHR and case law of the ECtHR in the EU law. This has been highlighted both in the Treaties as well as by the CJEU. The same goes for international human right obligations that form a part of the general principles of EU law as fundamental rights. In this connection, the International Covenant on Civil and Political Rights (ICCPR) and the Human Right Committee's interpretation thereon is very important. When commenting on Article 52 of the EUCFR in relation to the permissible limitations emanating from the ECHR, the EU Network of Independent Experts refers to the explanations of the Presidency of the European Constitutional Convention. In this, the equivalence between the two systems

[416] Sadurski Wojciech: "Reasonableness" and Value Pluralism in Law and Politics. EUI Working Papers. LAW 2008/13. Department of Law 2008, p. 10.

[417] Rivers Julian: Proportionality and discretion in international and European law. In Tsagourias Nicholas (ed.): Transnational Constitutionalism. International and European Perspectives. Cambridge University Press. Cambridge 2007, p. 108.

[418] Ibid., p. 110.

[419] Eleftheriadis Pavlos: The Standing of states in the European Union. In Tsagourias Nicholas (ed.): Transnational Constitutionalism. International and European Perspectives. Cambridge University Press. Cambridge 2007, p. 60.

[420] Rivers, p. 111.

[421] Ibid., p. 111.

is highlighted.[422] With regard to the drafting history of Article 52 (1), limitations to fundamental rights were only seldom a topics for discussions in the European Convention.[423] Anderson and Murphy remind that the ECHR and the EUCFR texts have a technically different approach to dealing with limitations of fundamental rights. In the ECHR, the acceptable grounds for interference have been set out in individual Articles of the Convention, while the EUCFR contains a general provision for limitation, namely Article 52. The authors, however, deny the simplicity of a general derogation clause as "the effect of Article 52 (3) is to prohibit derogations on grounds other than those sanctioned in the ECHR".[424] In fact, Article 52 (1) of the Charter defining the permissible limitations to fundamental rights can be considered to be state-of-the-art compared with the criteria stipulated in the ECHR. Paragraph 1 of the Article of the Charter is a well-developed provision because it sets out, in a very clear fashion, that any limitation of the rights of the Charter shall respect the essence of these rights. In its interpretation practice, the CJEU has further developed the core of this provision.

As Scheinin notes, and basing his argument on General Comment 27, the law itself has to establish the conditions under which the rights may be limited. Moreover, the Human Rights Committee sets certain qualifications before a law becomes a proper instrument for the purpose of limiting a human right. Restrictions must not impair the essence of the right and furthermore, the relation between right and restriction, between norm and exception, must not be reversed.[425] The ECtHR has established a step-wise test to review the requirement of "in accordance with law". First, the interference should obviously have some basis in domestic law. Second, these legal rules should be accessible and foreseeable. Finally, they should be in conformity with the Convention, including the general principles expressed or implied therein.[426] The general paradigms on permissible limitations to fundamental rights have also been developed in the general comments on the ICCPR. These dogmatic interpretations have been prepared by the Human Rights Committee of the

[422] See Commentary of the Charter of Fundamental Rights of the European Union. Article 52 by Olivier de Schutter. EU Network of Independent Experts, p. 398. In this commentary a reference has been made to the very illustrative statement of the Presidency of the Convention: "Le paragraphe 3 vise à assurer la cohérence nécessaire entre la Charte et la C.E.D.H. en posant la règle que, dans la mesure où les droits de la présente Charte correspondent également à des droits garantis par la C.E.D.H., leur sens et leur portée, y compris *les limitations admises, sont les mêmes que ceux que prévoit la C.E.D.H. Il en résulte en particulier que le législateur, en fixant des limitations à ces droits, doit respecter les mêmes normes que celles fixées par le régime détaillé des limitations prévu dans la C.E.D.H., qui sont donc rendues applicables aux droits couverts par ce paragraphe,* (Italics, KF) sans que cela porte atteinte à l'autonomie du droit de l'Union et de la Cour de justice de l'Union européenne".

[423] Borowsky Martin: Kapitel VII Allgemeine Bestimmungen. In Meyer Jürgen (Hrsg.): Kommentar zur Charta der Grundrechte der Europäischen Union. Nomos Verlagsgesellschaft. Baden-Baden 2003, p. 578.

[424] According to Anderson and Murphy this leads to the practical need to have the ECHR text at hand when assessing the scope of the power to derogate from the rights that the EUCFR guarantees. See Anderson David and Murphy Cian: The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe. EUI Working Papers. LAW 2011/08. Department of Law. European University Institute. Florence 2011, p. 7.

[425] Scheinin Martin: The Work of the Human Rights Committee under the International Covenant on Civil and Political Rights and its Optional Protocol. In Hanski Raija and Scheinin Martin (compiled) second revised edition. Institute for Human Rights. Åbo 2007, p. 4.

[426] Lawson R.A. and Schermers H.G. (Compiled, edited and annotated): Leading cases of the European Court of Human Rights. Ars Aequi Libri. Nijmegen 1997. Comment on case Kruslin v France, p. 373.

UN, which is in an authoritative position to do so and hence illuminate the *raison d'être* of the ICCPR provisions.[427] Especially interesting documents with regard to permissible limitations are related to the nature of the general legal obligation imposed on State Parties to the Covenant and general comment on the states of emergency provision of the Covenant. The first document on the legal obligations begins with the concept that obligations of the Covenant are binding on every State Party as a whole. According to the general comment "all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party".[428] This notion is generally very important and it clarifies the scope of the Covenant, whose binding nature does not only apply to the executive, but importantly from the perspective of this study to the legislative.

Further to this, the general comment on Article 2 of the Covenant is especially interesting. Pursuant to the interpretation of the Human Rights Committee, the legal obligation under this provision is both negative and positive. Accordingly, States Parties must refrain from violations of the rights enshrined in the ICCPR and any restrictions of any of those rights must be permissible under the relevant provisions of the Covenant. The argumentation continues: "where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant rights".[429] This clearly raises the principles of proportionality and necessity to the very heart of limitation considerations. The Committee takes an even stricter line with regard to the essence of ICCPR rights and their restrictions. This is particularly noteworthy. Another important strand of interpretations on limitations can be found in the General comment No. 29 on the States of Emergency Article 4.[430] The Committee starts its deliberations by highlighting the importance of this provision for the whole system of protection for human rights as it lays down the option for unilateral derogation while placing the derogation and its consequences under a specific regime of safeguards.[431] Secondly, the Committee underscores the exceptional and temporary nature of measures derogating from the provisions. In fact, there are two preconditions for

[427] Human Rights Committee is composed of independent experts. The focus in its work is monitoring the implementation of ICCPR, examining the reports of the State Parties, presenting recommendations, considering inter-state complaints and according to the First optional protocol of the ICCPR to examine individual complaints. The preparation of general comments is also an important duty of the Committee. The Committee should not be confused with the UN Human Rights Council (until 2006 UN Human Rights Commission), which is based on the Charter of the United Nations. The Human Rights Committee is not a UN organ *stricto sensu* but a Treaty monitoring body, which is established by a Treaty in order to monitor the compliance of States Parties' obligations under this Treaty. Nowak Manfred: The International Covenant on Civil and Political Rights. In Hanski Raija and Suksi Markku: An Introduction to the International Protection of Human Rights. A Textbook. Second revised edition. Institute for Human Rights. Åbo 1999, p. 91.

[428] General comment No. 31. The Nature of the General Legal Obligation Imposed on the States Parties to the Covenant. Adopted on 29 March 2004, CCPR/C/21/Rev. 1/Add. 13, paragraph 4, p. 2.

[429] Ibid., paragraph 6, p. 3.

[430] General comment No. 29. States of Emergency (Article 4). Adopted on 31 August 2001. CCPR/C/21/Rev. 1/Add. 11.

[431] Ibid., paragraph 2, p. 2.

invoking Article 4, namely a public emergency which threatens the life of a nation and state of emergency must be officially proclaimed by the State Party. The Committee continues its stringent interpretation of Article 4 by stating that derogating from the Covenant is only allowed in case of an armed conflict if it constitutes a threat to the life of nation. The Committee has, on various occasions, expressed its concerns about derogations executed by State Parties in situations not falling within the scope of Article 4.[432]

Yet another important issue is the fundamental requirement for any measures derogating from the Covenant that such measures are limited to the extent strictly required by the exigencies of the situation. According to the Committee, the obligation to limit any derogation to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation.[433] There is therefore a certain burden of proof laid on State Parties' derogating from Covenant obligations to demonstrate that their derogative measures are strictly required by the exigencies of the situation. It should be noted that proportionality has been an issue of major concern for the Committee when dealing with State Parties' reports. There are also elements for example in the right for non-discrimination that cannot be derogated from in any circumstances.[434] Given this and other above-mentioned interpretations, it is possible to conclude that also the ICCPR sets out a comprehensive legal framework for legitimate derogations that has to be taken duly into account by EU and national legislatures when dealing with permissible limitations to fundamental rights.

Constitutional pluralism also derives from the EU, ECHR and international human rights systems in connection with limitation criteria. Generally, new constitutionalism can be characterized with independent and partly overlapping mandates of national and supranational institutions in individual right protection.[435] In addition to relations between domestic institutions involved in rights protection, this also highlights the nexus between domestic and international institutions. Furthermore, it brings into play human rights as an international bill of rights and European constitutional pluralism in light of the current discussion about weak-form constitutionalism.[436] The notion of such multilevel constitutionalism is nothing new in the field of constitutional law, but transferred to the context of the EU it refers to wide legal co-operative arrangements between different levels. Furthermore, it aims to reconcile between claims of the unity of EU's legal order and the existence of several political and legal authorities.[437] According to Tuori "legal pluralism enters

[432] Ibid., paragraph 3, p. 2.
[433] Ibid., paragraph 4, pp. 2-3.
[434] See ibid., paragraph 8, p. 4.
[435] Lavapuro Juha, Ojanen Tuomas and Scheinin Martin: Rights-based constitutionalism in Finland and the Development of pluralist constitutional Review, International Journal of Constitutional Law. ICON (2011), Vol. 9 No. 2, p. 530.
[436] Ibid., 530-531.
[437] Mutanen Anu:Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain Other EU Member States. Hansaprint Oy. Helsinki 2015. p. 98. For a concise presentation of European constitutional pluralism, see Jaklic Klemen: Constitutional Pluralism in the EU. Oxford Studies in European Law. Oxford 2014.

European legal space together with transnational law. Diversity turns into pluralism when state law's exclusive jurisdiction is challenged".[438] This is exactly what has happened in the field of fundamental rights. In relation to constitutionalism and constitutional pluralism, it is very often the case that the focus has been set on the functioning of courts carrying out constitutional review and their interrelationships. *Ex ante* review of fundamental rights, however, should have its place in this discussion. *Ex ante* review is associated with constitutionalism and constitutional pluralism because it aims at reviewing the conformity of legislation with norms and case law of constitutional order and it involves several different actors carrying out this review. The importance of legislatures operating at different levels of the European constitutional review system should not be omitted as they have a lot to offer to the current debate on rights-based review taking place in the EU.

2.1.2. Balancing fundamental rights in the legislative process?

The criterion of proportionality can be regarded as a normative idea controlling all of the balancing steps in order to ensure the coherence, objectivity and certainty of the resulting judgments and decisions. The interconnection of balancing and proportionality is hence tight.[439] The essential element in deliberations on proportionality has been reserved for balancing. When fundamental rights collide, balancing is a very useful tool. In this research, we analyze the *ex ante* review of fundamental rights and thus certain theories and practices used for examining the *ex post* review are poorly applicable to the preview phase of fundamental rights. This can be attributed to the fact that *ex ante* review is predominantly of an *in abstracto* nature and not *in concreto*. In this sense, especially the weighing and balancing doctrine that is used in *ex post* review entails some problems when used in the *ex ante* review.

On the basis of international human rights conventions and the practice of their interpretation, Scheinin and Vermeulen have concluded that the essential content of any human right must always be respected within its scope of application.[440] This brings us back to the previously discussed core of fundamental rights. In some cases there is simply no room for limitations or balancing. This is the case if it is possible to identify a non-derogable core of a fundamental right that makes balancing impossible. Balancing should not be seen as an all-encompassing approach but for it too there is a scope of application. The right to privacy is not a non-derogable right and hence subject to permissible limitations but according to Scheinin and Vermeulen the essential question is whether the right to privacy or human rights generally is

[438] Tuori Kaarlo: European Constitutionalism. Cambridge University Press. Cambridge 2015, p. 88. See also interrelated discussion on European fundamental right pluralism and European security constitution by the same author.

[439] Valentini Chiara: The Reasonable Adjustment of Basic Liberties. Liberalism and Judicial Balancing. EUI Working Papers. Max Weber Programme. MWP 2009/36. European University Institute, p. 4.

[440] Scheinin Martin and Vermeulen Mathias: Unilateral exceptions to international law: Systematic legal analysis and critique of doctrines that seek to deny or reduce the applicability of human rights norms in the fight against terrorism. EUI Working Papers. Law 2010/08. Department of Law, p. 27.

just one factor in weighing and balancing or whether human rights law should be the framework for balancing through applying the test of permissible limitations and the requirement of proportionality in that process.[441] Similarly, certain dimensions of non-discrimination derive from Article 15 of the ECHR and Article 4 of ICCPR non-derogable human rights that shall be honoured also in the state of emergency, such as the state of war. In international law, the International Court of Justice has confirmed in some occasions the applicability of human rights law. This principle has been affirmed by the UN Human Rights Committee.[442] Scheinin and Vermeulen have also raised the EP to the status of international actors, which emphasizes the positive relationship between human rights and security. In practical terms, this means that in addition to stressing the importance of the principle of freedom in the EU, the EP has underscored that security must be promoted in line with the rule of law and fundamental rights obligations.[443]

Martin Scheinin has approached the issue of balancing in counter-terrorism measures by building his arguments on theories of Ronald Dworkin and especially Robert Alexy whose distinction of legal norms between rules and principles can provide an angle to this question. Scheinin admits that treating fundamental rights as principles is well-founded mainly because of their close connection to morality and the often occurring need for weighing and balancing.[444] Nevertheless, he considers that many constitutional and international norms concerning fundamental rights must be characterized as rules. In these cases involving rules with properly defined scopes of application, no balancing is needed nor allowed, and the rule applies in an all-or-nothing fashion.[445]

The critique of Scheinin on Alexy can be found in Alexy's notion of fundamental rights operation as principles only. This approach adopted by Alexy derives from the practice of the German Constitutional Court and considers the weighing and balancing probably in overly optimistic terms.[446] Even human rights that are subject to permissible limitation "should be understood to include one or more 'core' elements within which a broader principle is crystallized as a rule that allows no limitations or 'balancing'".[447] For example, Tzanou has, in her study on the right of data protection in EU law enforcement, come to a conclusion in data protection that the 'essential core' of data protection can be identified and more importantly this 'essential

[441] Ibid. They also conclude that in this context "a specific mistake in the use of balancing metaphor as a justification for states departing from their human rights obligations in the name of security relates to the extension of 'balancing' to those human rights that do not allow for restrictions, or that are non-derogable even in times of emergency".

[442] Ibid., pp. 10-11.

[443] Ibid., p. 26.

[444] Scheinin Martin: Terrorism and the Pull of 'Balancing' in the Name of Security. In Scheinin Martin et al.: Law and Security. Facing the Dilemmas. EUI Working Papers. Law 2009/11. Department of Law of the European University Institute, p. 56.

[445] Ibid.

[446] Ibid., pp. 56-57.

[447] Ibid., p. 63.

core' cannot be overridden.[448] This is particularly important to comprehend in order to be able to identify core elements of fundamental rights in the selected EU legal initiatives. For this reason, the arguments in favour of weighing and balancing may not always be valid. This is true, also because we are not discussing in this study the *ex post* review exercised by the courts but *ex ante* review carried out by legislative and other organs. Similarly, many of the selected files are related somehow to anti-terrorism. In this way, the ideas of striking a new balance between security and rights become highly relevant.[449] As Scheinin puts it, in the era of global terrorism there is a risk of accepting too many compromises in the name of balancing.[450] What is also important for this study is that the Commission has been active towards the ECtHR on balancing between the protection of needs of the individual and the security interests of the state.[451]

2.2. Effects of fundamental rights

The respect for human rights and some particular substantial fundamental rights have been highlighted as important values of the Union in Article 2 of the TEU.[452] Article 6 of TEU is even more important and in this provision the key role of the EUCFR has been recognized. One should note, however, that in Article 6 it is also clearly provided that "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties".[453] Article 7 of TFEU sets out the important consistency requirement for EU policies. Moreover, provisions having general application also contain Articles directly linked with specific fundamental rights.[454] If we take a very practical approach to the law-making process we can see that fundamental rights have always been present when discussing legislative dossiers. I believe that the EUCFR has had the value of popularizing and mainstreaming fundamental

[448] See Tzanou, p. 362. According to Tzanou there is a core of data protection principles that must be ensured under all circumstances so that data protection can guarantee the dignity and autonomy of our personality when our personal data are processed.

[449] Scheinin 2009, p. 58.

[450] Ibid., p. 57.

[451] Ibid., p. 61. Scheinin refers to the Commission working document: The relationship between safeguarding internal security and complying with international protection obligations and instruments, 5 December 2001. COM(2001) 743 final.

[452] According to Article 2 of the TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[453] Article 6 of TEU. This means that competence has to be conferred by Treaty Articles and the Charter does not alter this situation i.e. it does not create new competences for the Union. This issue was a source of some legal arm-wrestling when the Treaty amendment was prepared but this was the outcome probably because the drafters of this provision considered it problematic to have an open-ended provision which may have led to unintended consequences for the Union competence. This kind of limitation of competence with regard to the scope of the Charter has been attributed to the Member States' reluctance. See Schneider Catherine: Menschenrechte und Übertragung der Souveränität auf die Europäische Union: Folgen für die Definition und Entwicklung der Menschenrechte. In Haller Gret, Günther Klaus, Neumann Ulfrid (Hg.): Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormunde der Demokratie? Campus Verlag GmbH. Frankfurt am Main 2011, p. 218.

[454] Especially combating different forms of discrimination should be mentioned in this conjunction. Article 10 of TFEU hence highlights the prohibition of discrimination provided more extensively in Article 21 of the EUCFR.

rights among the drafters of especially sectorial EU legislation that at first glance does not seem to have direct connections to fundamental rights. That is, especially experts on other substantial issues than law. Around the negotiation tables of the EU, one can hear a growing number of references to fundamental rights, also in sectorial EU files and this is likely to be largely thanks to the Charter.

The issue of competence is crucial when considering positive and negative aspects of fundamental rights in the EU context.[455] Olivier de Schutter has meritoriously examined the EU fundamental rights vis-à-vis the issue of competence. As he correctly notes in the framework of the EU and the implementation of the EUCFR "fundamental rights appear not only as limits imposed from the outside to the exercise of powers which exist within this multilevel mode of governance, but they could also fulfill a positive role".[456] Hitherto, however, a defensive function of fundamental rights has been predominant, and the fear of transferring powers to the EU from Member States at the expense of protection of individuals in the national legal systems has been the key underlying factor. Therefore, fundamental rights have been utilized as checks on the exercise by the EU institutions of their powers.[457] In brief, fundamental rights are regarded in the EU as limits, and not as a mandate to fulfil.[458] In other words "fundamental rights are conceived of as external limits to the exercise of powers under EU law, rather than as objectives which the EU should seek to promote".[459] This has resulted in the lack of incentives to develop fundamental rights beyond the minimal obligation to respect them.[460]

The key in understanding the issue of competence is to comprehend Article 51 of the Charter. The first point is that the Charter does not extend the scope of application of EU law beyond its current limits. Secondly, the adoption of the Charter should not be seen as issuing the EU with the new tasks of realizing the fundamental rights recognized in the Charter. The latter aspect suggests that the rights of the Charter have purely a defensive role to play.[461] According to de Schutter, fundamental rights function as a shield: they rather restrict EU legislator than function as the objectives that the legislator should strive for.[462] The problem can also be deeper in the fundamental rights culture of the EU,

[455] For the importance of competence in the EU fundamental rights policy see Weiler and Fries. The authors correctly question why the duty to observe fundamental rights fall on the CJEU and in some instances on the Member State courts but not on the political institutions of the Community of that time. For a good analysis on the division of competence and fundamental rights see also Eeckhout Piet: The EU Charter of Fundamental Rights and the Federal Question. 39 Common Market Law Review 945. 2002.

[456] De Schutter Olivier: The Implementation of the EU Charter of Fundamental rights through the Open Method of Coordination. Jean Monnet Working Paper 07/04. NYU School of Law. New York 2004, p. 2.

[457] See ibid., p. 3.

[458] Ibid., p. 4.

[459] Ibid., p. 4.

[460] Ibid., p. 4.

[461] Ibid., p. 12.

[462] De Schutter Olivier: A New Direction for the Fundamental Rights Policy of the EU. REFGOV. Reflexive Governance in the Public Interest. Working paper series: REFGOV-FR-33. 2010, p. 10.

which despite positive developments, has focused more on limits to the EU action than promotion of fundamental rights.[463]

On the other hand, deriving positive obligations from the Charter cannot be excluded. Promoting the application of rights enshrined in the Charter is of great importance in this respect.[464] Indeed, this can be considered to be empowering phrasing, despite the clear limitations attached to it in terms of the limits of competences. In order to bridge the gap, de Schutter suggested some ten years ago the introduction of the open method of coordination in the realm of fundamental rights.[465] This idea paving the way for a more comprehensive EU fundamental rights policy within the limits of competences is more than welcome.

In the case of shared competence - i.e. where the Union does not possess exclusive competence - the Union may only act in conformity with the principles of subsidiarity and proportionality.[466] Keeping in mind that most of the EU issues are matters of shared competence, especially the point about proportionality in the context of fundamental rights is paramount. There are historical reasons for considering fundamental rights as limits but despite this burden of the past, we should try to move beyond the limit-oriented perception of fundamental rights. Nothing in reality forbids the EU legislator to look at things from a pro fundamental rights point of view as long as it acts *intra vires*.

2.2.1. Positive obligations

As the ECtHR case Evans v the UK has shown, it is not easy to weigh and balance between positive and negative obligations.[467] Let us now focus on the positive obligations under the European law, most notably the Charter. Article 51 of the EUCFR sets important restrictions to the scope of application of the Charter. Above all, it contains the normative basis for the application of the Charter only when the addressees of the provision are implementing EU law. Moreover, this provision sets out that the Charter does not establish new powers or tasks for the Union nor extend the field of application beyond the powers of the EU. Article 51 therefore aims at consolidating the current

[463] Ibid., p. 3.

[464] De Schutter 2004, p. 19. According to Article 51 (1) of the Charter "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. *They shall therefore respect the rights, observe the principles and promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties". (italics, KF)

[465] De Schutter 2004, p. 39. According to him the spearhead of this initiative should be decreasing the tension between the "Economic Constitution" and the "Political Constitution" of Europe. James Tully presents interesting remarks on the systems of law beyond the state with a view to the preceding economically oriented *ius commercium* and *lex mercatoria* regimes, which have had a significant impact on post-colonial world order. See Tully James: Modern Constitutional Democracy and Imperialism. Osgoode Hall Law Journal 46, 3, 2008.

[466] De Schutter 2004, pp. 29-30. He furthermore considers that for example "the Schmidberger case exemplifies in that respect that an examination of the proportionality of the restrictions imposed on the fundamental freedom of movement under the Treaty, where such restrictions are justified by the concern to protect fundamental rights, should not take the form of a strict examination of necessity", see p. 11.

[467] See ECtHR case Evans v the United Kingdom, application No. 6339/05, 10 April 2007.

division of competence and to hinder that any kind of new powers would be established for the Union.

We should, however, analyze Article 51 paragraph 1 further: It is stated that "They (the addressees i.e. the institutions, bodies, offices and agencies as well as the Member States, *KF*) shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of powers of the Union as conferred on it in the Treaties".[468] The most visible issue in this provision is the pursuit of preserving the division of competence that was already very high on the agenda of some Member States during the drafting phase of the Charter.

Nevertheless, this provision can also be seen in light of establishing a positive obligation to the Union in terms of promoting fundamental rights.[469] This has to take place within the existing powers but it cannot be denied that such an obligation of positive nature exists. In practice, this positive obligation can be considered to also cover the legislative functions of the Union thus penetrating into the legislative process of the EU. This kind of wider interpretation of this provision is necessary in order to ensure a fuller realization of fundamental rights.

EU institutions and bodies draw particular inspiration from the Charter also in relation to the promotion of fundamental rights. For example the Commission highlights its commitment to give a practical effect to the legally binding Charter and to foster a fundamental rights reflex in the preparatory phase of EU legislation. The role of other EU institutions, most notably the Council and the European Parliament, has also been underscored.[470] Despite these intentions and objectives, we can still notice a certain fundamental rights deficit, especially in the Council proceeding when amendments are proposed to Commission legal initiatives.

With regard to the pro-active approach to foster fundamental rights through the EU legislation, the Commission mentions some recent legislative proposals, including the EU data protection package, the Directive on improving the gender balance among non-executive directors of companies listed on stock-exchanges and related measures and the Directive on the right to information in criminal proceedings and the draft Anti-Counterfeiting Trade Agreement (ACTA).[471] Interestingly, the role of the Commission in promoting fundamental rights in some of these legal dossiers is questionable.

White and Ovey define the positive obligation in the context of the ECHR as follows: "Positive obligation is a label used to describe the circumstances in

[468] Article 51 (1) of the Charter of Fundamental Rights of the European Union.

[469] For the positive obligations in the Charter generally see Maduro Miguel Poiares: The Double Constitutional Life of the Charter of Fundamental Rights. In Eriksen Erik Oddvar, Fossum John Erik and Menéndez José Augustin (eds.): The Chartering of Europe. The European Charter of Fundamental Rights and its constitutional Implications. Nomos. Baden Baden 2003.

[470] See Report from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions. 2012 report on the application of the EU Charter of Fundamental Rights, COM (2013) 271 Final, 8.5.2013, p. 2.

[471] Ibid., pp. 3-5.

which a Contracting Party is required to take action in order to secure to those within its jurisdiction the rights protected by the Convention".[472] The position of positive obligations in the ECHR human rights system is nowadays strong, even if the limits of such obligations can be quite obscure.[473] White and Ovey take Article 2 of the Convention as an example. The right to life provision requires the Contracting Parties to take legal measures to put in place criminal sanctions for taking life but it is not clear at all if this provision extends to, say, health services and to what extent.[474]

It was noted already before the entry into force of the Lisbon Treaty and the subsequent change in the legal status of the Charter that it could impose a positive obligation on the EU institutions. The phrasing of the Charter suggests that the drafters wanted to keep this option open rather than restrict the institutions to purely act in the realm negative obligations of limiting fundamental rights.[475] Indeed and especially in the post-Lisbon era of European constitutional law, this seems very logical and clear given the status of fundamental rights in the EU legal order. This is without prejudice to the extent of EU competence in the field of fundamental rights, which is a crucial question.

We must nonetheless understand that there are certain restrictions for understanding the extent of positive obligation in a given file. To fully grasp the big picture, one would need to also follow up the legislation deriving from the basic act under scrutiny and ask how the positive obligation of the basic act has contributed to the realization of positive obligation in the secondary act. During the last few years this greater presence of the Charter has led particularly to empowerment of promotional aspects of fundamental rights in the EU legal texts. This has been concretized especially in the positions of the EP, the FRA and the EDPS. The EUCFR has also intensified discussion on the restriction of fundamental rights.

2.2.2. Negative obligations

When discussing the limitation of fundamental rights, Steve Peers makes a useful distinction between the ECHR approach and the EU approach. For the ECHR approach, he identifies three categories of limitations. The first limitation included rights, which are subject to express limitation on specific grounds and which are also necessary and proportionate. The second limitation contains the great variety of rights which are subject to limitations

[472] White Robin C.A. and Ovey Clare: The European Convention on Human Rights. Fifth Edition. Oxford University Press. Oxford 2010, p. 100.

[473] Ibid. Perhaps the most exhaustive presentation on the positive obligation of the Contracting Parties to the Convention can be found in Mowbray A.: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights. Hart Publishing. Oxford 2004. The ECtHR has dealt with the limits of positive obligations in its case-law, most notably in case Ilascu, see Ilascu and others v Moldova and Russia, 8 July 2004, ECHR 2004-VII.

[474] White and Ovey, p. 102.

[475] De Schutter Olivier: The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination. Jean Monnet Working Paper 07/04. NYU School of Law. New York 2004, pp. 19-20.

in the state of war or other specified emergencies. The third limitation includes the non-derogable rights.[476] The EU approach, then, has been according to Peers more open-ended as to limitations that have apparently been easier to pass. The CJEU has, however, taken a stricter line to limitations since the *Schmidberger* case. From this follows that the CJEU has been quite inconsistent regarding whether to use the ECHR standard or EU standard in the cases involving limitation.[477] Some ten years ago, Peers found it necessary to go for a "higher standards" approach in the limitation of fundamental rights. He was clearly in favour of ensuring that the ECHR standard is being upheld when the ECHR rights are being applied. This opinion apparently advocates the ECHR standard.[478] Nonetheless, the ECHR and the interpretation practice of the ECtHR are crucial for both dimensions of the analysis of the Charter, the promotion of fundamental rights and the limitation of fundamental rights.[479]

Regarding permissible limitations to fundamental rights and the CJEU, some scholars argue that the court underscores that fundamental rights in conjunction with the EU are always relative and never absolute.[480] Senden reminds us that the basic line of the CJEU can be seen especially in judgement in case *Wachauf*, in which restrictions are allowed if they meet certain limitation criteria and the core of the right is not affected.[481] Already some ten years earlier in *Hauer*, the Luxembourg court chose a rather different track than its Strasbourg counterpart when it comes to limitations.[482]

When assessing the limitation of fundamental rights, the issue of proportionality comes into play. The CJEU has to a great extent taken a stand on the proportionality in particular in *Afton Chemical and Nelson and others*.[483] Another significant CJEU ruling came from the *Sky Österreich*

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[476] Peers Steve: Taking Rights Away? Limitations and Derogations. In Peers Steve and Ward Angela (eds.): The European Union Charter of Fundamental Rights. Hart Publishing. Oxford and Portland, Oregon 2004, p. 142.

[477] See Peers, p. 143 and p. 151. With inconsistency Peers means that the CJEU applies "Community limitation standards in some cases but the ECHR standard in others without any explanation offered".

[478] Peers, pp. 178-179. Peers refers in particular to case Martinez and de Gaulle v. European Parliament, see T-222/99 R, 25.11.1999, Jean-Claude Martinez and Charles de Gaulle v. European Parliament.

[479] It is recalled that Article 52 (3) of EUCFR provides "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." This provision is a significant one because it raises the rights and even more importantly the scope of the rights of the ECHR to an important position when defining the rights and their scopes.

[480] Senden, p. 316.

[481] Ibid. and C-5/88 Wachauf. In ruling C-5/88 Wachauf the CJEU held that "the fundamental rights recognized by the court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objective of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights".

[482] C-44-79 Hauer.

[483] C-343/09 Afton Chemical and Joined cases C-581/10 and 629/10 Nelson. In paragraph 71 of the latter case the CJEU held "The principle of proportionality, which is one of the general principles of EU law, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and

GmbH case. The issue for this case was balancing between the freedom to receive information and the freedom of the media against the freedom to conduct a business. In *Sky Österreich GmbH,* the CJEU ruled the case in favour public access to information.[484] The freedom to conduct a business was hence limited and the CJEU found this limitation proportionate.[485] On numerous other occasions, the CJEU has also taken a position on limitations under Article 52 (1) of the Charter.[486]

When analyzing the Data Retention Directive, we must consider how the CJEU has conducted intrusion assessment. The CJEU judgment in case Digital Rights Ireland represents an example of fundamental rights review, which is based on a test of permissible limitations under Article 52 (1) of the Charter. It consists of three subsequent phases whereby the Court examined: 1) whether the directive falls within the scope of Articles 7, 8 and 11 of the Charter; 2) whether the directive constitutes an interference with the right to privacy and the right to protection of personal data; and 3) whether such interferences can be justified under Article 52 (1) of the Charter.[487] To this effect, the CJEU confirmed that the scope of Articles covered the Directive. Furthermore, basing its arguments on case Österreichischer Rundfunk, the CJEU noted that retention of data derogates from the system of protection of the right to privacy as set out in Directives 95/46 and 2002/58. Moreover, the Court affirmed that interference with the right to privacy and the right data protection should be considered to be wide-ranging and particularly serious. The permissible limitation test was a key consideration of the Court when analyzing the interference with the rights to privacy and data protection. The spearhead in this assessment was proportionality, which was not respected by the EU legislator.[488]

The SURVEILLE paper identifies five main issues, which lead to the CJEU conclusion that the EU legislator exceeded the limits of proportionality in the case of Data Retention Directive. First, the directive failed to set limits to the personal scope of application, i.e. it applies to persons with no proven links to serious crime. Second, the directive is too open for various interpretations regarding the legitimate objective of countering terrorism. Third, the directive failed to adequately limit the access of national authorities to the data retained

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the disadvantages caused must not be disproportionate to the aims pursued (Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62, and Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 35)".

[484] C-283/11 Sky Österreich GmbH v Österreichischer Fundfunk, paragraphs 66-67. In practical terms the CJEU got involved of balancing situation between the rights guaranteed in Article 11 and Article 16 of the Charter.

[485] Ibid. See paragraph 67 in which it was stated that "In those circumstances, the European Union legislature was lawfully entitled to impose the limitations on the freedom to conduct a business contained in Article 15(6) of Directive 2010/13 in relation to holders of exclusive broadcasting rights and to consider that the disadvantages resulting from that provision are not disproportionate in light of the aims which it pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case".

[486] See C-129/14 Zoran Spasic, C-611/12 Giordano and C-314/12 UPC Telekabel Wien GmbH.

[487] SURVEILLE Paper Assessing Surveillance in the Context of Preventing a Terrorist Act, Surveillance: Ethical issues, legal limitations, and efficiency, FP7-SEC-2011-284725, Extract from SURVEILLE Deliverable D2.8: Update of 2.7. on the basis of input of other partners. Assessment of surveillance technologies and techniques applied in a terrorism prevention scenario, 29.5.2015, p. 38.

[488] See ibid., pp. 39-40.

by private companies. Fourth, the directive set the data retention period to 6 months irrespectively of the nature of the data. Fifth, it lacked sufficient safeguards in relation to security and protection of data retained by private providers of electronic communications.[489] Building on these shortcomings, the paper attaches importance to the conclusion of the Court on the lack of "clear and precise rules governing the extent of interference".[490]

As for the limitation of fundamental rights under the ECHR, we should distinguish between Article 15 of the ECHR that provides on derogations to the ECHR in emergency situations and provision-specific limitations.[491] Let us make a general observation: the ECHR does not contain a general approach to the limitation of rights it protects. Quite the contrary: it includes a number of techniques and in addition to restriction under Article 15 also other Provisions, most notably Articles 8-11, list limitations.[492]

Limitations to the above-mentioned Articles contain one important general principle: only the limitations expressly authorized by the ECHR are allowed.[493] What is significant in the activities of the ECtHR is how it deals with permissible limitations that Contracting Parties have put in place in relation to ECHR Articles. The Court will scrutinize if the limitation has been prescribed by law[494] and whether the aim of the limitation is legitimate[495]. It also assesses if the limitation is necessary in a democratic society.[496] In all this, proportionality has a key role to play.[497] In the context of pluralism we also come across with the margin of appreciation doctrine. This is because proportionality has often been used as an indicator when analysing whether a Contracting Party has gone beyond its margin of appreciation. This doctrine has certainly fulfilled its task to protect value pluralism in the ECHR system of human rights protection.[498]

[489] Ibid., p. 42.

[490] Ibid.

[491] See White and Ovey, pp. 112-126. For an overall presentation on the limitations to fundamental rights and the role of the ECtHR in this matter see, Viljanen Jukka: The European Court of Human Rights as a developer of the general doctrines of human rights law: a study of the limitation clauses of the European Convention on Human Rights. Tampere University Press, Tampere 2003.

[492] See White and Ovey, p. 308.

[493] Ibid., p. 310.

[494] See cases Sunday Times v United Kingdom 26.4.1979 (6538/74) 2 EHRR 245, Slivenko v Latvia 9.10.2003 (48321/99) 39 EHRR 490 ECHR 2003-I, Leander v Sweden 26.3.1987 (9248/81) 9 EHRR 433, Herczegfalvy v Austria 24.9.1992 (10553/83) and Ollila v Finland 30.6.1993 (18969/91).

[495] See case Nnyanzi v United Kingdom 8.4.2008 (21878/06) 47 EHHR 461.

[496] See cases Silver and others v United Kingdom 25.3.1983 (5947/72) 5 EHRR 347, Handyside v United Kingdom 7.12.1976 (5493/72) 1 EHRR 737 and Lingens v Austria 8.7.1986 (9815/82) 8 EHHR 407.

[497] White and Ovey, p. 311.

[498] Ibid., p. 333.

PART TWO: EX ANTE REVIEW IN ACTION: SELECTED CASE STUDIES

IV Case studies illustrating ex ante review in action

1. The Method: Illuminating ex ante review of fundamental rights with legislative dossiers

Ex ante review deals with how the pre-adoption phase control of fundamental rights functions in the EU legislative process. This is the applied and practical part of the study. In the selected, concrete legislative dossiers, I have applied the theory presented in Part I. A major part of the analysis has been devoted to concrete EU legal files entailing significant fundamental right elements and very often problems. Many of these legal dossiers fall within the AFSJ that quite often gives rise to sensitive issues from a fundamental rights point of view. There is also a cluster of EU legislative exercises related to the fundamental right of data protection. When analyzing concrete cases of EU law I have sought to reflect them against relevant legal research literature, which ranges from quite theoretically-oriented studies to practical legislative studies. The virtue in all of this can be found in facilitating the necessary dialogue between part I and part II of the dissertation. Without this necessary linkage, the study would run the risk of becoming an empty shell, thus isolating the theoretical and practical parts of the research. Clearly, an analytical-descriptive research needs a theoretically focused background. My aim is to provide an insight into the assessment if *ex ante* review was executed in an optimal manner in each case.

Conclusions will be drawn of *ex ante* review of fundamental rights at different levels. The experiences of this research journey have also inspired the presentation of some *de lege ferenda* conclusions and other operational findings and recommendations. I will outline some general conclusions on my notion of the impact of fundamental rights on the EU legislative process. I will ask whether the impact been merely cosmetic like, involving recitals that state that the legislative act is in line with fundamental rights, or has the impact been concrete, going all the way to the most important Articles in the legislation under preparation. I will also ask whether there have been some overwhelming legal conundrums with fundamental rights in the chosen legislative dossiers that have in the end remained unresolved. From an institutional angle I will present the question of how have opinions and statements of actors, such as FRA and the EDPS, led to changing texts in order to overcome serious fundamental right related problems? It is also important to ask if the EDPS and/or the FRA has pointed out that draft legal texts contain such severe fundamental right problems that these legal texts cannot be adopted at all or need at least far-reaching changes? We could moreover pose

the question of whether EU institutions have bona fide taken advantage of opinions of the FRA and the EDPS, or politically exploited them?

A major part of this study consists of case analyses that aim to demonstrate how *ex ante* review at different levels functions in practice. The presentation focuses on both procedural and substantive analysis of the selected legal instruments. For the procedural aspects, it is interesting to note how legislative procedures have been carried out, what has been the role of different players in the law-making process and how much time these processes have consumed. As for Part I, the approach is process-oriented and all the cases will be dealt with in the chronological order of the EU legislative process. As for the more interesting dimension, namely the substantial one, it suffices to say here that a legal analysis will be provided when tackling the position of given fundamental rights in the relevant dossiers chosen for this study. Regarding violations of the constitution, Hans Kelsen distinguishes two categories of infringements. The first is related to the formal aspects of the legal instrument and the second to its contents.[499] In these cases, the focus has been set on the latter aspect in the legislative process.

The aim in the following presentation is thus to illustrate how different legal texts evolved and usually developed from a fundamental rights point of view. Furthermore, I will ask what was the role of different EU institutions in these processes. I will eventually draw some conclusions from an institutional angle and shed some light on the overall development of *ex ante* review in the EU legislative process. The following will be a three-tier analysis. It will first focus on the process. Secondly, it tackles the fundamental right relevant provisions. Proportionality and necessity play a central role. Thirdly, it identifies whether at issue is a negative obligation or a positive obligation of the legislator. Consequently, if limiting is at stake, then the test that seeks inspiration from the limitation Article 52 (1) of the Charter. The intention is to not delve too deeply into the hermeneutics of the texts but to offer a clear-cut analysis of lines taken by different stakeholders in these important fundamental right files. However, the objective of identifying the positions of institutions with regard to fundamental rights and possible changes in stances during the process requires quite detailed and descriptive presentation of each legislative file.

2. Criteria for selecting the cases

The following legislative initiatives share one common feature: a great majority of them fall within the scope of the former third pillar of the EU, now called the AFSJ.[500] Furthermore, each of them contains an element of

[499] Kelsen 2008, p. 8. Here Kelsen notes that "Gesetze sollen nicht nur auf die vorgeschriebene Weise zustande kommen, sondern dürfen auch keinen Inhalt haben, welcher die Gleichheit, die Freiheit, das Eigentum usw. verletzt. Die Verfassung hat dann nicht nur den Charakter von Prozess- d.h. Verfahrensrecht, sondern auch den Charakter von materiellem Recht."

[500] The Data Retention Directive is the most important exception as it was agreed before the Lisbon Treaty entered into force. What makes the Directive extremely significant is that it perfectly illustrates how *ex ante* review of fundamental rights can go wrong in the legislative phase.

particular fundamental rights sensitivity – in other words provisions that have caused concern from the point of view of one or more fundamental rights. With this, I refer especially to fundamental rights enshrined in the EUCFR and ECHR, but potential conflicts with fundamental rights set out in national constitutions of Member States are also of relevance in this context. Moreover, common characteristics of the cases of PNR, Security Scanners, ACTA and the Data Retention Directive also include the essential position of two fundamental rights, namely the right to data protection and the right to privacy. These cases will be analysed especially in relation to these substantive fundamental rights in light of the evolving legal texts and the interpretation practice of the CJEU and the ECtHR. As we can see later, these draft legal instruments constituted interference with these fundamental rights.

The further this study progressed, the more I came to a conclusion that an especially important part of the analysis should focus on limiting fundamental rights. The key issue with the legislative dossiers has very often been a situation where certain fundamental rights are being limited, but there have been doubts whether these restrictions fulfil the basic requirements for limitations, i.e. to be provided with law, to be proportional and necessary in a democratic society, the respect for the essence of fundamental rights and so forth. I will also try to tackle this aspect relative to the legislative process and show how institutions involved in the *ex ante* review of EU legislation have executed it. These cases illustrate European constitutionalism in its pluralistic expression with the many actors carrying out *ex ante* review.

Whether these interferences qualify as permissible limitations to fundamental rights as set out in the EUCFR, and as interpreted by the CJEU and the ECtHR, remains to be explored. I have therefore devoted a subchapter in the text to limiting fundamental rights under Article 52 of the EUCFR. Key questions that we must tackle are: Did interferences with fundamental rights occur in these legal files? How was this interference detected? How was the fulfilment of limitation criteria verified and what was the role of different institutions? Finally, we can ask what the impact of the eventual legal texts on fundamental rights was. Due to the emphasis set on *ex ante* review of fundamental rights in this study, I have closely followed the legislative process on these particular files and tried to identify how fundamental rights aspects have been dealt with by different institutions and stakeholders. I have tackled these dossiers in chronological order of the legislative process and analysed fundamental rights related positions and concerns of different institutions.

Regarding the Commission, the main focus of the analysis has been quite naturally on its initial proposals for legislation. This is only one part of the Commission's contribution in the law-making process, thus I have also studied impact assessments and explanatory memoranda that have accompanied the proposed legislative acts. I think that especially this phase is important because it is a way to look inside the Commission's internal legislative and preparatory machinery. The status of fundamental rights considerations is central in the impact assessment. In spite of this glance inside the Commission, we should bear in mind that this is only the façade towards the outside world. It is impossible to illustrate the Commission's internal decision-

making process with all the changes made to the draft texts, in particular in the inter-service consultation phase and the level of *chefs de cabinets* and finally the college. This information is not publicly available.

If we then turn to the Council, we must pay attention to the Council proceedings at the ministerial level. It would be useful to use to the full extent evolving drafts of the Council Working Groups and the Coreper, but unfortunately these texts are not always available. This being the case, we must mainly resort to public sources at our disposal that give hints and indications about how the Council as a whole dealt with – and to which directions it steered – the legislative proposals. In addition to only press releases, it is possible to follow the evolution of Council position and texts by analysing different Council documents that have been made publicly available. A practical problem for the researcher is the rather scarce availability of Council texts. Moreover, if texts are made available it is often the case that the most sensitive parts of the texts are deleted in order to preserve the confidential nature of Council proceedings with delicate topics.[501] The council documents used in this study mainly consist of press releases, but most importantly of the different Council versions of legislative texts. By following the different Presidency compromise texts, it is possible to identify the changes made to the previous texts and hence pinpoint the way towards which the Council is heading in its position.

In this context we should note the highly important EU discussion on public access to EU documents. The legal framework for public access has been set out in the EP and Council Regulation 1049/2001.[502] The application of the Regulation by the Council has been inadequate, however, as public access has been quite restricted to, for example, details on the positions of delegations. To this effect, the CJEU took a historical position in its verdict in case Access Info Europe on 17 November 2013.[503] This NGO had submitted a request for Council documents to the Council Secretariat, which provided the documents but did not disclose delegation details. The Council was against issuing the documents with all the relevant information and justified its stance with the derogation provision of the Regulation, namely Article 4(3). According to the Council, a detrimental effect to the decision-making process and sensitivity of the information were at issue.

In the vivid discussion, the EP took a side with the NGO and positioned itself against the Council by interfering in the legal process. The General Court of the EU came out with a ruling on 22 March 2011 and ruled the case in favour of the Access Info Europe.[504] The CJEU ruling C-280/11 in 2013 confirmed the interpretation of the General Court. This can be considered to be a real victory for transparency in the Council decision-making and the public access to

[501] This inevitably leads to the situation where the somewhat sporadic selection of Council texts can only provide a partial picture of where the Council stood at a given time on a given outstanding issue. In this case, the researcher must do their best to try to collate the big picture from different sources.

[502] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[503] C-280/11 Council v Access Info Europe, 17 October 2013.

[504] T-233/09 Access Info Europe v Council, 22 March 2011.

information. In this case, an alliance between the EP and NGOs was formed that strove for greater transparency. Now the Council must open its processes to the public to a greater extent. Despite this, it remains somewhat unclear how the Council will in practical terms carry out the disclosure of the delegation information. Furthermore, this interesting strand of discussion has progressed as the handling of the recast of the Regulation on public access to information has continued since 2008 when the Commission presented its proposal for a recast in the context of the European Transparency Initiative.[505] In this discussion, a dividing line can also be seen between the EP and the EDPS on one hand, and the Council on the other hand. The Commission has also been criticized for a low level of ambition.

I will base my arguments on EP resolutions and draft reports on draft legal instruments. I will argue that particularly the EP has raised significant fundamental rights concerns throughout legislative processes and sought to strengthen the *ex ante* review of EU legal acts. My further conclusion is as follows: I believe that especially the EP has extensively used expert opinions of the FRA and thus brought these views to the political discussion and hence all the way to the legislative process. It seems that EP was active in this field already before the change of the constitution framework, i.e. the Lisbon Treaty, and now with its role of the co-legislator also in the former third pillar matters it has taken an extremely high profile in fundamental rights protection. This has happened through the *ex ante* review of fundamental rights. From a general EU policy point of view, it is interesting that the EP position has often run counter to the Commission's position. Therefore, there is no way of talking about the EP and the Commission "being in the same plot" seeking support from each other as is the case in many other policy areas.

I also study the role of the FRA in the legislative process. It is somewhat early to analyse the impacts of the FRA on some key dossiers, but it seems that the FRA has taken a strong role, especially when it comes to exploring the impacts of draft legal texts on fundamental rights. The material used in this study suggests that the expert legal opinions of the FRA have often politically crystallized in the position of the EP in the legislative files. Therefore, one could say that the impact of the FRA has been both direct and indirect and we have a good reason to deal with the FRA as a key player occupying a rather neutral role in the EU legislative process. Finally, I should mention that yet another important stakeholder in legal cases associated with right to data protection and right to privacy is the EDPS. The scope of activity of the EDPS is more limited compared with the FRA, for example, but it has strong expertise in these special fields of European law and it also has clear authority even to impose its views also on the EU legislator in these special questions. The involvement of so many actors in this *ex ante* form of constitutional review

[505] Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents COM (2008) 229 final, 30 April 2008. After the entry into force of the Lisbon Treaty the Commission presented a renewed proposal, see Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents COM(2011) 137 final 21 March 2011.

offers interesting practical insights into the development of European pluralistic constitutionalism.

It would have been interesting to also study other topical fundamental right sensitive EU legislative cases, in particular the recent data protection reform package.[506] This package was negotiated for quite some time and various issues with fundamental rights were debated at great length during the decision-making process.[507] Tackling this set of new rules for data protection in the EU would require a dissertation focused entirely on this topic. Other topical cases of interest for the theme of this study falling under ordinary legislative procedure include directive on trafficking in human beings[508] and the Eurodac regulation[509], both important legislative files but beyond the practical reach of this dissertation.[510]

It is essential to utilize mainly official documents of the EU and let them "speak with their own voice". This illustrates, in its purest sense, the positions of the legislative institutions involved in the law-making process. The sources mainly consist of legislative proposals of the Commission and the related preparatory documents, such as impact assessments. When the Commission has presented its proposal, the legislative institutions, the Council and the EP for their positions on the initiatives and it is possible to follow-up how fundamental rights are treated in these positions. Furthermore, consultative bodies, FRA and EDPS, need to be heard during the process. All these documents can be characterized as EU preparatory documents, which do not have such legal status as preparatory works in some national legal systems. They are, however, important in terms of illuminating the positions of the institutions in relation to negative and positive obligations during different

[506] For initial proposals see Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, Brussels, 25.1.2012 and Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012), Brussels, 25.1.2012.

[507] It can be observed that especially the EP was a very active institution in promoting positive obligations in the texts during the negotiations. These positions often originated from the FRA.

[508] Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA. COM (2010) 95 final, 29 March 2010. For a concise overview of human trafficking set in the context of international human rights see Obokata Tom: Trafficking of Human Beings from a Human Rights Perspective. Towards a Holistic Approach. Martinus Nijhoff Publishers. Leiden 2006.

[509] Regulation (EU) NO 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29.6.2013.

[510] These three cases demonstrate the importance of ex ante review of fundamental rights in the EU. Also in these cases, the EP put a great deal of political pressure to the negotiations on taking a stronger view on fundamental rights in the dossiers concerned. FRA and EDPS positions were taken to the process mainly through the EP.

phases of law-making process. Research literature remains scarce on especially some of the files and, even if it exists, I have considered basing my findings on negative and positive obligations on the primary sources rather than second-hand sources important for the research theme.

V The case of Passenger Name Record

From the angle of fundamental rights protection in the legislative phase, it is particularly interesting to shed some light on the case of Passenger Name Record (PNR). As a consequence of the 9/11 terrorist attacks, the United States enacted stricter laws on data concerning airline passengers. In order to solve the contradiction between these requirements to access information and the EU data protection legislation, the Commission undertook negotiations with US authorities regarding the necessary requirements. This was followed by the Commission decision on the adequacy of data protection for such transfers.[511] The decision indicated that the Commission considered the level of US data protection to be sufficient.[512] On the basis of this decision, the Council adopted the agreement of 17 May 2004 that enabled transfers of the data between the EC and the US.[513]

The heart of the problem in this exercise seemed to be the adequacy criteria in the PNR agreements and the internal decision-making process of the EU. In the phase of concluding international PNR agreements, the EP was consulted but it did not issue an opinion within the required time limit. The EP, however, was dissatisfied with the content of the agreement and brought the case to the CJEU.[514] The conclusion of the court was very clear: it held that adequate protection of the PNR data by the US was doubtful and considered that the legal basis of the instrument was incorrect because the essence fell under the then third pillar of the EU. The legal basis TEC 95 was not appropriate and the agreement furthermore was not within the scope of Directive 95/46/EC on data protection.[515] Therefore, the CJEU held in its ruling of 2006 that the decision of the Council and the Commission had a third pillar dimension and could not have the Treaty Article on transport policy as the adequate legal basis. These decisions were thus declared null and void.[516] The judgment for its part contributed to the negotiation of a new agreement taking into account to a greater extent third pillar aspects of the issue.[517] The guidance of the CJEU facilitated a later consensus on the need for interim PNR

[511] Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the passenger name record of air passengers transferred to the United States' Bureau of Customs and Border protection, OJ L 235, 6.7.2004.

[512] De Hert Paul and de Schutter Bart: International Transfers of Data in the Field of JHA: The Lessons of Europol, PNR and Swift. See In Martenczuk Bernd and Van Servaas Thiel (eds.): Justice, Liberty, Security: New challenges for EU external relations, VUB PRESS, Brussels University Press, Brussels 2008, pp. 326-327.De Hert and de Schutter offer a brisk outline of the earlier discussion and events in the margins of the PNR.

[513] See Council Decision 2004/496/EC on the Conclusion of an agreement between the European Community and the US on the processing and transfer of PNR ("Passenger Name Records") data, OJL L 183, 20.5.2004.

[514] Faull Jonathan: The Role of the European Commission in Tackling Terrorism: the Example of Passenger Name Records. In Arnull Anthony, Barnard Catherine, Dougan Michael, Spaventa Eleanor (Eds.): A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood. Hart Publishing. Oxford and Portland, Oregon 2011, pp. 614-615.

[515] See Joined Cases C-317/04 and C-318/04 Parliament v Council.

[516] De Hert and de Schutter, p. 328. For CJEU judgment see Joined Cases C-317/04 and C-318/04 European Parliament v Council and the Commission.

[517] The view of the EP on the new agreement was also predominantly negative, see Resolution P6-_TA(2007)0347, 12.7.2007.

agreement that provided a way out of this problem.[518] After this, the upcoming Treaty changes were to mould the external aspects and required new agreements of the PNR significantly. The case of the PNR can hence be regarded as falling within the category of cases that in the pre-Lisbon era had a close connection to both the Community pillar and the third pillar. These files were extremely complex because they were usually problematic in terms of legal basis. Consequently, problems directly linked with competence loomed large and this gave rise to inter-institutional tugs-of-war. It certainly made a difference if a given file was deemed to be derived from the Community pillar or the third pillar. Nowadays, when the pillar division no longer exists, the Commission and above all the EP can be identified as the winners. This is also the case in such sensitive areas as personal data having a policy goal of a sectorial policy area on the one hand, but having implications on the matters covered by the current AFSJ on the other hand. It is also clear that the CJEU now has competence to interpret issues covered by the former third pillar.

The interesting common feature in both data protection and privacy is that these rights are not absolute and are subject to restrictions under certain conditions. Firstly, restrictions must be provided by law. Secondly, restrictions must pursue a legitimate aim. Thirdly, restrictions must be necessary in a democratic society. Fourthly, restrictions must conform to the principle of proportionality. Fifthly and finally, restrictions must respect the essence of the right to data protection.[519] This list can be derived from Article 52 of the EUCFR and the general principles behind limiting fundamental rights. As will become evident later, this list will be important for analyzing the impact of provisions of the proposed PNR instruments on the core fundamental rights enshrined in the EUCFR.

For the 2007 PNR agreement, the compliance with "provided by law"-requirement is very questionable. This is because the agreement consists of three documents, which are the agreement itself, a letter by US authorities (Department of Homeland Security, DHS) and the EU response letter to the DHS letter. These letters contain interpretation and assurances on the use of PNR and cannot be considered to fulfill requirements of Article 52 (1), nor to be in line with interpretation practice of the ECtHR. This is also because of the lack of foreseeability and accessibility of individuals to the legal basis. Moreover, legal certainty can hardly be provided by issuing such letters on the interpretation of the agreement.[520]

In the case of PNR, it is possible to identify various misgivings presented by different institutions and stakeholders when it comes to the necessity of the PNR. This applies to the EDPS, the EP and Article 29 Working Party that voiced doubts about the necessity of the PNR system in the EU.[521] Effectiveness of the system is of key importance when evaluating the necessity of the PNR. Then another issue to be considered is whether there are other less

[518] For the legislative solutions adopted in 2006 see De Hert and de Schutter, p. 330.
[519] Tzanou, p. 67.
[520] Ibid., p. 297.
[521] Ibid., p. 298.

extensive alternatives available.[522] In relation to profiling, we can hardly justify it from the perspective of necessity.[523] This is the case even if generally the wide margin of appreciation-doctrine of the ECtHR in national security and counter-terrorism issues is a well-established fact. According to Lohse, terrorist profiling that builds on the criteria of ethnic or national origin, or equally on religion, is not only problematic in relation to the right to private life, right to data protection, equal treatment and non-discrimination, but also because it is inefficient.[524] It is obvious that evaluating the necessity of a given legal measure in the democratic society is a primary task of the courts. Nevertheless, I think that it is important to assess the fulfillment of this requirement also in the legislative process. The European legislator should bear this issue in mind especially when "making holes to the fundamental rights" in the course of law-making process. That is why I believe that it is particularly important for parliamentary bodies to have a say *ex ante* in the legislative process. Restrictions to fundamental rights do not come into existence *ex nihilo* – there is always a political purpose behind it and it is necessary that the legislator takes a stronger role in this *ex ante* review of fundamental rights.

At this stage, a distinction between external and internal dimensions of the PNR should be made, although these are interlinked. The external part has to do with PNR agreements with third countries, most notably the US and the EU decisions on their approval. Internal dimensions on the other hand deal with internal EU legislation on PNR. Meanwhile, the relative position of Member States has been weakened. In this context, we should keep in mind that there is a strong interface with third countries also in the internal EU legislation in this particular file.

1. Internal aspects of the PNR: PNR proposal of 2007

A good example of *ex ante* review in action in the EU legislative process is the passenger name record. This controversial legislative dossier consisted of the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes.[525] The aim of the Commission was to enable the use of commercial passenger data for counter-terrorism purposes. Because only a limited number of Member States had taken into use the mechanism to oblige air carriers to provide relevant PNR data and to have it analysed for anti-crime and anti-terrorist purposes, the Commission found it useful to have a common EU approach in this area. The proposal also had a strong external dimension because of its links to the exchange of information with third countries. The proposal of the Commission

[522] Ibid., p. 299.

[523] Profiling generally refers to a systematic association of sets of physical, behavioral or psychological characteristics with their use as a basis for making law-enforcement decisions. For discussion on profiling see Tzanou, p. 310 and Lohse Mikael: Terrorismirikoksen valmistelu ja edistäminen. Suomalainen lakimiesyhdistys. Helsinki 2012, pp. 221-224.

[524] Lohse, p. 222.

[525] Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. COM (2007) 654 final, 6.11.2007.

passed the scrutiny of the IAB with some requests for changes and was published on 6 November 2007.[526]

The most important argument behind the PNR proposal was the added value of the use of PNR data in combating terrorism. For authorities, PNR data was considered essential because it offered a good way to identify risky persons and to take appropriate measures. The Commission also justified the proposal with the fact that only a limited number of Member States at the time had put in place PNR mechanisms.[527] It is therefore clear that the Commission wanted to avoid the situation where Member States would choose different approaches to PNR which would lead to unpredictable and scattered legal framework within the Union. The Commission hence saw harmonization as the way forward. The political push was also evident in the background. Most importantly, the European Council had in its conclusions of March 2004 called for the Commission to make a proposal for a common approach to the use of passengers' data for law enforcement purposes.[528] This invitation was reiterated twice at the highest political level in November 2004 in the Hague programme and the extraordinary Council meeting of 13 July 2005. Political soil was prepared already in the Commission's Communication "Transfer of air passenger name record data: a global approach of 16 December 2003".[529]

In the explanatory memorandum accompanying the proposal, the Commission tried to reassure that the proposal is fully in line with the objective of creating a European AFSJ and that it complies with fundamental rights provisions. Furthermore, the fundamental rights ranging from protection of personal data to protection of privacy of persons were identified.[530] The proposed legal instrument for PNR was a Council Framework Decision.[531] We can see that in this initiative, the particularly alarming element from the point of view fundamental rights was its clear connection with the core of protection of personal data. This is safeguarded both in the ECHR and the EUCFR, as well as in differing ways in Member States' constitutions. What was striking in the Commission's proposal was almost total omission of fundamental rights aspects of the proposed piece of legislation. There was a real flaw, or even a black hole, in the analysis of fundamental rights in the impact assessment that accompanied the

[526] See Avis du Comité des Evaluations d'Impact. Council Framework Decision on the use of Passenger name record (PNR) for law enforcement purposes. SEC(2007) 1457, In its opinion the IAB recommended however that "the IA report should be further improved by better illustrating the risk of no EU action, by explaining in more detail the choices made in shaping and selecting the preferred policy option, and by elaborating on the consequences for relations with third countries". The responsible Directorate-General agreed to amend the IA report on these points.

[527] Explanatory memorandum, p. 12.

[528] Brussels European Council Conclusions of 25 and 26 March 2004. 9048/04. Brussels 19.5.2004. This request was made in the annexed Declaration on combating terrorism.

[529] See Communication from the Commission to the Council and the Parliament. Transfer of Air Passenger Name Record (PNR) data: A Global Approach. COM(2003) 826 final, Brussels 16.12.2003.

[530] See explanatory memorandum, p. 3.

[531] Council Framework Decision was very much a Directive-like instrument that was used in third pillar matters in the pre-Lisbon times. Similarly to Directives, Framework Decisions had to be implemented by the Member States within the provided timeframe and obligations were addressed to Member States. The legal basis of the proposal consisted of Article 29, Article 30 (1) (b) and Article 34 (2) (b) of TEU.

proposal.[532] As requested by the IAB, the Commission introduced some changes to the final impact assessment on the basis of recommendations but these were not considerably relevant from the point of view of fundamental rights.[533] The Commission did emphasize in the impact assessment, and also in the argumentation of the explanatory memorandum, that terrorism is one of the greatest threats to security, peace, stability democracy and fundamental rights – the basic values of the European Union.[534] Despite this general approach, safeguards for fundamental rights were not in place when substantial provisions of the legal text were outlined. This can be detected, for example, in the chapter of the impact assessment concerning respect for fundamental rights that did screen the affected fundamental rights set out in the ECHR and the EUCFR, but very strongly emphasized the limitation aspect of these rights on national security and public safety grounds. The Commission nevertheless underscored the need of these limitations to be proportionate, necessary in a democratic society and in accordance with law. The Commission finally considered that the proposed actions aim to combat terrorism and organized crime, and they hence come under the umbrella of these exceptions.[535] In the explanatory memorandum of the proposal, fundamental rights were addressed simply by stating that "it *(the proposal, KF)* also complies with fundamental rights provisions, particularly with respect to the protection of personal data and the privacy of the persons concerned".[536] One could well say that counter-terrorism endeavours prevailed over fundamental rights in this proposal.

The PNR proposal was accompanied with an impact assessment. The assessment had undergone the scrutiny of the IAB on 5 September 2007 and consequently an opinion of the IAB was issued on the first draft of the IA. The IAB found the IA insufficient due to inadequate handling of the preferred policy option, explaining the limitation to of the scope to extra-EU flights, elaborating the impacts on relations with third countries and eventually illustrating the risk of divergent national measures.[537] As a result of the opinion, a re-drafted impact assessment came out on 6 November – so it took the Commission two months to provide an IA, taking into account the remarks of the IAB.

In the IA, the Commission explained the method of consultation of stakeholders and the results. The key issue in IAs is the choice of policy option. The big decision to be made is always whether to go down the legislative road or not. In the IA, the Commission stated that most of the Member States were clearly in favour of a legislative instrument. What is striking here is the fact

[532] Commission staff working document. Accompanying document to the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. Impact assessment. SEC(2007) 1453, Brussels 6.11.2007.

[533] See impact assessment 2007, p. 3.

[534] Ibid., p. 7.

[535] Ibid., p. 14.

[536] See explanatory memorandum of the above mentioned proposal, p. 3.

[537] Commission Staff working document accompanying document to the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. Impact assessment. SEC(2007) 1453, Brussels 6.11.2007. p. 3.

that the Article 29 Working Party was against the proposal.[538] From this, one can sense the upcoming sensitivity and difficulties related to the Framework Decision. Regarding the problem definition, the Commission considered that the terrorism and organized crime constitute one of the greatest threats to security, peace, stability, democracy and fundamental rights. PNR data was regarded as a useful tool to fight terrorism and organized crime and therefore the objective of the IA was to assess whether there is a need for a legislative proposal setting the framework for the use of PNR data.[539] In the background, the question was always about harmonization at the EU level. This is because the Commission found in the IA that the most problematic issues with the current situation was the insufficient access of law enforcement authorities to passenger information, the diverging legal requirements for PNR in different Member States that put at risk legal certainty, the risk of being unable to manage the growing number of travellers and the lack of EU position that may be useful with regard to international dimensions of the PNR. Most interestingly, the Commission held that the prevailing situation was also a risk to the protection of citizens' fundamental rights, in particular to privacy, if the exchange of PNR takes place on the basis of incompatible systems.[540] This was yet another argument in favour of a harmonized approach.

The IA included a separate sub-chapter focusing on the respect of fundamental rights. In this part of the text it was stated that the purpose of the measure was to ensure the right of European citizens to enjoy all their fundamental rights. The right to life and physical integrity were particularly mentioned.[541] The Commission concluded that the proposed actions involved the collection, processing, exchange and the use of personal data of travelling citizens. The Commission found that they might as such interfere with the right to the protection of family life and the protection of personal data. Hence, Articles 7 and 8 of the EUCFR and Article 8 of the ECHR were concerned.[542]

The Commission very much underlined in the IA that these fundamental rights are subject to limitations, in accordance with Article 52 of the EUCFR. The Commission drew the attention to the possibility of limiting these fundamental rights, which are not of absolute nature. More specifically, the necessity for these exceptions was justified with "the interest of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others".[543] These grounds are subject to be in accordance with law and necessary in a democratic society. The Commission went on trying to vindicate that fighting terrorism and organized crime would count as justified exceptions, but interference with fundamental rights would need to be considered against the principle of proportionality.[544] Eventually, the Commission introduced a list of the minimum PNR data elements to be used

[538] Ibid., p. 5.
[539] Ibid., p. 7.
[540] Ibid., pp. 11-12.
[541] Ibid., p. 13.
[542] Ibid., p. 14.
[543] Ibid.
[544] Ibid.

by competent authorities. Probably the biggest shortcoming in the Commission's IA was the fact that it lacked analysis on substantial fundamental rights of the PNR proposal vis-à-vis relevant provisions of the EUCFR and ECHR. Nor did the Commission analyse the substance of the proposal in depth from the perspective of necessity. No proportionality test was carried out either. This sub-chapter contained only some slight weighing and balancing between various fundamental rights. This weighing and balancing was not properly done. Taking all of this into account, one may think that for the Commission, the fight against terrorism and organized crime was some kind of super-reason to limit fundamental rights that would *an sich* justify restriction to these constitutional rights.

The IA also contained a chapter on the objectives of the proposal. Here the Commission named the right to privacy and the protection of fundamental rights as one of the objectives.[545] In defining more accurate policy objectives, the Commission mitigated this basic principle considerably. This was achieved by speaking about "protecting citizens' fundamental rights, in particular right to privacy, while recognizing the need for a wider sharing of relevant personal data for law enforcement purposes".[546] The latter change in the Commission's emphasis constituted a visible departure from the outset of protecting fundamental rights, notably right to privacy. As we can see later in the analysis of the legal text, sharing of personal data for law enforcement purposes prevailed. As always for impact assessments, the Commission presented an analysis of the policy options under consideration. In the case of PNR, two alternative approaches were tackled. Firstly, there is always a business-as-usual scenario. This means that no action will be taken and that one sticks to the existing legislative framework. In this case, the only relevant piece of EU legislation would have been Council Directive 2204/8/EC on the obligation to carriers to communicate passenger data for the purposes of border control.[547] At the outset, the Commission found that this scenario would not entail solving the issue of exchange of PNR information for combating terrorism and organized crime. According to the Commission, this might lead to different Member States enacting different PNR data rules. Similarly, Member States might agree with third countries to exchange such data.[548] First and foremost, the deepest fear of the Commission was probably that this development would result in fragmentation of the European PNR regime. It is often the case that in similar circumstances the Commission proposes harmonization as the remedy. Minimum standards are often utilized for the containment of fragmentation and to hinder the fall of the dominoes in the face of Member States introducing national systems of their own.

For the "no action" policy, the Commission pinpointed that it has a detrimental impact on the ability of the EU to fight terrorism and organized crime and therefore affect European citizens' security.[549] Already in the impact assessment phase, it was the security and vulnerability of the citizens' that was

[545] Ibid., p. 15.
[546] Ibid., p. 16.
[547] Data are commonly known as Advance Passenger Information (API) data.
[548] Ibid., p. 16.
[549] Ibid., p. 18.

to a great extent underscored in the face of no action and diverging national PNR systems that might lead to "lowest standard shopping" by the criminals. The Commission very rightly stated in the IA that "no action" policy would mean that the right of privacy would not be interfered with at the EU level. Member States would continue to use and develop systems of their own. Finally the Commission drew the attention to Article 29 Working Party on Data Protection reply according to which in case Member States start implementing national measures, then it would be necessary to have a harmonized action. The Commission argued that the impact of no action on protection of data was zero. What is quite astonishing is that the impact of a legislative proposal covering air travel with a decentralized collection of data was estimated to provide in this scale twice a higher level of protection of privacy.[550]

Let us then go into the second policy option that was eventually chosen: the introduction of a legislative proposal covering air travel with decentralized collection of data. This option was all about establishing a passenger information unit to which air carriers would be obliged to transmit PNR data. These data then filtered out of sensitive and non-required PNR elements. The unit would then after processing and filtering of the data transmit it to relevant law enforcement authorities of its own Member State and to the corresponding units of other Member States.[551] The Commission was convinced that this would enhance significantly the security in the EU and deliver the aimed objectives. For the above-mentioned protection of privacy aspects, the Commission found that decentralized collection of data inherent in the legislative proposal and therefore the majority of remaining of data in one Member State would mean less interference with the right of privacy, while only the PNR data of identified high-risk passengers would be transmitted to other Member States. This would also serve the purpose of ensuring proportionality in interferences with fundamental rights. The Commission also reassured that safeguard clauses would be inserted in the legal text as for the rights of access and correction, limited periods of retention, measures to safeguard data security and clear purpose limitations.[552]

A third option was also present in the Commission's IA. It was the alternative of introducing a legislative proposal covering air travel with a centralized collection of data. The biggest difference compared with the previous option was the novelty of obliging air carriers to submit PNR data to a centralized unit at the EU level.[553] According to the Commission, it would not be necessary to establish a new body to perform these functions as for example Europol could carry out these tasks. This policy option was considered useful from the point of view of increasing security and especially the centralized aspect of collection of data was deemed to be positive because

[550] See ibid., p. 19 and p. 21. The zero in this scale can be considered neutral and thus not providing particular pros or cons.
[551] Ibid., p. 20.
[552] Ibid., p. 21.
[553] Ibid., p. 23.

of ensuring application of common criteria. The protection of privacy was considered to be at a very high level in this option.[554]

When comparing the options in the IA, it became evident for the Commission that a business-as-usual scenario was out of the question. The Commission estimated that going for this option would entail a risk of diverging national systems, the increased costs of compliance and also risking the protection of privacy.[555] Hence, the Commission found that a legislative proposal was the preferred option. Of the two remaining alternative legislative approaches, the Commission preferred the decentralized one. The Commission obviously had underlying misgivings about very practical issues of the centralized system, i.e. how to ensure co-operation between Member States and would the system be manageable and operable?[556] Now, when we concentrate on the proposed PNR framework decision, we can see that the PNR data that was suggested to be transmitted was almost identical with the categories listed in the EU-US agreement.[557] One can therefore see the inextricable link of the external dimension of the PNR to the internal dimension. The underlying reason for striving towards such an internal arrangement was probably the need to be the moral leader in the anti-terrorist measures with a high respect to human rights standards, but we should not omit the need for reciprocity in internal considerations.[558]

Article 8 of the proposed Framework Decision dealt with the transfer of data to third countries. In its paragraph 1, it was stated that PNR data may be provided by a Member State to law enforcement authorities of third countries only if the Member State is satisfied that two conditions are met. The first precondition was that the authorities of third countries shall only use the data for the purpose of fighting terrorism and organized crime. The second prerequisite was about the prohibition of a third country to transfer the data to another third country without the express consent of the Member State.[559] These are good preconditions for fundamental rights, but it raises especially one major doubt in the practical sense of the implementation of this provision. One can well ask how to ensure that the third country concerned complies with these requirements when using the data and considering their transfer. There is simply no way of ensuring that this happens and unfortunately this makes the whole provision very questionable from the fundamental rights point of view. The whole chapter III of the proposal concerned the protection of personal data. Paragraph 1 of Article 11 established a link to Council Framework Decision on the Protection of Personal Data within the frame of police and judicial co-operation. Pursuant to this provision, Member States were obliged to ensure that this legal instrument, that was still under negotiation, also applied to PNR Framework Decision thus making the general Framework Decision *lex generalis* and the PNR Framework Decision *lex specialis*.

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[554] Ibid., pp. 23-24.
[555] Ibid., p. 26.
[556] Ibid.
[557] Tzanou, p. 277. For further similarities of the internal and external systems, see ibid., p. 279.
[558] Ibid., p. 278 and 281.
[559] See Article 8 (1) of the draft PNR Framework Decision.

Paragraph 2 aimed at limiting the scope of the use of data by setting out that the data was to be exclusively processed for the purposes of the prevention, detection, investigation and prosecution of terrorist offences and organized crime. What is interesting, is paragraph 3 of this draft legal instrument. This provision enshrined the prohibition addressed to Passenger Information Units and the competent authorities of the Member States to take enforcement action only by a reason of the automated processing of PNR data or by a reason of a person's race or ethnic origin, religious or philosophical belief, political opinion or sexual orientation. With this provision, the Commission obviously tried to put the text in line with Article 21 of the EUCFR. This provision did not change the situation in practice, however, because the problematic annex related to Article was present in the text. This annex contained exactly these elements.

In the proposed legal act itself, fundamental rights were touched directly upon by the drafters in the following way. Firstly, in the proposed recital 18 the Commission stated that contents of lists of required PNR data should reflect an appropriate balance between the legitimate requirements of public authorities to prevent terrorist offences and organized crime and the protection of fundamental rights of citizens, in particular privacy. The text of the recital went on by stating that the "list should not contain any personal data that could reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or data concerning health or sex life of the individual concerned".[560] The purpose of the recitals in the EU legal instruments is that of providing help to interpretation of the related Article of the text and explaining the rationale of these provisions. As for their legal force, they are more or less aspirational but can function as an aid to interpretation when considering what the draftsmen meant. In this recital the objective was apparently to exclude the possibility of the lists being in breach with fundamental rights. The idea was obviously to especially address Articles 7 – respect for private life – and Article 21 – the prohibition of discrimination – of the EUCFR.

Similarly, recital 20 raised to consciousness the principle of data protection and the need to avoid enforcement actions on the basis of automated processing PNR data or by reason of a person's race or ethnic origin, religious or philosophical belief, political opinion or sexual orientation.[561] Again, by means of trying to convince that one can rest assured that the provisions of the Framework Decision are not incompatible with Article 21, the Commission sought to eliminate collisions with fundamental rights in the text. Lastly, in recital 24 it was stated that the Framework Decision "respects the fundamental rights and observes the principles recognized, in particular by the Charter of Fundamental Rights of the European Union".[562] This can be considered to be a standard clause in the preamble. This recital does not make it unnecessary to analyse the contents of substantial provisions of the text from a

[560] Ibid., Recital 18.
[561] Ibid., Recital 20.
[562] Ibid., Recital 24.

fundamental rights perspective which in fact reveal several conflicts of the text with fundamental rights.

On 5 December 2007, the Article 29 Data Protection Working Party adopted an opinion on the proposal. The main criticism in this opinion was addressed to the disproportionate nature of the proposal and possible breach of right to data protection.[563] In its opinion, the Article 29 Working Party and the Working Party on Police and Justice quite frankly found that "if the current version of the draft Framework Decision is implemented, Europe would take a great leap towards a complete surveillance society making all travellers suspects."[564] This is serious language from an expert group. In the same vein, the EDPS in its opinion on the proposal raised serious doubts especially concerning necessity and the proportionality of the proposed instrument.[565]

2. Possibility to ask for the opinion of the FRA as a way out?

In this situation the FRA stepped onto the scene. The legislative episode related to the handling of this file offers a good platform to look at the role played by the FRA that probably had its finest hour since its establishment in terms of real impact on one particular legal text. In autumn 2008, the French Presidency of the Council requested an opinion of the FRA on the proposed Council Framework Decision on the use of Passenger Name Record. In its opinion of 28 October 2008 the FRA raised several concerns deemed problematic in terms of fundamental rights.[566] In the course of the negotiations the FRA opinion contributed positively to the final outcome. The FRA focused in its opinion on three fundamental rights, namely respect for private life (Article 7 of EUCFR), the right to data protection (Article 8 of EUCFR) and the prohibition of discrimination (Article 21 of the EUCFR). The substance of the proposed Framework Decision also touched upon the scope of ECHR, which all the EU Member States are Contracting Parties to. This said, it is clear that in the analysis on the PNR proposal also *praxis* of the ECtHR was necessary to be included as a core element. In its opinion, the Agency gives a very prominent position to the ECHR system of protection of fundamental rights and consequently also to the ECtHR.

The FRA drew attention to the use of open-ended and imprecise phrasing in the PNR proposal.[567] It is clear that with such a legal text touching upon the

[563] Opinion number 145 of 5 December 2007. In fact, Article 29 Working Party adopted a joint opinion with the Working Party on Police and Justice.

[564] Joint opinion, p. 13.

[565] Opinion of the European Data Protection Supervisor on the draft Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, OJ C 110, 1.5.2008. In paragraph 37 of the opinion the EDPS took a stand on necessity and proportionality elements stating that "it can only be noted that such elements of justification are missing in the proposal and that the necessity and proportionality tests are not fulfilled". He further insisted necessity and proportionality tests to be developed.

[566] The FRA opinion is available on web-pages of the Agency at http://www.fra.europa.eu/fraWebsite/research/opinions/op-pnr_en.htm

[567] Opinion, paragraph 47.

very substance of data protection, the need to be precise in defining concepts is fundamental. Otherwise, the risk of putting this fundamental right at risk looms large. The Agency also called for more evidence to demonstrate that the use of such data was necessary to achieve the objectives of the Framework Decision.[568] This was all about the questionable proportionality and added value of the legal proposal that the FRA challenged in this way. Moreover, the Agency called for a review of the already-existing measures with a view to analysing their adequacy and the need to include sufficient procedural safeguards.[569] All these points are pertinent. Finally, the FRA attached the utmost importance to the need to ensure that data transfers to third countries are only possible if an adequate level of protection of PNR data is safeguarded and monitored in the recipient country.[570] Similarly, the eventuality of profiling was considered to be problematic.[571] On the issue of ethnic profiling, Tuomas Ojanen reminds of its close link to the principle of non-discrimination safeguarded for instance by the ICCPR and the EUCFR. According to him, the prohibition of discrimination on the grounds of race and religion is a non-derogable right in international human rights law and deviating from this principle is not allowed even in the situation of public emergency.[572] In the very recent PNR proposals by the Commission, the concerns expressed by the FRA seem to have been taken more exhaustively into account, although we can expect that discussion on fundamental rights will continue, not least under the auspices of the EP.[573]

3. EP intervention into the legislative process; bringing in the FRA position

The EP adopted a resolution on 20 November 2008 on the proposed Framework Decision.[574] The opinion of the EP, which was at the time still outside the legislative process, did not offer a *deus ex machina* solution to the fundamental rights related shortcomings of the proposal, but it did highlight these problems at the political level. The EP very much relied on the opinions of the FRA, the EDPS, the Article 29 Working Party and the Working Party on Police and Justice but after all the most significant impact that it had on the process, was political. In the resolution, democratic accountability has been mentioned and it seems obvious that the EP especially took a profile as the protector of a "small citizen" against the faceless and arbitrary enforcement

[568] Ibid., paragraph 48.
[569] See ibid., paragraphs 49 and 50.
[570] Ibid., paragraph 51.
[571] Ibid., paragraph 52.
[572] Ojanen Tuomas: Human Rights Dilemmas in Terrorist Profiling. In Scheinin Martin et al.: Law and Security. Facing the Dilemmas. EUI Working Papers. Law 2009/11. Department of Law of the European University Institute, p. 93.
[573] See Proposal for a Directive of the European Parliament and of the Council on the Use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. COM(2011) 32 final, 2.2.2011.
[574] EU and PNR Data. European Parliament Resolution of 20 November 2008 on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. P6_TA(2008)0561.

bureaucracy. It is also worth noting that the EP took a stand for involving national parliaments in the legislative process on the new proposal.[575]

Through the EP, it is possible for the opinions of the FRA to become concretized at the political level. FRA draws up legal technical analysis on fundamental rights aspects of the proposals and the EP seems to be quite keen on taking them on board, especially if this adds to the fundamental rights protection of individuals and reinforces the democratic control. The basic argument inherent in the EP resolution is that the proposed measures in the PNR have significant impact on the personal life of the EU citizens and that the justification of these measures needs to be convincing when it comes to the necessity, proportionality and usefulness with a view to their objectives. Furthermore, safeguards to privacy and legal protection are underscored. Eventually, the EP considers that "this is a precondition for lending the necessary political legitimacy to a measure which citizens may view as an inappropriate intrusion into their privacy".[576] Interestingly, political legitimacy is once again stressed and it is also intriguing to see that the EP uses word "citizens" instead of "individuals", a more often used legal term in fundamental rights discourse. This is apparently another hint of a more politicized side of this resolution.

The EP goes on to criticize various legal uncertainties of the proposed text in their relation to the ECHR and the EUCFR and also finds the legal basis of the proposal problematic. For the problems concerning legal certainty, the EP associates itself with the opinions of FRA, EDPS, Article 29 Working Part and the Working Party on Police and Justice.[577] The concern about legal basis was definitely connected to the role of the EP in the legislative process at the time. The EP also expressed concerns about the necessity of the proposal in the context of the Article 8 of the ECHR and called for justification on the pressing social need for it.[578] By the same token, the EP doubted whether the proposed text would lead to harmonization of national systems – one of the main arguments of the Commission.[579] Again, in paragraph 16 of the resolution the EP reminded about the necessity and also about requirements for limiting fundamental rights under Article 8 of the ECHR and Article 52 of the EUCFR, which is one of the most significant positions that the EP took in this resolution.[580] This is not the end of the story because the EP also established a link to the ECHR interpretation practice in paragraph 19, where proportionality, preciseness and foreseeability are dealt with in the context of Article 8 of the ECHR.[581]

Another key finding in the resolution was its criticism addressed to the possibility of profiling in the PNR proposal. The EP found it important to remind about the prohibition of discrimination enshrined in the primary law

[575] See ibid., paragraph 11.
[576] Ibid., paragraph 2.
[577] Ibid., paragraph 3.
[578] Ibid., paragraph 7.
[579] Ibid., paragraph 14.
[580] Ibid., paragraph 16.
[581] Ibid., paragraph 19.

of the EU as well as the ECHR.[582] Finally, an important conclusion of the EP had to do with the principle of the adequate level of protection in the transfer of data to third countries.[583]

4. A changing tide: Communication on the global approach to transfers of PNR data to third countries

In autumn 2010, the Commission issued its Communication on the global approach to transfers of PNR data to third countries.[584] The focus of this policy paper was mainly on external aspects of PNR, but as we have seen in the PNR the external dimension has always had an impact on the internal EU PNR system. The flow has been exactly from external to internal. While reminding in the communication about the recent agreements with third countries in this field the Commission found it important to reconsider its global approach bearing in mind strong data protection guarantees and full respect of fundamental rights.[585] The Commission also stressed that the Member States, the EP, the EDPS and the Article 29 Working Party "are especially important in the development of the revised approach on PNR".[586] With these assurances, the Commission probably tried to make it up for these key stakeholders, whose reactions on the Commission's earlier PNR initiatives were above all critical.

For the considerations on the need to establish PNR system, the Commission raised the issue of diversity of approaches of Member States in the PNR. Reading between the lines one can identify the need for harmonization, and reading in the lines one can see the consideration about replacing the proposed PNR Framework Decision with a draft directive.[587] As for the external dimension, the Commission also found that legal certainty for air carriers was of key importance.[588] Protection of personal data and privacy were also mentioned as the significant motives for the proposal.[589] These were actually not the only indications of the Commission having changed its approach. In the Communication, the Commission admitted that transmission, use and processing of PNR data affects fundamental rights, namely the right to protection of personal data. It also drew attention to the principle according to which an adequate level of protection of data would be required from third countries.[590] To follow-up the data protection issue more closely, the Commission stated that the transfer of PNR data to third countries has an impact on a large number of individuals and their personal data and private life and as a consequence of this the Commission found it necessary to

[582] Ibid., paragraph 23.
[583] Ibid., paragraph 30.
[584] Communication from the Commission on the global approach to transfers of Passenger Name Record Data to third countries. Brussels 21.9.2010, COM(2010) 492 final.
[585] Communication 2010, p. 3.
[586] Ibid.
[587] Ibid., p. 5.
[588] Ibid., p. 6.
[589] Ibid.
[590] Ibid., p. 7.

remind of the safeguards provided in the ECHR (Article 8) and EUCFR (Articles 7 and 8).[591] Instead of only resorting to a normal liturgy of these fundamental rights being subject to limitation the Commission admitted the interference and considered that it has to be balanced.[592]

The adequacy requirement was again reflected, especially when it comes to data protection regimes of third countries and their respective legal bases. Furthermore, the proportionality principle, the purpose limitation and data security together with the prohibition of using PNR data revealing racial or ethnic origins, political opinions or religious or philosophical beliefs, trade union membership, and health or sexual life "unless under exceptional circumstances where there is an imminent threat to loss of life and provided that the third country provides appropriate safeguards".[593] As a conclusion of the Communication, the Commission found that the EU should reflect the possibility of replacing bilateral PNR agreements with a multilateral agreement. The Communication contains general considerations which should guide the EU in negotiations with third countries.[594] This Communication of the Commission can be seen as a turning point that implied more sensitivity from the part of the Commission towards fundamental rights aspects of the PNR. Nevertheless, we can see that these intentions did not yet materialize in a sufficient manner when drafting provisions of the PNR and analyzing their impact.

5. PNR proposal of 2011

On 1 December 2009 the TFEU entered into force and hence the controversial Council Framework Decision proposed by the Commission was replaced by the proposal for a Directive of the EP and the Council on PNR.[595] The change in the constitutional framework brought especially the EP to the core of the legislative proceedings and put it on an equal footing with the Council. This is a considerable change from the past. The change in the legal form of the instrument brings it into communitarized legislative framework in terms of the process.

[591] Ibid. Additionally, the Commission also reminded of international law instruments in the field of protection of privacy and personal data, such as covenants, guidelines, recommendations and conventions under the auspices of the United Nations, the OECD and the Council of Europe.

[592] For the limitation of fundamental rights the Commission stated that "Any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by the law and respect the essence of these rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others". As can be seen this text has been taken almost directly from the EUCFR. Ibid., p. 8.

[593] Ibid., p. 8.

[594] Ibid., p. 11.

[595] For discussion on features of EU Directives including that of the direct effect see Prechal Sacha: Directives in European Community Law. A Study of Directives and Their Enforcement in National Courts. Clarendon Press. Oxford 1995.

The Commission analyzed the impacts for the proposal for a PNR Directive that was published on 2 February 2011.[596] The Commission highlighted the Stockholm Programme, which called for the Commission to present a proposal for the use of PNR data to prevent, detect, investigate and prosecute terrorism and other serious crime.[597] Similarly, the Commission carried out an impact assessment and strove to tackle the issues of necessity and proportionality as requested by the other interlocutors of the process.[598] The Commission also made it clear in the text that its aim in the new impact assessment is to answer criticism raised by the other institutions and the stakeholders.[599] What is particularly important and interesting in the Commission's impact assessment is a separate chapter devoted to respect for fundamental rights.[600] This has clearly been carried out in accordance with the principles of the Commission's strategy for the effective implementation of the Charter of Fundamental Rights by the European Union and in its fundamental rights "Check List". The Commission's elaboration on how it used this check list in the analysis, however, remains quite superficial and no in-depth explanation has been presented.

In the fundamental rights part of the impact assessment, the Commission identified links of the proposal particularly to the protection of private life and the protection of personal data and referred to the relevant provisions in the ECHR, EUCFR as well as the TFEU. It however reminded of these rights being subject to limitations under Article 8 of the ECHR and Article 52 of the EUCFR. At the heart of these limitations lie the principles of proportionality, necessity in a democratic society and the limitations being in accordance with the law. As a conclusion, the Commission found in the impact assessment that "as the proposed actions would be for the purpose of combating terrorism and other serious crime, contained in legislative acts they would clearly comply with such requirements provided they are necessary in a democratic society and comply with the principle of proportionality".[601] The Commission still seemed to attach great importance to limitations of fundamental rights in order to pursue the objectives of the PNR.

Other consultative bodies, the EDPS and the Article 29 Working Group, were not that convinced on the arguments behind the necessity and proportionality and how these issues found their expression in the draft legal text, although some improvements made to the text were welcomed. The EDPS strongly criticized the Commission's proposal for not meeting the requirements of necessity and proportionality imposed by Article 8 of the EUCFR, Article 8 of the ECHR and Article 16 of the TFEU and expressed doubts about how the proposed text fulfills the conditions for limiting

[596] See Commission Staff Working Paper Impact Assessment accompanying document to the Proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. SEC(2011) 132 final. 2.2.2011.
[597] Ibid., p. 18.
[598] Ibid., p. 6.
[599] Ibid., p. 7.
[600] Ibid., p. 19.
[601] Ibid.

fundamental rights.[602] Some of these suggestions were already in place in the previous EDPS opinion, such as the need to delete the general requirements list, and were thus restated. At the end of his opinion the EDPS presented quite a few recommendations for the further drafting of the text.[603] The Article 29 Working Group in its opinion for example still considered that it was disproportionate and not in line with article 8 of the EUCFR to collect and retain all data on all travellers on all flights.[604] The EP also used this possibility to be active on this fundamental rights sensitive file by using its right to request the opinion of the FRA on the new proposal for a Directive in April 2011 soon after the Commission had adopted its new legislative proposal. The FRA proceeded accordingly and issued its second opinion on the PNR on 14 June 2011.[605]

In this second opinion, the FRA identified links to several fundamental rights that are protected by both the EUCFR and the ECHR including non-discrimination, respect for family and private life and protection of personal data.[606] For the analysis of the fundamental rights implications of the proposal, the FRA very much based itself on preparatory documents of the Commission, namely the impact assessment and the explanatory memorandum.[607] The FRA mainly concentrates in its opinion on non-discrimination aspects and the requirements for limitations of fundamental rights and effective supervision. In its opinion on proposal for a Council Framework Decision the FRA paid attention to especially discriminatory profiling in the PNR. For the phrasing of the new proposal, the FRA considered that the text has improved thus reducing the risk of direct discrimination and discriminatory profiling.[608] However, the FRA still found it necessary to strengthen the text somewhat by introducing an explicit prohibition on the transmission of sensitive data.[609] Another concrete proposal of the FRA was to take the full advantage of using statistics for the assessment of the PNR system and in tackling the problem of indirect discrimination.[610] Regarding the limitation of fundamental rights, the FRA draws particular attention to criteria concerning objectives of general interest recognized by the EU, the requirement to be provided for by law, and the necessity and proportionality. The FRA underscores that limitations are possible under the Charter, but such limitations must meet these conditions.[611] The FRA held that the proposal for

[602] Opinion of the European Data Protection Supervisor on the proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. Brussels, 25.3.2011, pp. 3-4.

[603] Ibid., pp. 11-12.

[604] Opinion 10/2011 on the proposal for a Directive of the European Parliament and of the Council on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, WP 181, 5.4.2011, p. 4.

[605] Opinion of the European Union Agency for Fundamental Rights 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 (COM(2011) 32 final)

[606] Ibid., p. 5.

[607] Ibid., p. 6.

[608] Ibid., p. 7.

[609] Ibid., p. 8.

[610] Ibid., pp. 8-10. Additionally, the FRA proposed to add non-discrimination as an area of special attention for the review according to Article 17 (b) of the proposal.

[611] Ibid., p. 11.

PNR directive gave rise to some concerns in terms of the requirement to be provided for by the law because of the vague phrasing used in particular in annex 12 of the proposal.[612] Furthermore, the definition of serious crime in Article 2 (h) was considered too open for various interpretations hence endangering legal certainty.[613] Later in its opinion, The FRA made a constructive suggestion to limit the EU PNR system to serious transnational crime.[614] Finally, foreseeability of Article 4 (2) (b) of the proposal was questioned in the opinion and the FRA in that sense associated itself very much with the EDPS and Article 29 Working Party.[615] In its concluding remarks the FRA confirms that it has taken the opinions of the EDPS and Article 29 Working Group as a point of departure in its analysis. In addition to the points described previously it among other things suggested to create aggregate statistics based on PNR data to detect discriminatory patterns and trends in the application of PNR system. The use of statistics was also proposed to assess the efficiency of the PNR system.[616] A big block of the conclusions of FRA dealt with the principle of proportionality, for example when limiting fundamental rights and in the treatment of innocent people.[617] Last but not least, the FRA considered it essential to ensure in Article 12 of the proposal the full independence of supervisory authorities.[618]

The 2011 PNR Directive was accompanied with an impact assessment. In this new IA, the Commission argued in favour of presenting the new legislative proposal pursuant to the provisions and procedures of the Lisbon Treaty. The Commission also reminded of the request made in the Stockholm Programme of 2009 addressed to the Commission to present a proposal on PNR. Further to this, the Commission highlighted that a consultation process had taken place in the context of the 2007 PNR proposal and concluded that a consensus was reached in the Council working group regarding many provisions of the previous proposal. Most importantly, the Commission argued that the IA aimed at answering criticisms raised by the stakeholders and including all new facts and experience gained since 2007.[619] The Commission proposed Articles 82 and 87 of the Title V of Chapter V of the TFEU as legal basis and found that action at EU level in this field would ensure harmonized data protection. The

[612] Proposal for a Directive of the European Parliament and the Council on the use of Passenger Name Record for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. COM(2001) 32 final, 2.2.2011. The FRA took in its assessment into account especially item 12 of the annex that lists information under title general remarks that include all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details guardian on arrival and relationship to the minor, departure and arrival agent.

[613] Ibid., pp. 13-14.

[614] Ibid., p. 22.

[615] Ibid., p. 14.

[616] Ibid., p. 21.

[617] Ibid., p. 22.

[618] Ibid., p. 23.

[619] Commission Staff Working Paper. Summary of the Impact Assessment accompanying document to the Proposal for a European Parliament and Council Directive on the use of Passenger name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. p. 2.

Commission also considered that the proposal was in line with the subsidiarity principle.[620]

In relation to the objectives of the proposal, the Commission pinpointed that it is essential to ensure that individuals' right to the protection of personal data is respected when PNR data are collected and processed. It was also noted that access to PNR should be limited to what is necessary. This time the Commission also decided to include a separate chapter in the IA on fundamental rights considerations, mainly because these aspects in the previous proposal for a Council Framework Decision had attracted so much criticism. The new feature in impact assessment this time was using the Fundamental rights checklist, a new tool introduced in the strategy for the effective implementation of the EUCFR.[621]

In this round, the Commission also admitted in the impact analysis that the use of PNR data would interfere with protection of private life and protection of personal data, key fundamental rights.[622] It stressed that these rights are subject to limitation. Conditions and the prerequisite for the limitation would be "in accordance with law" and "necessary in a democratic society". Proportionality would also need to be taken into account.[623] Eventually regarding the much discussed feature of profiling in the previous Framework Decision, the Commission held that EU data protection legislation assured that automated processing of data intended to evaluate personal aspects of an individual should not produce legal effects. On the contrary, any automated decision should be controlled by a human being.[624] Finally in the IA, the Commission concluded again that a legislative proposal containing a decentralized system of data collection was the best available option.[625] The difference with the previous IA process was that this time fundamental rights aspects were examined in a more detailed and analytical way. When it comes to data protection and its added value, the case study of PNR, for example, seems to suggest that there is an added value. This was namely the case with regard to its practical significance in relation to the fair information principles that can provide guidance – both *ex ante* and *ex post* – on the problems of processing. One could even consider it as *lex specialis* of privacy. More to this, that is the case because of its normative importance in the context of law enforcement.[626]

6. EP position on the new PNR proposal

The position that the EP formed in its internal procedures on PNR can be characterized as very positive. If we take the rapporteur's draft report as our point of departure, we can on several occasions identify the overarching

[620] Ibid., p. 4.
[621] Ibid., p. 5.
[622] Ibid.
[623] Ibid.
[624] Ibid.
[625] Ibid., p. 6.
[626] Tzanou, p. 370.

contentment with the Commission's proposal. In the explanatory statement of the LIBE, it was acknowledged that the EP recommendations dating back to 2008 were taken into account. In the Opinion of LIBE, the same went for opinions of the EDPS, Article 29 Working Party and the FRA. Moreover, the impact assessment and consultation process were considered to be complete.[627] The conclusion that the rapporteur drew is also important: he contented the necessity, proportionality and added value of the measures.[628]

Similarly, amendments proposed by the LIBE Committee were scarce and mainly of a cosmetic nature. From the fundamental rights point of view, these amendments constituted some clarifications. The EP, for instance, proposed to add specific references to the Articles of the EUCFR.[629] Compared to the Commission's proposal for a Directive, the EP also sought to extend the list of grounds for prohibition of discrimination. The EP did not pursue to go beyond the EUCFR, but simply to put the text in line with the list of grounds for prohibition of discrimination set out in Article 21 of the EUCFR. These proposed amendments 3 and 14 helped to secure consistency of this legal instrument with the Charter and contributed to bridging possible gaps of the text proposed by the Commission.[630] It remains a mystery why the Commission proposed an incomplete list with regard to Article 21 of the EUCFR in the first place, thus omitting the grounds related to an individual's sex, colour, social origin, genetic features, language, membership of national minority, property, birth, disability, age and sexual orientation. Apparently, the Commission held that the grounds presented in its initial proposal were the most obvious possible reasons for discrimination, but it should have gone for an exhaustive list pursuant to the EUCFR.

Furthermore, the EP sought to provide more ambitious safeguards for sharing information under Article 7 of the proposed Directive.[631] In the same vein, it also stressed the need for an adequate level of data protection by possible third countries or international bodies that are involved.[632] Another set of proposed changes were related to the protection of personal data in Amendment 24, which included more far-reaching suggestions on notifying affected individuals and necessary enforcement measures.[633] Overall, the EP had a higher level of ambition with regard to the provisions of the PNR directive. One of the last proposed amendments of the EP was related to an independent review with a role to be given also to the EP.[634] With this, the EP was also striving for a role in the evaluation of the directive, thus moving towards the implementation, which is usually in the hands of the Member States and under the control of the Commission.

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[627] Draft Report on the proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Timothy Kirkhope, 2011/0023(COD), 14.2.2012, pp. 30-31.

[628] Ibid., p. 32.

[629] See ibid. Amendment 3, p. 7 and Amendment 12, p. 11.

[630] Ibid., Amendment 3, p. 7 and Amendment 14, p. 12.

[631] See ibid., Amendment 18, p. 14.

[632] See ibid., Amendment 21, paragraph 1 (ac), p. 16.

[633] See ibid., Amendment 24, p. 20.

[634] Ibid. Amendment 32, p. 26.

On 25 March 2011, the EDPS issued its opinion on the draft criteria. Some of the previous basic criticism was still present in the new opinion. We should not, however, forget about the positive aspects of the EDPS opinion. The EDPS finds that especially data protection provisions have been ameliorated in the current text compared with the text that the EDPS commented on previously. Improvements can be found particularly in the new scope of the proposal, the roles of different stakeholders, the exclusion of the processing of sensitive data, the use of the PUSH system without a transitional period and the limitation of data retention.[635] Furthermore, the EDPS hailed the development of the impact assessment on the reasons for an EU-PNR scheme.[636] The EDPS opinion on the more recent PNR proposal suggests that the Commission had amended the text towards the line taken by the EDPS in the previous phase and this satisfied the EDPS to some extent. We can therefore also identify the importance of the EDPS in the process.

7. Council proceedings and the flexible approach on intra-EU flights

During the Hungarian Presidency in spring 2011, the Justice and Home Affairs Council had its first policy debate on the proposed PNR directive. The main point of the discussion was the question of whether the collection of PNR data should be restricted to only flights from and to third countries or whether intra-EU flights should also be covered. Several options were possible regarding the question of scope. The Commission proposal limited the obligation to PNR data to extra-EU flights. On the other hand it would have been possible to go for the option, which would have enabled the Member States to designate those intra-EU routes starting from or landing on its territory for which PNR data should be transmitted to law enforcement authorities. Alternatively, one could have made the inclusion of all intra-EU flights mandatory.[637] In the ensuing discussion, a majority of Member States found that Member States should have at least the option to include also intra-EU flights in the PNR data collection.[638] This would cater to some of the expressed concerns about the scope of the directive.

In July 2011, the Polish Presidency issued a discussion paper on the way forward with the PNR file to Member States' delegations. The Council Working Party on General Matters including Evaluation (GENVAL) had tackled the outstanding issues, and on the basis of these discussions the Presidency came

[635] Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, 25.3.2011, paragraph 6, p. 2.

[636] Ibid., paragraph 7, p. 2.

[637] See Background note for Justice and Home Affairs Council in Luxembourg on 11 and 12 April 2011, Issued on 8 April by the Press office of the General Secretariat of the Council of the European Union, p. 4.

[638] See Press release 3081st Council meeting of Justice and Home Affairs, Luxembourg 11-12 April 2011, 8692/11 PRESSE 93, PR CO 21, p. 5.

to the conclusion that "proportionality and necessity - are perceived as the key to success in the co-decision process".[639] Interestingly enough, it is impossible to trace the key issues for further discussion in this document outlining the tests of proportionality and necessity as the texts have been deleted from the publicly available versions. The only thing that can be extrapolated from this is that necessity and proportionality issues played a central role in the Council discussions. The Presidency furthermore invited Member States to submit their written comments on the necessity and proportionality issues.

In a Council document released in September 2011, the Presidency presented to the delegations its compromise text based on Member States' written contributions on proportionality and necessity. In the annexed compromise text, it becomes clear that Council proposals in relation to proportionality and necessity are mainly covered in recitals.[640] This is good for highlighting the proportionality but not good enough to function as a guarantee for proportionality. The same goes for the references to the EUCFR. The changes to key articles and annexes remain by and large cosmetic. Probably the biggest impact of amendments is on the scope in Article 1, which is more restricted in the Presidency text. In a Council document released in April 2012 the Danish Presidency found that a clear and strict purpose limitation is important in order to safeguard the proportionality of the Directive. The Presidency hence found it necessary to leave this part of the text untouched. Another important element of the text that was to be offered to the EP in inter-institutional negotiations was about the compromise of allowing Member States to apply the Directive to all or selected intra-EU flights.[641]

During the Danish presidency, in April 2012 the Justice and Home Affairs Council debated the PNR Directive again. In the proceedings, a majority of Member States supported the inclusion of at least an option for each Member State to mandate the collection of such data also with regard to targeted intra-EU flights. The main topic in the discussion was whether the PNR should be restricted to flights from and to third countries or should also apply to flights inside the EU. The compromise that was accomplished allowed, but did not oblige, Member States to collect PNR data also concerning the selected intra-EU flights. The Council also agreed to maintain the overall data retention period of five years but decided to extend the first period, during which the data are fully accessible, to two years.[642] On the basis of this general approach, the Danish presidency received the green light for starting inter-institutional negotiations with the EP.

[639] See Council document 12373/11, 4 July 2011.

[640] See Council document 14233/11. For instance new recital 11 has been formulated as follows: "The processing of personal data must be proportionate to the specific security goals pursued by this Directive".

[641] See Council document 8916/12, 23 April 2012.

[642] Press release 3162 Council Meeting Justice and Home Affairs, Luxembourg 26 and 27 April 2012, 9179/12, PRESSE 172, PR CO 24, p. 8.

In the case of PNR, an interesting contribution to the discussion on proportionality of the proposal was provided by the Dutch Senate. In its opinion, the Senate forcefully questioned the added value of the Commission proposal and expressed serious doubts as to whether the proposal complies with the requirements of proportionality.[643] In its response the Commission defended its proposal and the added value of using PNR data. The purpose limitation was at the heart of the Commission's arguments explaining why the proposal was necessary and proportional. [644] The Commission, however, did not provide a clear answer to the concerns expressed by the Senate.

8. Assessment of the case in relation to the ex ante review of fundamental rights

The prohibition of discrimination has been enshrined in Article 21 of the EUCFR by stating in paragraph 1 that "any 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 shall be prohibited". According to Timo Makkonen, this provision is innovative because its scope has apparently not been restricted and it can therefore be expected to also apply to relations between private parties. Furthermore, the list of prohibited grounds set out above is not a closed list and it is additionally unprecedented among international instruments.[645] These aspects make Article 21 a very special provision.

Similarly, paragraph 2 provides that "within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited". This provision has sometimes been criticized for being narrower than the preceding paragraph and for putting non-EU country nationals in a disadvantageous position vis-à-vis EU country nationals.[646]

Maria Tzanou – basing her arguments on the provisions of the Data Protection Directive – finds that the principle of non-discrimination is of utmost importance proffering added value in data protection.[647] The prohibition of unequal treatment can be highly relevant for some processes

[643] See Opinion of the Senate of the Netherlands on the application of subsidiarity and proportionality. 15402/11, 13 October 2011. The Senate linked the proportionality concerns mainly to the retention of data of persons who are not guilty of committing a criminal offence and where the manner of processing could lead to the preparation of profiles pursuant to Article 4. Furthermore, the proposed text was considered inadequate in relation to anonymization.

[644] See Letter of Commissioner Sefcovic of 11 October 2011 addressed to the Senate. Attached to the previous document.

[645] Makkonen Timo: Equal in Law, Unequal in Fact: Racial and ethnic discrimination and the legal response thereto in Europe. University of Helsinki 2010, p. 157.

[646] Ibid., pp. 157-158.

[647] Tzanou Maria: The Added Value of Data Protection as a Fundamental Right in the EU Legal Order in the Context of Law Enforcement. European University Institute. Department of Law, p. 47. Tzanou attempts to examine what is the practical significance and normative importance of data protection in the field of counter-terrorism.

like profiling that can be discriminatory.[648] In connection with the PNR case (*vide infra*), the risk of using this process implying the eventuality of illegal discrimination also became extremely intrinsic. Tzanou notes that Article 15 of the EU data protection directive is aimed at protecting individuals against fully automated decision-making.[649]

It is clear that the biggest concerns of the case of PNR were related to fundamental rights. The proposed air passenger screening practices constituted interference with right to privacy, right to data protection and prohibition of discrimination. Similarly, this case raised concerns about proportionality and the necessity of this exercise in relation to its security merits. As Tzanou sees it, the possibility of data protection to have a hard core was neglected in the PNR and there was in fact no need to fall back to the right to privacy.[650]

The prohibition of discrimination contains both direct (open) and indirect (hidden) forms of discrimination.[651] When we tackle the concept of non-discrimination we can identify its close relationship to equality. Basically, these two concepts can be held to have semantically the same meaning: The term discrimination is focused on a specific action while equality describes an ideal.[652] Hence, equality which is enshrined in Article 20 of the Charter, can be considered a more positive notion of non-discrimination.

The case of the PNR illustrates that the FRA can make a valuable contribution to the *ex ante* control of fundamental rights in the EU legislative process. This happens with an in-depth legal analysis of the proposed legal instrument and contains various concrete suggestions for amendments. In this legal analysis, the particular yardstick against which the fundamental rights will be evaluated is the EUCFR, with emphasis also given to the ECHR. The FRA therefore draws inspiration from this legal basis and the interpretation practice of the CJEU and the ECtHR. Very much the same can be said about the significant role of other expert bodies, the EDPS and the Article 29 Working Party, which were also capable of drawing the attention of policy-makers to fundamental rights concerns of the PNR proposals. The most essential issue is, however, the utilization of the test of permissible limitations by the FRA. This had a great impact on the process and how the substance of the legal text evolved.

In this legislative process, both the Council and the EP have taken advantage of its expertise by requesting its opinion on fundamental rights

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[648] Ibid., p. 47.

[649] Ibid., p. 48.

[650] Ibid., p. 289. Tzanou considers that the PNR case very well demonstrates reasons why data protection should be accepted as a fully-fledged fundamental right. It should be noted that Tzanou focused in her study mainly on the PNR agreements. This choice is well-founded due to incompleteness of the legislative work on internal EU PNR system. The legal points made about PNR agreements are very valid and pertinent also in the context of the "internal EU PNR system".

[651] Hölscheidt Sven: Kapitel III, Gleicheit. In Meyer Jürgen (Hrsg.): Kommentar zur Charta der Grundrechte der Europäischen Union, Nomos Verlagsgesellschaft. Baden-Baden 2003, p. 285.

[652] See Schiek Dagmar, Waddington Lisa and Bell Mark: Cases, Materials and Text on National, Supranational and International Non-discrimination Law. Hart Publishing. Portland 2007, p. 26.

aspects of the proposals in question. Furthermore, the Commission has also taken into account a great number of the proposals of the FRA in its proposal for a Directive after the FRA had drawn attention to fundamental rights problems in the original Council Framework Decision.[653] The FRA can thus serve the purpose of a neutral body involved in the EU *ex ante* review. It is important that it can function somewhere outside the traditional fights over competence and the political power of the EU institutions. The importance of the EDPS can especially be found in its functioning as a sector-specific expert body whose views carry a considerable authoritative weight in the field of data protection and privacy. Is it possible to draw certain conclusions from the discussion on this file in the EU? The answer is yes and in this dossier we can probably learn some procedural lessons and identify a new law-making scheme for dealing with a fundamental-rights-sensitive EU dossier. First, in this case the constitutional *ex ante* review of a piece of draft EU legislation cut its teeth. The more important issue was the strong involvement of the FRA that can be considered a slight novelty. This has to do especially with the action of the Agency in bringing fundamental rights more deeply into the legislative considerations, which should potentially be followed by the upcoming draft legislation. In practice this would mean a much stronger role for the Agency in the analysis of fundamental rights aspects of a given file and consequently a stronger impact on the legal text under discussion.

It would be important to involve the FRA more closely in the *ex ante* review of fundamental rights in the EU legislative process. The EU institutions, including the EP, should consider the Agency as a useful body in analysing fundamental rights aspects of EU legislation in preparation. It has been the EP that has repeatedly brought the FRA legal opinions into the political discussion and we can therefore claim that the EP has been the co-legislator that has used the FRA expertise most extensively. One more observation that can be made is that of the *longue durée* of the PNR in the legislative process. The reason for this is the sensitivity of this file from the point of view of fundamental rights. It is also obvious that ordinary legislative procedure with more legislative actors has been one reason for the relatively long-lasting law-making phase. In this case, I can fully associate myself to Gearty's notion of liberty being subjugated to security by the executive, in this case the Commission, at the expense of fundamental rights.[654] PNR can be considered very much as a child of its time.

If we assess the case against the criteria discussed previously we can see that the problems resulted mainly from disproportionality. If we use the criteria developed for the analysis we can see that in terms of substance, the PNR case failed the tests of proportionality, necessity and also the non-

[653] This was the general impression of the FRA on the Commission's new proposal. According to the opinion, the Commission took account of the previous opinion of the FRA in its new proposal and referred also to the explanatory memorandum accompanying the proposal. See opinion of 14 June 2011, p. 5.

[654] Gearty Conor: Escaping Hobbes: Liberty and Security for Our Democratic (Not Anti-Terrorist) Age. LSE Law, Society and Economy Working Papers 3/2010. London School of Economics and Political Science. Law Department 2010, pp. 15-16 and p. 22. Gearty analyses the US and the UK policies with regard to human rights against the background of security and liberty in the aftermath of the "war against terrorism".

interference with the core of a fundamental right. Probably the grimmest interference happened with regard to the proportionality, where the Commission crossed the line and did not sufficiently take into account Article 52 (1) of the Charter. Should the PNR have been adopted in its initial form it would most probably have been annulled by the CJEU at a later stage due to serious shortcomings with regard to proportionality. In this scenario, the court would have clearly sent a signal to the EU legislature on compliance with the requirements of this Charter provision.

The focus in this file was mainly in limiting fundamental rights with only a minor role given to promoting fundamental rights. This is clearly a result of the overly far-reaching initial legal proposal which drew the attention mainly to the limitation aspects of the legal text. In this setting, the positive obligation had no possibility to be passed.

We should nevertheless note that the text was improved in the course of the handling and this can be considered as proof of strength of *ex ante* review focused on the test of permissible limitations which takes place in the EU at different levels. Looking at the case from an institutional perspective, we can see that EU institutions supplemented with other stakeholders in the law-making process can function as a system of checks and balances in fundamental rights issues. The legislative process on PNR witnessed institutional struggle as a consequence of the entry into force of the Lisbon Treaty and the altered competences of EU institutions. In spite of this, the EU was able to put this file on a more sustainable track in terms of fundamental rights protection. This demonstrates the usefulness of pluralism with multiple *ex ante* review actors.

According to Blume, the fundamental principle in the rules on trans-border data transfer is simple: "transferring personal data to another country must presuppose that the protection level in the importing country corresponds to that of the exporting country since it assumed that the laws of each country aim at safeguarding integrity at a certain level".[655] This was not the case in the PNR, and the level protection of data with regard to international transfers was a considerable problem, especially in the first Commission PNR proposals. We can see that even though the EU can be seen as a leader in data protection legislation in the world, at the same time it has its counter-terrorism and law-enforcement measures that affect this right significantly.[656] In this case the text was significantly ameliorated in the course of the law-making process and problems with proportionality were duly taken care of.

Why did the Commission make such a disproportionate proposal in the first place? It seems that there was a good intention to combat terrorism. This together with the huge political pressure to do something about it led to the initial proposal. I do, however, believe that there was also a certain kind of aspiration to test some limits with regard to Commission powers and the proportionality in the proposal. If this far-reaching interpretation was

[655] Blume Peter: Protection of informational Privacy. DJOF Publishing. Copenhagen 2002, p. 190.
[656] Tzanou, p. 358.

accepted by other institutions, it would have been an important precedent for the Commission to go on like this also in other files. It was important that this tendency was eventually stopped.

The terrorist attacks in Paris during 2015 and in Brussels in March 2016 have put significantly more pressure on taking the PNR file further. Attempts have been made to persuade the EP, which for its part has been a loud critic of the Commission and the Council stances. The PNR file did not proceed in the EP for some years due to the resistance among mainly liberal democrat, socialist and green MEPs. In the face of a huge political pressure, the EP, however, adopted in the plenary the PNR Directive on 14 April 2016. The main elements of the compromise were related to setting up passenger information units, application to extra-EU flights with the Member States' option to apply it also to intra-EU flights and the review clause.[657]

[657] In the practical EU law-making review clauses very often carry a significant political weight as it can be politically easier for different actors involved in the decision-making to explain that the problematic issues can be opened within a certain timeframe.

VI The use of security scanners as a fundamental rights dilemma

The significance and visibility of policy area covered nowadays by the AFSJ has obviously remarkably increased, especially due to the war against terrorism that was launched in 2001 by the United States and its allies as a response to large-scale terrorist attacks against civilian targets. In addition to terrorism, other types of organized international crime have enhanced the importance of the AFSJ. This makes the former third pillar an area in which the EU can also show its citizens the added value that the Union can bring into this field with enhanced co-operation between the Member States. It is not only the need for confidence building and adding credibility, but a real necessity to work closely in the international field to fight such phenomena as international crime.

The terrorist attacks of 9/11 can be regarded as a watershed in many ways in the field of international security. Its aftermath, new international measures and initiatives were launched to contain terrorism, but these efforts were not always easy to put in line with fundamental rights. Fundamental rights proved important also in the context of the EU.[658] One related EU file, in which the EP was involved with its *ex ante* review of fundamental rights is that of security scanners. The introduction and rolling out of security scanners at the airports became topical as a consequence of the attempted terrorist acts some years ago. The Commission reacted quickly to these attempts and proposed new measures to establish a common EU approach for taking into operation of body scanners at the EU airports. In practice the proposed EU instrument would have meant the rapid installation of such scanners at the airports. Similar to predominantly all the responses to possible terrorist threats, the proposed measures were prepared rapidly and understandably the related decisions had to be made quickly as well. In this rush, however, several concerns regarding the nature of fundamental rights remained unaddressed.

What is a security scanner used at airports? It is a device that scans a human body and thus is used to detect possible materials and equipment that must not pass the security control of airports. This illicit equipment may, for example, include some types of weapons, such as knives and materials intended for explosions at the airports or detonating airplanes. The scanning exposes the human body, which is being scanned, to those who are carrying out the scanning. The exposure gives rise to problems related to fundamental rights. From the point of view of the EUCFR that can be used as a yardstick also in the case of security scanners, such fundamental rights may include human dignity (Article 1), respect for private and family life (Article 7), protection of personal data (Article 8), freedom of conscience and religion (Article 10), non-discrimination (Article 21), the rights of the child (Article 24) and ensuring a high level of human health protection in the implementation

[658] See for example Ojanen Tuomas: Perus- ja ihmisoikeudet terrorismin vastatoimissa Euroopan unionissa. Lakimies 7-8 2007.

of EU's policies and activities (Article 35).[659] What is alarming is that this is not an exhaustive list of fundamental rights concerns related to the use of security scanners.

When limiting an individual's fundamental rights, the very basic point of departure is that the limitation concerned is clearly defined. Other requirements must also be set for such limitations, but the clear guidelines for waiving the fundamental rights related to using body scanners were simply not established. The EP thus started its proceedings on the dossier. The EP adopted on 23 October 2008, on its own initiative, a resolution on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection.[660] The EP held that the measures proposed by the Commission were far from being merely technical and it included a strong impact on the above-mentioned fundamental rights that should be provided with strong safeguards.[661]

The EP challenged the Commission's approach in many ways and required among other things that an impact assessment on fundamental rights should be carried out and that necessary consultation of the European Data Protection Supervisor, the Article 29 Working Party and the FRA should be executed.[662] Furthermore, it stressed the importance of verifying the compatibility measures with human rights and fundamental freedoms. Similarly, follow-up actions were mentioned.[663] From these statements we can notice the strong legal ethos highlighting the rule of law elements. What is interesting from the angle of fundamental rights is the role of the FRA that the EP points out. There is indeed some room for improvement in this regard. The FRA should be used to a larger extent as an expert body in analyzing the fundamental rights sensitive dossiers.[664] Later on, and having been consulted, FRA found security scanners particularly problematic in terms of right to privacy.

Eventually, this legislative circle was closed by the approval of the Commission Regulation 272/2009 supplementing the common basic standards on civil aviation security laid down in the annex to Regulation 300/2008.[665] The most controversial elements discussed above were left outside the scope of this regulation. The Commission reacted later to the EP's requests by issuing a Communication on the use of security scanners at EU airports. In this Communication, the Commission elaborated the aspects that

[659] See Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports, COM(2010) 311 Final, 15.6.2010, p. 4.

[660] Aviation security measures and body scanners. European Parliament Resolution of 23 October 2008 on the Impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection. P6_TA(2008)0521.

[661] Ibid., recital D and paragraph 2.

[662] Ibid., paragraph 3.

[663] Ibid., paragraph 4.

[664] In July 2010 the FRA released its contribution on the issue of security scanners. See The use of body scanners: 10 questions and answers. Available at http://www.fra.europa.eu/fraWebsite/research/opinions/op-bodyscanner_en.htm.

[665] OJ L 91/7, 3.4.2009. The secondary law basis for this Regulation is Regulation (EC) No 300/2008 of the European Parliament and of the Council of March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002. OJ L 97/72, 9.4.2008.

the EP had taken up in its resolution and the intention to carry out, for example, an impact assessment was confirmed. Respect of fundamental rights and addressing health concerns were given a particular emphasis in the analysis.

1. Inside the Commission's impact assessment

We can notice that the pressure exercised by other institutions made the Commission to address fundamental rights aspects of the security scanner dossier in a more elaborate manner. In March 2011, the Commission finally came out with an impact assessment on the topic.[666] This impact assessment contained in-depth analysis of various impacts of the Commission's legal instrument, but it is worth noting that one of the focus areas was fundamental rights. The formal introduction of the impact assessment was preceded by the IAB phase within the Commission that took place in January 2011. On the basis of the IAB evaluation and comments, the Commission decided to integrate the fundamental rights and health concerns in the problem definition and also included fundamental rights and health as a specific objective emphasizing the trade-offs between airport efficiency, security, minimization of risks and fundamental rights.[667] This is yet another piece of evidence that the IAB phase can be useful in dealing with fundamental rights aspects of the Commission's preparatory documents in the legislative process.

In the impact assessment, the Commission devoted an introductory chapter of its own to legal basis, subsidiarity and fundamental rights. The main argument seemed to be that the lack of action and undertaking fragmented and uncoordinated action by individual Member States in this field would increase existing concerns about fundamental rights. The reason that was put forward was inequality of treatment of passengers and staff at different EU airports.[668] Equal treatment is a basic fundamental right and it is safeguarded in international agreements in various ways, as well as in national and the EU law. Putting forward this kind of argument is doubtful, however, as it should be the individual EU Member States' burden of proof that their legislation in the field of airport safety is in line with the EU acquis and complies with fundamental rights at different (international, national and EU) levels. Equal treatment appears to have mainly been used to justify policy action, not the protection of fundamental rights.

The Commission went on to analyze impacts of the altogether seven policy options. When addressing each option, the Commission also tackled the pros and cons of each option in terms of protection of fundamental rights. When commenting on the baseline scenario, with no new EU regulatory action, the Commission mainly referred to the existing Treaty base of fundamental rights,

[666] See Commission Staff Working Document. Impact assessment on the possible use of security scanners at EU airports. Brussels 23.3.2011. Also the Commission admits in the narrative on the policy background of the proposal that the *Leitmotiv* behind the Commission's reappraisal and withdrawal of the security scanners was a result of the EP resolution on the matter in 2008, p. 4.

[667] Ibid., p. 8.

[668] Ibid., p. 18.

the TFEU and the Charter as well as to ECHR and its fundamental rights provisions relevant for this case. Furthermore, secondary EU legislation, such as the Directive on the use of personal data was mentioned. In this case, it would be up to the EU Member States to decide whether to adopt codes of practice in order to address fundamental rights concerns.[669] In this case, the umbrella of protection would clearly be EU primary law and the ECHR.

Option 2 presented by the Commission was also centered on no or discontinued EU action. The solution in this case would be the abolition of the exclusive nature of the list of allowed screening methods and technologies. In this case, the consideration of the Commission was similar to that under option 1, but additionally the Member States would decide whether or not to set operational conditions for other technologies to be possibly deployed in the future.[670]

Option 3 would have added security scanners to the list of allowed screening methods for passengers. For this alternative, the same fundamental rights considerations are applicable as with the two previous options. The outcome would have been a situation in which Member States would decide whether or not to establish operational standards for the use of security scanners as a permanent screening method.[671]

Option 4 foresaw that adding security scanners to the list allowed screening methods for passengers and fixing performance standards with the general possibility for passengers to opt out. The Commission highlighted that passengers would have the possibility of opting out. Therefore there would be no need to fix operational rules concerning fundamental rights. The EU legislation would impose the obligation that each person is fully informed of the implications of being screened by the security scanner. Those who would refuse to be screened for fundamental rights reasons would have to undergo an alternative method of detection.[672]

Option 5 aimed at adding security scanners to the list of allowed screening methods and technologies for passengers and fixing the detection performance standards and the operational conditions under the implementing legislation without the general possibility for passengers to opt out. This option would impose a legal requirement for Member States/airports that decide to use security scanners to apply special hardware and software to ensure that certain fundamental rights relevant preconditions are fulfilled in the screening procedure. It was deemed necessary that the image is destroyed immediately after the passenger is cleared and it would not be stored, retained, copied or printed. Additionally, the necessity of the analysis being carried out by a person of the same gender was recalled. It was also considered necessary that the image could not be connected with the identity of the screened person and finally the Commission held that unauthorized access to the screening

[669] Ibid., p. 20.
[670] Ibid., p. 22.
[671] Ibid., p. 23.
[672] Ibid., p. 24.

information is prevented and that passengers are fully informed of these procedures.[673] What is significant with these operational conditions is that they resonated the opinions of the EDPS and the FRA.

Option 6 was concerned about adding security scanners to the list of allowed screening methods. It also considered technologies for passengers, fixing the detection performance standards, the operational performance standards and the operational conditions under the implementing legislation with the general possibility for the passenger to opt-out. According to the Commission, this policy alternative shared the same fundamental rights considerations with option 5.[674] In any case, those passengers who would refuse to be screened due to fundamental right considerations would be provided with the possibility of opting for an alternative screening method as set out under option 4.

Finally, the last option 7 presented in the impact assessment aimed at making the use of security scanners mandatory at all airports, in combination with the operational conditions of option 5. This option would have the same basic fundamental right elements as option 5.[675] We have now exhausted the list of policy options and their fundamental rights aspects identified by the Commission so let us move forward to drawing some conclusions.

Firstly, we can note that the first 4 options contained no specific EU operational conditions for fundamental rights, while options 5, 6 and 7 did. We can also see that probably the most relevant fundamental rights involved were those related to the protection of human dignity and private life as well as the protection of personal data. Moreover, concerns on rights of the child and right to equality and the prohibition of discrimination were also present in the fundamental rights considerations.[676] In the analysis on fundamental rights aspects of the different options, the Commission simply states that the European fundamental rights legislation is applicable. Those Member States and airports who already have codes of conduct established for the use of security scanners would continue to use them without the Commission systematic control. The Commission, however, notes that even though some Member States use codes of practice in order to comply with fundamental right, their content and practical application may vary.[677] Under these options, if those Member States not using security scanners would go for this type of security check, they would according to the Commission most probably establish rules on fundamental rights. The underlying concern that the Commission seems to have is that these rules would be different in different Member States and consequently this assessment of fundamental rights aspects at the national level and obvious lack of co-ordination would lead to different treatment of passengers and staff in different Member States.[678] The

[673] Ibid., p. 25.
[674] Ibid., p. 26.
[675] Ibid.
[676] See ibid., p. 31.
[677] See ibid., p. 32.
[678] Ibid.

arguments in favor of a level playing field and certain level of harmonization seem to be coming out of the impact assessment across the board.

The Commission also drew attention to its notion of options 2 and 3, which had higher inherent fundamental rights risks than the baseline. For option 2, this was due to the removal of the exclusive list of allowed screening methods and technologies. This being the case, the lack of European standards on fundamental rights would concern not only the security scanners but all new equipment and methods to be used in the future to come.[679] For option 3, the Commission raised concerns about the restrictions on the deployment of security scanners and the subsequent result of more airports using them. This would, for its part, lead to fragmentation of fundamental rights.[680] As regards option 4, the same fundamental rights considerations are valid and pertinent, but the Commission however raised the issue of the eventuality of passengers suffering from biased or incomplete information on the potential threats to their fundamental rights.[681] If we then move on to options 5, 6 and 7 we can make the general observation that these alternatives would set detailed operational conditions for compliance with fundamental rights. What is in common in all these three options is their intention to get rid of differing codes of conduct in different Member States and to replace them with EU operational conditions for fundamental rights that would create a framework for the use of security scanners. This approach would also ensure uniform treatment of passengers and staff in compliance with the EUCFR.

The Commission argues that "the necessity of the interference with fundamental rights is justified by the public interest of a better and more harmonized level of detection necessary for enhancing aviation security".[682] The Commission is thus putting forward arguments on the restriction of fundamental rights. The Commission justifies this interference with data protection and other fundamental rights with necessity and proportionality of the operational guidelines.

The Commission considers that the presented option 6 is the best alternative in terms of fundamental rights.[683] This is most obviously because of the possibility given to individuals to opt-out, a possibility that does not exist under options 5 and 7. A positive element would probably be an increased social acceptance that springs from the opt-out.[684] The Commission finds that a passenger choosing the opt-out would have to undergo an alternative method of detection that would be as effective as security scanners, but in the end this might undermine European airport security.[685] We should note,

[679] Ibid., p. 32

[680] Ibid. In this alternative the Commission identified the risk of more and more airports using restrictions that would at the end of the day lead to a scattered fundamental rights regime.

[681] Ibid.

[682] Ibid.

[683] Ibid., pp. 33 and 55.

[684] Ibid., p. 33. The Commission remarks that empirical evidence shows that there are in fact only few people who use this opt-out and due to the number of passengers undergoing an alternative method of detection, also the impact on social acceptance is limited.

[685] Ibid., pp. 33-34. The Commission argues that giving the passengers various options may allow them to test the weak points in the security systems. Furthermore, the Commission attached importance

however, that other EU bodies had intervened in the context of the previous Communication on the use of security scanners. The EDPS, for example, drew attention to its view that consent should not be used to legitimize a process of personal data if there is no legal basis for the processing. With this, the EDPS meant that the legal necessity to legitimize the use of scanners should not be transferred on the consumer through a choice option. In practice, this means that turning down the scanner search and opting for an alternative method would put the individual under suspicion.[686] In this context, the need for legal obligation was brought up with a reference to Article 8 of the ECHR and Articles 7 and 8 of the EUCFR.

The overall selection of instrument is balancing and trade-offs between different policy choices and their positive and negative sides. We must, however, keep in mind that fundamental rights include criteria that cannot be compromised. If limitations to them are to be made, strict limitation requirements need to be complied with. Even if an option was considered to provide the best level of fundamental rights protection, options 5 and 7 were raised as examples of ensuring compliance with fundamental rights and option 5 was evaluated as the best alternative from the angle of airport security.[687] From this point of view, the protection of fundamental rights was considered to be the weakest in options 1 and 2. Taken together, we can see that especially in the case of security scanners, fundamental rights considerations were put on par with other underlying factors of this legal dossier, such as cost-efficiency and security aspects. We have to be cautious, however, when drawing conclusions on the Commission's role in this case, because further fundamental rights deliberations were mainly a result of another EU institution, in this case the EP.

It is also worth noting that other stakeholders intervened during this rather heated policy-making process. For example, the Centre for Science, Society and Citizenship issued a very detailed study on the impacts of the use of security scanners.[688] Already earlier in the process the Commission had aimed at having relevant stakeholders on board in the consultation process on the use of security scanners. The Commission set up a public-private dialogue by establishing a Body Scanners Task force that convened in December 2008.[689] The policy report of the Center above all set the EUCFR at the apex and considered that it should be the general framework for the introduction in the EU of new technologies for passenger screening and aviation security.[690]

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to demanding training and supervision aspects of the alternative detection method, the full body hand search.

[686] See EDPS comments on the Communication COM (2010) 311 final from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports, p. 2.

[687] Ibid., p. 55.

[688] See Whole Body imaging at airport checkpoints: the ethical and policy context. Centre for Science, Society and Citizenship. Policy Report No. 2010/01. February 2010.

[689] Ibid., p. 11. The setting up of this task force was accompanied with a public consultation on the impact of the use of body scanners in the field of aviation security on human rights, privacy, personal dignity, health and data protection.

[690] Ibid., p. 23. Against the legal and political background the report of the Centre especially focused on the need to take ethical aspects into consideration when dealing with security scanners given their sensitivity from the point of view of fundamental rights. See ibid., p. 44.

I will take the EUCFR as the basis of the analysis on the relevant fundamental rights involved in the legislative case on security scanners. We can easily identify the following provisions that need to be considered. Article 1 deals with human dignity – from the use of security scanners concerns can be expressed if all the practical methods by using security scanners are fully in line with this provision. Another key provision that was raised during discussion on the legislative file on security scanners was Article 8, which deals with the protection of personal data. Also clear links with Article 21 (non-discrimination) and in some senses also Articles 24 (the rights of the child) and Article 26 (integration of persons with disabilities). Pursuant to Article 52 of the EUCFR limitations to these rights and freedoms can be made although to a clearly defined extent.[691]

2. Closing the security scanner file: The Commission regulation of 2011

In terms of legislation the next step taken by the Commission was the approval of the Commission Regulation 1141/2011 of 10 November 2011, amending Regulation 272/2009 supplementing the common basic standards on civil aviation security as regards the use of security scanners in the EU airports.[692] It was also accepted by the Council and the European Parliament. This Commission Regulation amended the regulation in force on common basic standards by adding the possibility to use "security scanners which do not use ionising radiation".[693] This Regulation made the use of security scanners optional within the EU. So, it remains up to every Member State and their airports to decide whether to go for this security screening measure.

In addition to allowing the use of security scanners the Regulation also provided some useful technical common standards for the performance of the scanners. More interestingly, it also included a separate recital on fundamental rights. In the preamble, the possibility to undergo alternative screening methods was confirmed. Moreover, in the same context, it was stated that the Regulation is in line with the EUCFR and that it respects fundamental rights. In particular, respect for human dignity and for private and family life, the right to protection of personal data, the rights of the child, the right to freedom of religion and the prohibition of discrimination were

[691] Article 52 of the EUCFR on the scope and interpretation of rights and principles sets out in its paragraph 1 that "any limitation on the exercise of the rights and freedoms recognized by this charter must be provided for by the law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

[692] Commission Regulation (EU) No 1141/2011 of 10 November 2011 amending (EC) Regulation No 272/2009 supplementing the common basic standards on civil aviation security as regards the use of security scanners at the EU airports. OJL L 293/22, 11.11.2011.

[693] See Article 1 of the Commission Regulation and the Annex related to it. Legal technically the amendment was therefore executed with an annex solution that is a very common method in the EU law of introducing changes to legislation in force. At the heart of this method lies an operational Article that establishes a linkage to the annex that contains the real substance of the amendment.

mentioned in the text.[694] Eventually, the Regulation referred also to its application according to these rights and principles and also in the other parts of the text fundamental rights safeguards were introduced.[695]

It is noteworthy that over the longer term, the fundamental rights considerations in the Commission changed substantially. This was due to pressure from the EP and other stakeholders involved in the case of security scanners but if we look at the political and legislative documents of the Commission we can see a change in the internal approach of the Commission as well. Another proof of this is the Commission Regulation on security scanners wherein fundamental rights aspects were anchored in a totally different way than in previous legislative documents. The Commission Regulation, also by definition, is Commission-driven legislation and without a considerable rethinking within the Commission such a different approach would not have been possible. We only need to see the legal form of this piece of legislation to understand this.

This tendency can be further confirmed in the Commission implementing Regulation 1147/2011 adopted on 11 November 2011 amending Regulation 185/2010 implementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports.[696] In addition to the similar recital on fundamental rights as in the previously presented Commission Regulation, the Commission implementing Regulation enshrined important requirements for the use of security scanners from a fundamental rights point of view. Again, security scanners have been presented only as an alternative and strict conditions have been set for their use.[697] Passengers shall be entitled to opt out from a security scanner and in this case alternative screening method will be used. Furthermore, paragraph 3 of the annex included important supplementary requirement for the use of security scanners especially regarding data protection, human dignity and also for the prohibition of discrimination.[698] From a practical viewpoint, all these requirements were relevant for securing compliance with fundamental rights.

If we take into account the requirements set out in this implementing Regulation, we can see that there is a significant difference in this Implementing Regulation and the legal documents from which the Commission started the legislative saga of security scanners. It has been a long journey from nearly omitting fundamental rights in the early legal instruments of the Commission compared to the Commission Regulation and the

[694] See recital 7 of the Commission Regulation.

[695] See recitals 7 and 6 of the Commission Regulation.

[696] Commission implementing Regulation (EU) No 1147/2011 of 11 November 2011 amending Regulation (EU) No 185/2010 implementing the common basic safety standards on civil aviation security as regards the use of security scanners at EU airports. OJL L 294/7, 12.11.2011.

[697] Implementing Regulation, see paragraphs 2 and 3.

[698] Sub-paragraphs a-f included i.a. requirements related to storing, retaining, copying, printing, retrieving and deleting of images. Furthermore, they contained conditions for location of human reviewers and technical devices capable of storing, copying, photographing or recording images. Moreover, one can identify a block of requirements related to anonymity of screened persons vis-à-vis images and blurring and obscuring of images in order to prevent the identification of the face of the passenger. Lastly, requirements include the right of passenger to request his or her body to by analysed by a human reviewer of his or her choice.

implementing Regulation. In its annual report on the implementation of Regulation 300/2008, the Commission further underscored that it will pay particular attention to ensure that the rules, including those on fundamental rights, are fully respected by the Member States.[699]

3. Assessment of the case in relation to the ex ante review of fundamental rights: EP as an initiator of the review of fundamental rights and the change of the position of the Commission

On the right to privacy it is set out in the Charter:

Article 7
Respect for private and family life
Everyone has the right to respect for his or her private and family life, home and communications.

This classical human right can be seen to reflect the right to protection of this realm as stated in all constitutions of Member States and hence to belong to the basic rules of Union law.[700] We should take note that privacy and the right to privacy do not mean the same. The right to privacy is instrumentally targeted *on something* while in privacy at issue is *something*, i.e. certain special interests that are targeted by the norms.[701] Article 7 can also be considered to entail a positive obligation, which is stronger when the possibilities of an individual to take care of the protection by himself are weaker.[702]

For a long time, the right to privacy was deemed to mean the right to be left alone.[703] Nowadays, according to many commentators there is more to privacy. The respect for a private and family life is more than simply the right to be left alone.[704] Underlying the discussion on privacy is the classical dichotomy between private and public realms discussed already in the works of Socrates and Aristotle.[705] The CJEU has increasingly referred to Article 7 of the Charter in its recent interpretation practice.[706] It is particularly noteworthy that in May 2014 the CJEU came out with an extremely important ruling in

[699] See Report from the Commission to the European Parliament and the Council. 2011 annual report on the implementation of regulation (EC) No 300/2008 on common rules in the field of civil aviation security. COM(2012) 412 final, Brussels 24.7.2012, p. 4.
[700] See Bernsdorff Norbert: Kapitel II, Freiheiten. In Meyer Jürgen (Hrsg.): Kommentar zur Charta der Grundrechte der Europäischen Union. Nomos Verlagsgesellschaft. Baden-Baden 2003, p. 146. This study is creditable due to thorough discussion on the preparation of the Charter in the European Convention.
[701] Mahkonen Sami: Oikeus yksityisyyteen. Werner Söderström Lakitieto Oy. Porvoo 1997, p. 14.
[702] Bernsdorff, p. 151.
[703] See Blume, pp. 13-14.
[704] See Bernsdorff, p. 152.
[705] Turkington Richard C., Trubow George B. and Allen Anita L.: Privacy. Cases and Materials. The John Marshall Publishing Company. Houston 1992, p. 1.
[706] See for instance C-212/13 Rynes.

the case Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González.[707] The Court confirmed in this case "the right to be forgotten" of individuals. The verdict represents an important interpretation of Data Protection Directive and Articles 7 and 8 of the Charter and it will certainly change the whole setting of EU data protection regime in relation to the right to be forgotten.

We can interestingly conclude that in the case of security scanners of all the EU institutions, it was the EP that most effectively fulfilled its role in the *ex ante* review of fundamental rights. The Commission probably acted somewhat hastily with certain kind of a tunnel view focused on security aspects. Because the Council was more or less unable to act and in this situation it was the EP that raised the fundamental right concerns and somehow got the discussion on the right track. The EP functioned as a *primus motor* in securing compliance *ex ante* with fundamental rights in the EU legislative process. The role of the EP as a protagonist in policy-making with regard to human rights has been obvious. Very often this has been seen in a conflicting relation to the Council.[708]

It is interesting that the beginning of this legislative story happened already before the entry into force of the Lisbon Treaty. In the current situation, there are even more constitutional powers for the EP to carry out its role. Another observation links the example with procedural handling of fundamental rights issues within the EP architecture. The problems that emerged were largely dealt with in the context of a sectorial EP Committee, namely the TRAN. This can be regarded as the most welcome sign since it indicates that the EP structure is prepared to detect and tackle horizontal fundamental rights issues in *prima facie* sector-specific legislative dossiers.

Lessons learnt from the case of security scanners can be concluded by stating that in this legislative file, the EP exercised strong *ex ante* review of fundamental rights. The EP was able to take a leading role in highlighting the serious fundamental rights concerns, and also bringing a strong political impetus, to take into account fundamental rights dimension of the dossier. A good quality of legal technical analysis and argumentation was successfully combined with the necessary political thrust. The case of body scanners is a good example that *ex ante* review of the EP can have a positive effect on the EU legislative process. With this file, the EP put the whole process on the right track that would not have been the case otherwise. I find it quite obvious that if the initial security scanner legislation would have been adopted, it would eventually have ended in the docket of the CJEU. In this case, annulling this piece of legislation would have been at issue due to insufficient proportionality considerations. The focus in the assessment would then have been on whether the legislation is in line with Article 52 (1).

[707] C-131/12 Google. Also this landmark ruling originated from a reference for a preliminary ruling under Article 267 of TFEU.

[708] See Schneider Catherine: Menschenrechte und Übertragung der Souveränität auf die Europäische Union: Folgen für die Definition und Entwicklung der Menschenrechte. In Haller Gret, Günther Klaus, Neumann Ulfrid (Hg.): Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormunde der Demokratie? Campus Verlag GmbH. Frankfurt am Main 2011, pp. 205-206

What conclusions can we draw from the EP position presented above? It is obvious that the EP is keen on taking a significantly higher profile in the AFSJ and protection of fundamental rights. It is encouraging to note that at least in these statements, the EP pays a lot of attention to the preparatory phase of legislation that would have the merit of improving quality of legislative texts. It remains to be seen if the views presented in the resolution are more likely showing the new competence of the EP in the AFSJ or if these notions of taking fundamental rights more seriously, also in the preparatory phase of legislation, will lead to concrete actions from the part of the EP. In any case, we have a reason to believe that a new form of *ex ante* review of fundamental rights in the EP has emerged in addition to traditional methods of bringing fundamental rights into EU discussion, like the written questions of MEPs.[709] One could even say that the *ex ante* review of the EP is already in a consolidation phase. This is also a proof of the strength of European constitutionalism with one expression thereof being the pluralist *ex ante* review: After all, the EP was able to influence the Commission with fundamental right arguments in an effective manner, which was responsible for the preparation of this legislative file. Consequently, the Commission had to engage in a wide-ranging impact assessment focusing on the relation of the proposed legislative act to fundamental rights set out in the Charter. Substance-wise, the problem from the beginning was the inadequate handling of the Charter rights in the preparation of legislative proposal.

As for the case of PNR, in the initial security scanner proposal the issue of limiting fundamental rights went too far. If we look at the substance, we can identify again the emerging concern on proportionality and we have a good reason to say that this test was failed in the initial proposal. The principal claim in this file can be found in non-discrimination, right to privacy and the right to data protection. In this case, *ex ante* review was also carried successfully in the law-making process, despite the failure of the Commission to take fundamental rights seriously in its initial proposal. Once more, the discussion was focused on the limitation dimension of the legislative proposal where the Commission tried to stretch the boundaries of limitation. It has been argued that counter-terrorism is a policy area labelled by externalization and Europeanisation and hence illustrative for the expanding powers of the executive branch.[710] Only seldom were calls for positive obligations heard in this case.

[709] The question for written answer is a procedure in accordance with rule 117 of the Rules of Procedure of the European Parliament whereby any Member may put questions for written answer to the President of the European Council, the Council, the Commission or the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy. MEPs very often have used this method to take up issues related to fundamental and human rights.

[710] See Curtin Deirdre: Executive Power of the European Union: Law, Practices and Living Constitution. Oxford University Press. Oxford 2009, p. 195.

VII The Anti-Counterfeiting Trade Agreement (ACTA)

Another interesting legislative file can be found in the field of intellectual property rights. The Anti-Counterfeiting Trade Agreement (ACTA) is an international trade agreement which aims at tackling intellectual property rights violations and ensuring that a high level of protection of these rights can be enforced globally. By enhanced international co-operation and IPR enforcement, the objective of the ACTA is to combat counterfeiting and piracy. On 14 April 2008, the Council authorized the Commission to negotiate this agreement on behalf of the EU and its Member States. The competence of the EU is indeed strong on topics touching upon common trade policy. The negotiations on the ACTA agreement were then followed, then concluded and the agreement was initialled on 25 November 2010.[711] In the course of negotiations on ACTA, the EDPS submitted an opinion on the negotiations on ACTA on 22 February 2010 on its own initiative.[712] The EDPS first considered that enforcement of IPR raised significant issues as to the impact of the measures taken to combat counterfeiting and piracy on individuals' fundamental rights, and in particular their right to privacy and data protection.[713] This being the case, the EDPS also found it regrettable that the Commission did not consult the EDPS in this file.[714]

The Council adopted ACTA in December 2011 and it was signed by the Commission and altogether 22 Member States on 26 January 2012.[715] In order to enter into force as a part of the EU legal framework, the ratification of Member States is required as well as the consent of the EP.[716] Once the negotiations drew to a close, the ACTA agreement very soon found itself in difficulties in many EU Member States and large-scale movements and demonstrations against the ACTA took place. Serious concerns on the compatibility of ACTA with EU fundamental rights were raised across the board. This was also noted by the EU institutions. Another sign of sensitivity of this dossier was the hesitance of the Member States to ratify the agreement. In the academic circles, too, the agreement was faced with a lot of criticism, mainly due to serious fundamental right concerns. [717]

[711] See Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, 12195/11, Brussels 23 August 2011, recitals 1 and 2.

[712] Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA): OJ C147/1, 5.6.2010.

[713] Ibid., paragraph 3.

[714] Ibid., paragraph 4.

[715] Ibid., paragraph 3.

[716] Pursuant to Article 40 of the ACTA agreement the ACTA would enter internationally into force when ratified by six signatory states.

[717] See e.g. opinion of European Academics on ACTA. Available at http://www.iri.uni-hannover.de/tl_files.pdf/ACTA_opinion_20111_2.pdf. Visited on 25.10.2012.

1. EP takes a high profile in safeguarding fundamental rights

The role of the EP regarding the draft Council decision is very simple under the TFEU. The EP consent for the adoption is needed and therefore the EP can either approve or reject the text. It is clear that the EP cannot directly change the content of the Council Decision, but the necessity to have the EP consent provides the EP with some heavy arsenal in dealing with the Council Decision.[718] In October 2012 the Chairman of the JURI committee requested the opinion of the EP Legal Service on question related to ACTA, including whether ACTA's application can be considered compatible with the Treaties, the general principles of Union law and the Union *acquis*.[719] The general principles of the Union law include fundamental rights and therefore the Legal Service also assessed the compliance of the ACTA with fundamental rights. As remarked by the Legal Service, the framework of the EUCFR and the ECHR must be taken into account in the analysis. The Legal Service found that ACTA belongs to the sensitive area of potentially conflicting fundamental rights, basically the IPRs on the one hand and the protection of personal data and the right to fair and due process on the other hand.[720]

It is striking that the Legal Service considers that ACTA *per se* imposes no obligation on the EU that is incompatible with fundamental rights. The Legal Service rather suggests that ACTA allows the Contracting Parties to implement the agreement in a manner which balances the positions of the different right holders involved.[721] In its conclusions, however, the Legal Service reminds that in the implementation and application of the ACTA, there is a need to strike a fair balance between the different and potentially conflicting fundamental rights. This is clearly up to the EU institutions and the Member States.[722] Reading the opinion between the lines, one could consider that the Legal Service aims to say that this is more like a political decision. At least the tone is very cautious and no infringements of fundamental rights have been identified by the Legal Service. Interestingly, later the EP Committees, most notably the LIBE, took a much stricter view on the ACTA than the Legal Service of the institution. The opinions of the technocratic and political bodies therefore differ considerably. In the face of the fundamental rights concerns, the Commission referred the ACTA to the CJEU. The question which was agreed upon unanimously within the Commission was: "Is the Anti-Counterfeiting Agreement (ACTA) compatible with the European Treaties, in

[718] As I see it, it would be possible for the EP to press indirectly for changes in the Council Decision. If the problematic provisions were identified the EP could in an informal way try to impact the Commission and the Council to introduce changes in the legislative process in a way that would make the text acceptable in the end also for the EP. The problem with this file is, however, not the Council decision itself that can be characterized as technical, but rather the underlying ACTA agreement.

[719] See Legal opinion of the EP Legal Service on Anti-Counterfeiting Agreement (ACTA) – Conformity with European Union law, paragraphs 1 and 2. Available at http://lists.act-on-acta.eu/pipermail/hub/attachments/20111219/59f3ebe6/attachment-0010.pdf. Visited on 24.10.2012.

[720] Ibid., paragraph 28.

[721] Ibid., paragraph 30.

[722] See ibid., paragraph 40 e).

particular with the Charter of Fundamental Rights of the European Union?"[723] By doing so, the Commission rightly wanted to avoid situation where this legal text would run counter to the provisions of the EUCFR. Consequently, also the EP proceedings were postponed for the time being until the CJEU would give its view on whether the ACTA is in line with European fundamental rights.

2. EDPS calls for taking the right to data protection and the right to privacy seriously

Again, the EDPS intervened with a legal opinion, this time on the draft Council Decision.[724] This second opinion comes mainly from the perspective of data protection and reflects the views presented in the first opinion. The EDPS throughout the opinion underscores that the enforcement of IPR should not happen at the expense of fundamental rights. In this case, these rights include right to privacy, data protection and freedom of expression, as well as presumption of innocence and effective judicial protection.[725] The EDPS continued by stating that monitoring of users' behavior in the internet may interfere with the above-mentioned rights and freedoms.[726] The EDPS stressed that necessity and proportionality requirements of the proposed measures would be in breach with Article 8 of the ECHR, Articles 7 and 8 of the EUCFR and the most relevant piece of secondary EU legislation in this field, the Data Protection Directive.[727]

Attention was finally drawn to Article 27 of the agreement by EDPS legal analysis, from the angle of EU legislation.[728] The most important legal point was however made in the very final chapter of the analysis. Here, the EDPS considered that "the Agreement does not contain sufficient limitations and safeguards in respect of the implementation of measures that entail the monitoring of electronic communications networks on a large-scale. In particular, it does not lay out safeguards such as the respect of the rights to privacy and data protection, effective judicial protection, due process, and the respect of the principle of the presumption of innocence".[729] The EDPS presented an extremely critical attitude towards the ACTA. As we will see, a large part of this criticism was taken at the political level by the EP. We must now turn to the EP consideration of ACTA drawing inspiration from the legal opinions of its Legal Service.

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[723] See Press release of the European Commission Directorate-General for Trade: Update on ACTA's referral to the European Court of Justice. 4 April 2012.

[724] See Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America., 24.4.2012.

[725] Ibid., p. 15.

[726] Ibid., pp. 15-16.

[727] Ibid., p. 16.

[728] Ibid. Concerns were raised particularly on the vague scope of enforcement measures, lack of definitions and the implementation of the so-called voluntary enforcement cooperation measures.

[729] Ibid.

3. EP rejects the ACTA - test of permissible limitations in action

The EP finally rejected ACTA before the CJEU was able to provide a ruling on the compatibility of the ACTA with the EU law. This took place in the EP plenary on 4 July 2012 with an overwhelming majority of MEPs voting against the controversial ACTA.[730] In fact, this was the first that the EP used its power to say no to an international trade agreement in the legislative framework of the Lisbon Treaty.

To be able to explain this voting behavior, we must turn to the recommendation of the responsible Committee on International Trade that compiles of opinions of other relevant EP committees.[731] It is interesting that in their separate opinions, the Committee on Development, Committee on Industry, Research and Energy and Committee on Legal Affairs, the Committee on Civil Liberties, Justice and Home Affairs proposed that Parliament decline to give its consent. This means that all the involved Parliamentary Committees shared the same view. Of the contribution of all the Committees, the most significant was the opinion of the LIBE committee. The LIBE opinion was extremely detailed and precise in analysing fundamental rights aspects of ACTA and it well illustrates the importance that LIBE puts on *ex ante* review of fundamental rights. A wide variety of legal sources has been used for the LIBE opinion and it is actually far from being merely a political pursuit masqueraded as a legal opinion. Quite the contrary, the LIBE opinion analyses in an accurate and thorough manner especially the ACTA in relation to compliance with the EUCFR.

It is worth noting that one of the major tasks of the LIBE Committee after the entry into force of the Lisbon Treaty is to also assess the compatibility of EU legal instruments with the EUCFR. This was exactly the case with the ACTA. The LIBE itself considered that although the role of the CJEU enshrined in the Treaties should be respected, the LIBE assessment "must take into consideration Parliament's role in the protection and promotion of fundamental rights in their letter as well as in their spirit, in the external and internal dimensions, from the perspective of the individual as well as from that of a community."[732] This reflects a commitment from the side of the EP and LIBE, particularly in the *ex ante* review of fundamental rights. The quality of the legal assessment of the LIBE with various sources and useful references to the case law of the European courts is also better than usually is the case with the EP anodyne legal analyses. In the opinion of the LIBE Committee attached

[730] European Parliament rejects ACTA. Press release of the European Parliament. The outcome of the vote does not leave any room for speculation because altogether 478 MEPs voted against, 165 abstained and only 39 voted in favour of the ACTA.

[731] Recommendation on the Draft Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America. Committee on International Trade, Rapporteur David Martin. A7-0204/2012, PE486.174v03-00, 22.6.2012.

[732] Draft recommendation, LIBE opinion paragraph 15, p. 18.

to the EP draft recommendation, the following points in particular were elaborated. After having acknowledged the importance of intellectual property rights in many respects, the LIBE turns to position itself on some key aspects of the ACTA. The LIBE criticises quite heavily the opaque nature of ACTA negotiations concluding that the EP has not been informed in the course of the negotiations and claiming that the process has lacked transparency.[733] After these procedural remarks, the more interesting part of the LIBE opinion starts.

LIBE finds that it is extremely important to strike a balance between IPRs and fundamental rights. In particular, freedom of expression, the right to privacy and protection of personal data are mentioned together with the confidentiality of communications and the right to due process. The LIBE reminds that this fair balance can be found in international law, European law and the case law of the CJEU.[734] Later in the opinion, the LIBE goes even further by stating very rightly that the new Lisbon Treaty framework has fundamentally changed the landscape of the EU that now has a multi-level system of fundamental rights protection that emanates from multiple sources and is enforced through a variety of mechanisms. The EUCFR, the ECHR and constitutional traditions are mentioned, as well as the interpretation practice of the ECtHR and the CJEU. Furthermore, the exemplary role of the EU in fundamental rights has been taken up, also in relation to external policies.[735]

The crucial issue for the EP seems to be the relation between the fundamental right of IPR under Article 17 (2) of the EUCFR and other fundamental rights.[736] The other group of fundamental rights consists primarily of privacy, data protection and the freedom of expression. So, we are approaching a classical weighing and balancing situation. This is the case even though we are currently in the legislative phase. For the LIBE, too, the limitation of fundamental rights pursuant to Article 52 of the EUCFR plays a significant role. It stresses, according to the limitation requirements set out in the EUCFR, that the permissible restrictions must be provided for by law, necessary and proportionate to the legitimate aims pursued.[737]

In the context of the ACTA, the LIBE also reminds – basing its arguments on case *Kadi* – of the CJEU according to which general principles of EU law, such as fundamental rights, cannot be prejudiced by international obligations stemming from international agreements.[738] All the EU acts simply have to respect fundamental rights. If the LIBE pointed its finger on the Commission for the lack of transparency in the ACTA negotiations, the same is true with the impact assessments of the Commission. The LIBE finds it deeply regrettable that no fundamental rights specific impact assessment was carried out and considers that this runs counter to the views expressed in the Commission's strategy for the effective implementation of the Charter.[739] As

[733] Ibid., LIBE opinion paragraph 3, p. 16.
[734] Ibid., paragraph 4, p. 16.
[735] Ibid., paragraph 8, p. 17.
[736] See ibid., paragraph 6, p. 16.
[737] See ibid., paragraph 11, p. 17.
[738] See ibid., paragraph 12, p. 18.
[739] Ibid., paragraph 13, p. 18.

for the hard substance of the ACTA, the LIBE found that especially the provisions of the agreement on privacy and disclosure of information and general obligations with respect to enforcement were relevant from the fundamental rights point of view. Furthermore, provisions that aimed at preserving freedom of expression, fair process and privacy were considered as problematic. [740] Generally, the impact of the ACTA on legal certainty and the appropriate balance between fundamental rights were deemed doubtful by the LIBE. Furthermore, the LIBE expresses its concern about the implementation of the provisions of the ACTA. The committee brings up serious misgivings about the transposition as the rather vague provisions may lead to implementation that is illegal or contrary to fundamental rights.[741] Moreover, regarding the vague provisions and allowed flexibility, the LIBE is concerned about legal uncertainty caused by the ACTA.[742] This legal uncertainty is omnipresent, particularly in Article 11 (information related to infringements), Article 23 (criminal offences) and Article 27 (scope of the enforcement measures in the digital environment and particularly paragraph 3 thereof). These provisions were deemed especially problematic from the point of view of protection of personal data, the right to due process and the right to conduct business.[743] The lack of precision of the ACTA provisions is one of the underlying reasons for these concerns.[744]

By referring to Article 49 of the EUCFR, the LIBE also raises the discussion of the maxim *nullum crimen, nulla poena sine lege*. This is because section 4 (criminal enforcement) of the ACTA is ambiguous.[745] This is yet another example of the very fundamental issues inherent in the ACTA text, a serious source of problems that were taken up by the committee. The LIBE concludes its deliberations by stating that the proposed text "does not strike a fair balance between the IPRs and other fundamental rights and freedoms".[746] This goes especially to the right to protection of personal data, the freedom to receive or impart information and the freedom to conduct a business.[747] Moreover the LIBE clearly finds that "ACTA does not provide guarantees on preserving the right to respect for private life, the right of defence (particularly the right to be heard) or the presumption of innocence."[748] The same applies to the right of respect for private life and communications.[749] The LIBE comes to an end by stating that according to the jurisprudence of the ECtHR, any limitation on fundamental rights must be foreseeable in its effects, clear, precise and accessible, as well as necessary in a democratic society and proportionate to the aims pursued.[750] Finally, the LIBE draws its conclusion to a close by noting

[740] Ibid., paragraph 16, pp. 18-19.
[741] See ibid., paragraph 18, p. 19.
[742] Ibid., paragraph 19, p. 19.
[743] Ibid., paragraph 20, p. 19.
[744] In the context of the amorphis scope and vague phrasing the LIBE also refers to the opinion of the EDPS.
[745] Ibid., paragraph 22, p. 19.
[746] Ibid., paragraph 25, p. 20.
[747] Against this background the LIBE refers to the CJEU ruling in case C-70/10 Scarlett Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).
[748] Ibid., paragraph 26, p. 20.
[749] Ibid., paragraph 27, p. 20.
[750] Ibid., paragraph 32, p. 21.

that ACTA is incompatible with the EUCFR and recommends that the EP declines to consent to the conclusion of ACTA.[751]

The ultimate deathblow to the ACTA became unavoidable when the rapporteur of the International Trade Committee concluded in the explanatory statement that "the intended benefits of this International agreement are far outweighed by the potential threats to civil liberties. Given the vagueness of certain aspects of the text and the uncertainty over its interpretation, the EP cannot guarantee adequate protection for citizens' rights in the future under ACTA".[752] The rapporteur therefore recommended that the EP declines to give consent to the ACTA and consequently, a draft EP legislative resolution was drafted and annexed to the recommendation.[753] In the resolution, the EP declined to consent to the conclusion of the ACTA and this was the end of the story for the EU participation in this agreement.

4. Assessment of the case in relation to the ex ante review of fundamental rights

From an institutional angle, too, the ACTA is a very interesting case. This is because traditionally common commercial policy has been the Commission's playground belonging to the EU exclusive competence. In the new constitutional framework, however, the consent of the EP is required in the international agreements – this is a change introduced in the EU primary law mainly because of the need to increase democratic accountability. We can now see that the EP has also used this right and what makes this case extremely interesting is that in the case of ACTA it happened because of fundamental rights reasons. This can be seen as a challenge to the Commission's role in this field but it is even more important to see in this case the strengthened role of the EP in *ex ante* review of fundamental rights and its readiness to use the all the necessary legal tools to ensure compliance with the EUCFR. This is a proof of the increasingly high profile of the EP in *ex ante* review.

Another conclusion to be drawn from the role of the EP is the key importance of the LIBE committee. In handling of the ACTA, we can see seeds of LIBE turning into a real parliamentary *ex ante* review body of fundamental rights. We may well see even further development in this because it is the LIBE that very often deals with fundamental rights sensitive dossiers. The bold position of the LIBE in ACTA should also be seen as a commitment to effectively safeguarding the rights and freedoms enshrined in the EUCFR.

In light of the ACTA it is justifiable to talk about the EP and particularly its LIBE committee as an emerging *ex ante* review institution that undertakes to assess the compliance of legal instruments with the EUCFR. The EP is clearly ready to use its new constitutional rights, also when it comes to fundamental

[751] Ibid., paragraph 34, p. 21.
[752] Recommendation, p. 7.
[753] Ibid., p. 5.

rights in international agreements. Additionally, as we have seen in other case studies, the EP seems to be especially willing to take onboard fundamental rights considerations of other key players, such as the FRA and the EDPS. The same is true in this case with the EDPS, but in the handling of ACTA, the EP also functioned very much in an independent manner and came out with very bold and groundbreaking conclusions. Seen from an internal angle, the Committee structure of the EP actually took a much bolder position on ACTA than its Legal Service.

Can the true colours of the EP be seen in this file with regard to the *ex ante* review? Critics of the EP approach might say that the EP position on ACTA was value-laden and political. One may also hear criticism towards the timing of the EP final position on ACTA. Why did the EP not wait for the CJEU view on this highly controversial agreement? I cannot subscribe to this point of view. First, the analysis of the EP was legally very sound and arguments put forward in it were solid. Second, with its new competence, the EP should be considered to be a major interlocutor in fundamental rights issues and an important actor exercising *ex ante* review of fundamental rights against the background of the EUCFR. The EP should not be seen as usurper of politico-legal power hi-jacking legislative dossiers with the means of fundamental rights.[754] On the contrary, this should be seen positively as taking fundamental rights seriously in the preparatory phase in sector specific legal instruments.

The way forward for Bellamy seems to be the system of procedural democratic checks and controls. These procedures underscore the importance of openness in decision-making and within such a system it is justice that designates a *modus vivendi* achieved through a balance of power between interlocking institutions, rather than an overlapping consensus on core constitutional values that may be upheld by a court of putative moral experts.[755] Concerning the question of democracy, it is equally important to try to democratise EU legal and judicial discourses.[756] The experience from ACTA can be seen as a sign of democratisation of the EU and its legislative processes, which in this case has taken place through the EP.

In this case, "softer" fundamental rights prevailed over economically-oriented fundamental rights — in this sense it can be seen as a continuum to Schmidberger. Proportionality was again clearly one of the key concerns. The limitation criteria were effectively applied by the EP, which took a strict and appropriate view with regard to fundamental rights and their relation to

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754 Laurent Dutoit hits the bulls-eye when remarking about the EP that "en effet, la croissance, de manière coutumière, de ses pouvoirs est une caractèristique de son développement. D'un autre côté, on s'aperÇoit rapidement de la difficulté de sa position dans l'equilibre institutionnel". Dutoit Laurent: Parlement Européen et société civile. Vers de nouveaux aménagements institutionnels. Bruylant-Academia s.a. Louvain-la-Neuve 2009, p. 99.

755 Bellamy Richard: The Constitution of Europe: Rights or Democracy? In Bellamy Richard, Bufacchi Victorio and Castiglione Dario (Eds.) Democracy and Constitutional Culture in the Union of Europe. Lothian Foundation Press. London 1995. p. 166.

756 Maduro Miguel Poiares: Contrapunctual law: Europe's Constitutional Pluralism in Action. In Walker Neil (ed.): Sovereignty in Transition. Hart Publishing. Oxford and Portland, Oregon 2003, p. 518.

Article 52(1) of the Charter. One cannot overdo the importance of the EP applying the test of permissible limitations based mainly on the "limitation Article" of the Charter. This demonstrated sound legal argumentation in the background of political deliberations. There is no denying, either, that the political pressure to do this was high but the EP acted in conformity with fundamental rights and was able to bring proportionality sharply to the discussion.

ACTA belongs to the series of cases which would have been considered in terms of substance to be in breach with the EUCFR by the CJEU if not rejected by the EP. This case also illustrates the holistic nature and power of *ex ante* review conducted by many EU actors with an impact also on international agreements and thus on external relations. Therefore, ACTA can be regarded as a proof of the strength of pluralist *ex ante* review in European constitutionalism. It is interesting that in this case it also has implications on the outside world and not only the EU. In this case, it goes hand in hand with the increased competence of the EP in external relations.

VIII European Investigation Order

Yet another interesting file is the European investigation order (EIO) – a Member-States-driven proposal touching upon the area of criminal law.[757] The domain of criminal law is interesting in the sense that it has traditionally belonged to the very essence of sovereignty of Member States' legal systems. During the last decade, the integration of EU law and approximation of Member States' laws have progressed also in the field of criminal law. The EIO is an initiative that was put forward by seven Member States under Article 82 (1) (a) of the TFEU. This proposal for a Directive aims at creating a new framework for gathering evidence and reinforcing co-operation between Member States in this particular field. Considering the contents of the proposal, the underlying philosophy of the EIO was highlighted several times in the European Council's calls for the reinforcement of mutual recognition in the field of judicial co-operation. This issue was especially addressed in the Stockholm Programme. The main objective of the EIO was to establish a single European regime for obtaining evidence and mutual recognition was clearly a key principle in this initiative. The need for the proposal was apparently triggered by the need to create a comprehensive system for investigative measures in cases with a cross-border element.

Such a system of mutual recognition *prima facie* interferes with fundamental rights of the individual. The biggest impact of this legislative proposal is probably on data protection. Due to the absence of an impact assessment in this Member States' initiative it is hard to analyze the background fundamental right parameters of this proposal, but , the answer can be found in the proposed legal text itself. In any case, this proposal was to receive quite a lot of criticism from stakeholders involved in the legislative process.

Regarding the fundamental rights provisions of the proposed EIO directive, we can first notice that a standard provision-like recital has been introduced to the text. It contains assurance that the directive respects the fundamental rights and observes the principles of Article 6 of the Treaty and the EUCFR. In this recital, a reference has also been made indirectly to Article 21 on non-discrimination of the EUCFR.[758]

[757] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. OJ C 165/22, 24.6.2010.

[758] See ibid., recital 17. In terms of non-discrimination it is stated in this recital that "nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons".

1. Lack of impact assessment as a shortcoming in Member States' legislative proposals

Generally, the weak point of Member States' initiatives is the lack of impact assessments. These initiatives do not go through the Commission's procedures on examining and analyzing the impacts of the proposal. Another problematic issue about the Member States' initiatives is the angle of their approach at the outset. They originate from a group of Member States with similar political aspirations and often with similar ideas how to tackle the problem that has been identified. The Commission for its part strives for a European approach and does its best to analyze impacts on EU as a whole, taking into account – and giving its best shot in this regard – diverging national circumstances of all Member States. That is, at least, the starting point.

The Member States' initiatives are biased, because the preparation is carried out within national administrations of the involved Member States. Inevitably, this brings into the process the need of the Member States to avoid certain problematic issues that do not fit into their legal and political circumstances and systems. In order to encourage the group of Member States to agree on a common proposal, the lowest common denominator must be found. This is exactly the difference of Member States initiatives compared with the Commission's proposals. A legal initiative without a proper impact assessment can be considered to be a step into the darkness due to the unpredictable consequences that it may entail. This is particularly the case with Member States not co-sponsoring the legal initiative. It is possible to analyze the impacts in the course of negotiation when drafts change, but Council procedures in assessing the impacts of developing drafts are not very convincing.

2. EDPS takes a stand on EIO; concerns about insufficient data protection

Soon after the introduction of the EIO directive, the EDPS published its opinion on this legislative proposal.[759] This was the first opinion of an expert body on this legislative dossier with no impact assessment but despite this implying major fundamental right effect. The EDPS submitted its joint opinion on EIO and EPO on 5 October 2010.[760] This happened on its own initiative and throughout the opinion the EDPS regrets that it was not consulted by the initiators of the EIO and EPO in such important dossiers touching upon the very essence of the right to data protection.[761] This is the reason why in its conclusion the EDPS recommends the Council to set up a consultation

[759] Opinion of the European Data Protection Supervisor on the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels 5 October 2010.

[760] Ibid.

[761] See ibid. e.g. paragraph 6, p. 3.

procedure of the EDPS in the upcoming initiatives of Member States.[762] If we consider that Member States' initiatives have an obvious impact assessment deficit we should also see that a stronger involvement of the EDPS in files connected to the domains of the right to privacy and the right to data protection would deliver a significant added value. In the absence of proper impact assessments these bodies could bring the necessary expertise into the process.

Setting the institutional framework aside, let us now turn to the substance of the EDPS opinion. First, the EDPS notes that the EIO and the EPO are both based on the principle of mutual recognition of judgments and judicial decisions. They also spring from the Stockholm Programme and set rules for exchange of personal data between the Member States.[763] In the view of the EDPS, the EIO has a significant impact on the right to protection of personal data.[764] The EDPS highlights that the objective of the EIO is to create an efficient instrument for obtaining information located in another Member State in the context of criminal proceedings. This is why, throughout the opinion, the EDPS consistently stresses the impact on the right to the protection of personal data due to evidence collecting that often contains personal data.[765]

In addition to the lack of impact assessment, the EDPS also "wonders why the initiatives neither address the protection of personal data" nor explicitly refer to Framework Decision 2008/977/JHA.[766] A link had already been established between the EPO directive and the above-mentioned Framework Decision and the EDPS suggested inserting text in the EIO in this regard.[767] The spirit in the EDPS opinion seems to be that fundamental rights aspects are left in the shadow of enhancing the effectiveness of judicial co-operation in the EIO and EPO as well. The EDPS even very frankly states that "both initiatives once again raise the fundamental issue of incomplete and inconsistent data protection principles in the field of judicial co-operation in criminal matters".[768]

In the same vein, the EDPS makes several proposals to overcome the unsatisfactory situation of data protection inadequately taken into consideration when drafting the EIO proposal. Most of the suggestions are related to security aspects of cross-border transmission of personal data, the roles of competent authorities, the accountability principle in the processing of personal data and admissibility of evidence. For the EIO, particularly the EDPS found it necessary to address the issue of evidence gathering by means of an exception. A safeguard clause was proposed to cover the need to ensure

[762] See ibid., paragraph 60, p. 13.
[763] Ibid., paragraph 7, p. 3.
[764] Ibid., paragraph 19, p. 5
[765] Ibid., paragraphs 17-19, p. 5. As regards evidence collecting and its impact on personal data we can identify as the most important Articles of the proposal Articles 21 and 22 (video or telephone conference), Article 23 (bank account information), Article 24 (banking transactions) and Article 25 (monitoring of banking information).
[766] Ibid., paragraph 25, p. 6.
[767] Ibid., paragraph 26, p. 7. See also paragraph 35, p. 8.
[768] Ibid., see paragraphs 28-29, p. 7.

that the EIO may not be used for other purposes than the prevention, investigation, detection, or prosecution of crime or the enforcement of criminal sanctions and the exercise of defence.[769] In more general terms, the EDPS called for a comprehensive data protection legal framework. The EDPS found it very important that it would also cover AFSJ and therefore police and justice affairs.[770]

3. EP associates itself with the position of the FRA

The EIO is a legislative dossier in which the EP took a very high profile in terms of promoting fundamental rights. This case is rather different from the cases of the PNR and security scanners where the skepticism and criticism of the EP was addressed towards the Commission. In the EIO, it was more or less targeted towards the Council position due to the fact that the proposal was launched by a group of Member States. The EP formed its position on the proposed Directive and a draft report on EIO was introduced in January 2011 in the LIBE committee by rapporteur, MEP Nuno Melo.[771] The recitals of the draft report already included a great number of proposed changes that touched upon fundamental rights. This bulk of comments ranged from giving the Charter a stronger position in the text to better incorporating the *ne bis in idem* principle.

In the proposed amendment 2, the EP also suggested to state that the Lisbon Treaty introduced appropriate parliamentary scrutiny in the EU criminal law legislation. In this regard, the EP was mentioned as the co-legislator and the national parliaments were mentioned in the context of controlling subsidiarity. Furthermore, in this proposed amendment, the EUCFR was referred to as a legally binding document and many of its Articles were expressly stated in the text.[772] Taking into account these amendments, it is possible *grosso modo* to systematize the recitals to a group that concern "Lisbonization" of this field and the fundamental rights in this new constitutional setting.

The importance of the ECHR and the ECtHR in promoting fundamental rights has been underlined, especially regarding the right to fair trial. The same goes for the Treaties, the EUCFR and the accession process of the EU to the ECHR.[773] In the justification part of this amendment, the EP admits that this amendment has been inserted on the basis of the opinion of the FRA.[774]

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[769] Ibid., p. 10.

[770] Ibid., paragraph 55, p. 12.

[771] Draft Report on the Adoption of a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. 2010/0817, PE478.493v02-00, 23.1.2011.

[772] Ibid., Amendment 2, p. 6.

[773] Ibid., Amendment 3, p. 7.

[774] Ibid., p. 8. In this context the EP reminds of serious implications on various fundamental rights that the EIO could have by stressing that the Charter refers directly to the understanding of these rights as provided under the ECHR.

It is quite interesting to see that with regard to mutual recognition in this field, the EP also highlights the legal anomalies to the detriment of suspects.[775] The somewhat hesitant approach of the EP towards the issue of mutual recognition can also be identified in Amendment 8 where the EP suggested dropping references to the principle of mutual recognition.[776] In addition to these proposed changes, fundamental rights have a prominent place in Amendments 9, 10, 11, 14 and particularly in 15 that deals with the principle of *ne bis in idem*. These all related to the *considerant*-part of the text that very much highlighted fundamental rights. How did the EP then proceed with the operative part of the text – the real essence of the proposal? If fundamental right considerations of the EP are limited to the recitals, the whole legal exercise risks becoming an empty shell. We can see that this is not the case. The EP, for example, sets some useful conditions for issuing EIO in Article 5 a. This includes proportionality and necessity. The requirement of the EIO to be validated by a judge, a court, an investigating magistrate or a prosecutor was also put forward.[777]

In amendment 35 on Article 10, where grounds for non-recognition or non-execution of an EIO in the executing state have been set out, the EP suggests complementing the list with additional grounds. A significant example of these is the requirement respecting the *ne bis in idem* principle.[778] This amendment comes directly from the FRA opinion. Additional grounds have been proposed, too. These are associated with such fundamental rights as freedom expression. Lastly and most importantly, in amendment 40 the EP suggests the last ground for refusal, which is infringement of a fundamental right as laid down in the EUCFR and the ECHR. The same applies to breaches of fundamental national constitutional principles regarding criminal proceedings.[779] Overall, we can see that the EP very much drew inspiration from the opinion of the FRA. The legal analysis of the FRA was crystallized in the EP position.

4. EIO and the reserved position of the FRA

The structure of FRA promotes a great deal of interaction between both statal and non-statal actors in Member States and organizations of the EU and the CoE. This can be considered to be co-operative problem-analysis.[780] The role of external actors and networks in this is essential. It is set out in Article 4 of the Council regulation setting up the FRA that one of the tasks of the Agency is to "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of

[775] Ibid., Amendment 4, p. 8.
[776] Ibid., Amendment 8, p. 11.
[777] Ibid., Amendment 24, pp. 24-25.
[778] Ibid., Amendment 35, p. 30.
[779] Ibid., Amendment 40, p. 33.
[780] Von Bogdandy Armin und Von Bernstorff Jochen: Die Europäische Agentur für Grundrechte in der europäischen Menschenrechtsarchitektur und ihre Fortentwicklung durch den Vertrag von Lissabon. In Haller Gret, Günther Klaus, Neumann Ulfrid (Hg.): Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormunde der Demokratie? Campus Verlag GmbH. Frankfurt am Main 2011, p. 254.

the European Parliament, the Council or the Commission". Furthermore, recital 13 of the same Agency regulation lays down that the institutions should be able to request opinions on their legislative proposals or positions taken during the legislative procedures as far as the compatibility with fundamental rights is concerned. FRA formally adopted its opinion on EIO on 14 February 2011.[781] The opinion originated from a request of the EP that had asked the opinion of the FRA on the following questions:

1. Does the Charter of Fundamental Rights of the European Union include certain standards for an instrument involving mutual recognition of investigation orders?

2. Should the EIO Directive provide for review by the executing state of an issued measure, due to the current lack of comparability of existing standards in criminal procedural law between EU Member States?

FRA therefore tackled these questions and stated in the beginning of its analysis that consistency with fundamental rights needs to be ensured irrespective of who initiates the legislative proposal.[782] Given this fact, the FRA also very clearly remarks that the "draft directive is neither based on a proper impact assessment nor on an extensive gathering of evidence in the 28 Member States."[783] In initiatives like this, the lack of adequate impact assessments can be a real pitfall. This lack blurs and dilutes the evidence on which the proposal in question has been based.

In its opinion on EIO, the FRA considered that the EIO potentially interfered with several fundamental rights. It nevertheless concentrated mainly on the right to fair trial that was also highlighted in the request of opinion by the EP.[784] In order to pave the way for deeper analysis on this substantial fundamental right, the FRA highlights the interpretation practice of the ECtHR, namely the case of Miailhe v. France.[785] In this ground-breaking verdict, the court held that it must satisfy itself that the proceedings as a whole are fair.[786] Furthermore, according to the court's case law no investigative measure is acceptable if it would prejudge the right to a fair trial.[787] Most importantly, the FRA gave particular attention to the *ne bis in idem* principle, which is extremely pertinent in the context of the EIO. This is the case mainly because of the eventuality of the suspects to be tried for the same crimes in different jurisdictions.[788] Another key aspect of the FRA opinion related to defence rights. FRA especially found it important to take up the principle of

[781] See Opinion of the European Union Agency for Fundamental Rights on the Draft Directive regarding the European Investigation Order. Vienna, 14 February 2011.
[782] Ibid., pp. 2-3.
[783] Ibid., p. 14.
[784] Ibid., p. 3.
[785] Miailhe v. France, No. 18978/91, 26 September 1996.
[786] See ibid., paragraph 43.
[787] FRA opinion, p. 4.
[788] Ibid., p. 4. It should be noted that double jeopardy rule is set out in Article 50 of the EUCFR. Moreover, the Charter connects the principles of legality and proportionality into guaranteeing fairness in criminal proceedings in Article 49.

the presumption of innocence.[789] In addition to this crucial principle, FRA also observed other issues related to defence rights, such as the right to be notified of criminal charges, access to legal aid and lawyer and most notably the effective access to courts.[790] All of these aspects were inextricably linked with the proposed EIO directive.

The second spearhead of the FRA arguments dealt with issues wrapped up in the right to privacy and data protection. The request of the EP was also centred in this topic. In connection with the right to the protection of personal data, FRA fully supports the EDPS recommendations that were laid down in the EDPS opinion. Above all, the lack of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in the text of the EIO has been identified as a major handicap leading potentially to legal uncertainty.[791] FRA found that, for example, the ECtHR has very often considered Article 8 of the ECHR and its potential interferences in light of the in accordance with law principle.[792] This can be seen, for example, in case Malone v. the United Kingdom that dealt with a judicial order to telephone tapping in a situation where legislation is not clear enough.[793] This need to clearly indicate the scope of public authorities has been confirmed in consecutive ECtHR rulings. Another legal point to be taken into account had to do with the retention of personal data and particularly the need to ensure that it is in line with data protection legislation, notably in the case of the European data protection system under the Data Protection Directive.[794]

One of the most important questions in the EIO was the issue of execution of EIO and possible fundamental rights-based refusal grounds. The key question was if the executing state should be able to refuse to execute an EIO on the basis of a breach of fundamental rights.[795] FRA found that "a fundamental rights-based refusal ground could acts as an adequate tool to prevent fundamental rights violations occurring during cross-border investigations".[796] On the other hand the FRA expressed misgivings about the possibility of the executing state to be totally familiar with criminal law rules and procedures of the issuing state. This might – according to FRA – lead to time-consuming and complex procedures that might undermine the used fundamental right standards.[797] The FRA therefore had some concerns in relation to different approaches of the Member States in the implementation phase of the directive and this would not be a good thing for the system of mutual recognition nor the protection of fundamental rights.

The FRA also pinpointed that the proposed Article 10 of the draft EIO did not include a fundamental rights-based refusal ground. The FRA was of the opinion that as Member States are generally obliged to respect fundamental

[789] Ibid., p. 5.
[790] Ibid., pp. 5-6.
[791] Ibid., p. 8.
[792] Ibid., p 9.
[793] See ECtHR, Malone v. the United Kingdom, No 8691/79, 2 August 1984, paragraph 67.
[794] FRA opinion, p. 9.
[795] Ibid., p. 10.
[796] Ibid., p. 11.
[797] Ibid.

rights, it is arguable that the possible contradiction of fundamental rights could be removed by including a reference to Article 1 (3) of the draft EIO that confirmed that the directive does not have the effect of modifying the obligation to respect fundamental rights as set out in the Treaty.[798] The FRA was also somewhat sceptical towards the approach of the Council Presidency and the Commission to insert the double jeopardy rule into the text.[799] The FRA, however, also saw merits in this approach, mainly because of its relative objectivity. The FRA proposed four types of safeguards in order to ameliorate the situation. Firstly, the FRA advised to include a provision in the text that would expressly require the executing state to adopt the least intrusive investigatory measures regarding interference with fundamental rights when executing the issuing state's request.[800] Secondly, due to data protection concerns, the FRA deemed it necessary to define the concept of "investigatory measures" in order to enable these measures to be carried out in accordance with law.[801] Thirdly, the FRA called for adequate safeguards to address the right to fair trial and eventually the Agency found it necessary to include clear provisions on legal remedies and time limits. Similarly, *ex post* evaluation and assessment of the system's operability was considered to be an important element.[802]

To conclude, the FRA answered the questions put forward by the EP. The first question in connection with the EUCFR and fundamental rights standards in relation to mutual recognition of investigation orders was responded to in the following way. FRA opinion was focused on the existing EU standards, concentrating mainly on fair trial, based on the case law of the CJEU and the ECtHR.[803] The second question was about review of the executing state of an issued measure due to the current lack of comparability of existing standards in criminal procedural law between Member States. FRA paid attention to a potential provision on fundamental rights-based refusal ground. The FRA found that this kind of provision would have to be clearly defined. FRA emphasized the importance of various safeguards to be introduced in the text.[804] What is important in the FRA conclusion are the critical remarks on the lack of impact assessment of this proposal put forward by a group of Member States.[805] It is evident that assessment of impacts cannot be as complete as evaluation carried out by the Commission on a great variety of Member States' systems across the EU. The evidence used for the assessment, and its comparability on the Member States' legal systems, is questionable. Hence, probably the biggest pitfall of Member States initiatives can be found in the field of assessing impacts.

[798] Ibid.
[799] Ibid., p. 12.
[800] Ibid.
[801] Ibid.
[802] Ibid., pp. 12-13.
[803] Ibid., p. 14.
[804] Ibid.
[805] See Ibid.

5. EIO in the Council

The Council discussed the issue of proportionality in its meeting of December 2010.[806] The grounds for non-recognition and non-execution were also discussed. Handling was already launched in the Working Party on Cooperation in criminal matters (COPEN). In April 2011, the Hungarian Presidency issued a state of play report on EIO. Grounds for non-recognition or non-execution were one key outstanding issue in the negotiations and the Presidency concluded that they should be as specific and as limited as possible.[807] In a ministerial meeting of June 2011, safeguards regarding these issues were deemed important in order to protect defence rights of concerned persons.[808] This was reflected in the partial general approach of the Council.[809]

The institutions were able to make some progress in the trialogue negotiations in 2013. Only fragments of information on the detailed negotiations are publicly available.[810] It is nevertheless important to point out that a sufficient level of political will existed in order to take proportionality duly into account in the compromise. The same applies for *ne bis in idem*.

The EIO Directive was published in the Official Journal of the European Union on 1 May 2014.[811] In the final version adopted by the institutions, Article 6 setting out conditions for issuing and transmitting EIO was significantly strengthened compared with the initial proposal of a group of Member States. In paragraph 1 (a) proportionality was stipulated as a clear condition. Moreover, Article 11 on grounds for non-recognition and non-execution now includes the principle of *ne bis in idem*. The recitals of the final text carried improvements in terms of fundamental rights and proportionality.

Proportionality was also raised to the discussion by some Member States' parliaments. In November 2010, the President of the Austrian Federal Council submitted its EU Committee's opinion on subsidiarity of the EIO. The failure to establish any minimum requirements that the issuing authority can refer to when deciding on an investigation order was criticized. According to the Committee, it did not contain legality nor a proportionality test.[812] The Senate of Italy also took a critical view with regard to proportionality in the text.[813] The UK Parliament, for its part, took a rather skeptical approach towards the EIO in terms of fundamental rights.[814]

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[806] Press release, 3051st Council meeting Justice and Home Affairs, Brussels 2-3 December 2010, 16918/10, Presse 322, PR CO 41.

[807] Council document 8369/1/11. 7 April 2011.

[808] Press release 3096th Council meeting Justice and Home Affairs, Luxembourg 9 and 10 June 2011, 11008/11, Presse 161, PR CO 37.

[809] Council document, 11735/11. 17 June 2011.

[810] See for example Council document 9747/1/13 REV 1, 29 May 2013.

[811] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. OJ L 130/1, 1.5.2014.

[812] Council Document 16340/10, 15.11.2010.

[813] Council Document 8055/11, 22.3.2011.

[814] Human Rights Joint Committee: Fifteenth Report. The Human Rights Implications of UK extradition Policy. Available at http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15602.htm. Visited on 1 August 2014. The Committee held that "the lessons from the EAW must be learned when negotiating the

6. Assessment of the case in relation to the ex ante review of fundamental rights

Many countries and international legal systems have increasingly transformed towards judicial review with a significant role given to juristocracy as a result of constitutionalisation.[815] In the empowerment of *ex ante* review of fundamental rights at the EU level, we can see signs of the partial come-back of the legislature to the core of constitutional control, however.

Dworkin makes a distinction between principles of integrity. The first part of this set is the principle of integrity in legislation. This means that the law-makers must keep the law coherent in principle. The other principle is the principle of integrity in adjudication, according to which those in charge of adjudication must enforce the law in a coherent manner.[816] Incoherence with regard to proportionality, in accordance with law and noting the *ne bis in idem*, were key problems in this piece of legislation that the legislator had to cope with. In the course of the proceedings, the institutions managed remove significant fundamental right problems, such as that of *ne bis in idem*, which had a significant impact in this case as had in accordance with law criterion. It is therefore noteworthy to state that this part of the limitation test as applied by the legislator proved useful.

Proportionality can be considered to be a doctrinal tool to establish whether an interference with a *prima facie* right is justified. Furthermore, this justification succeeds if the interference is proportionate.[817] On the basis of examining the various texts regarding EIO, it is relatively easy to conclude that biggest problem was proportionality. It is therefore easy to associate oneself with views expressed, for example by the UK Parliament on inadequate proportionality. A partial explanation to the shortcomings in proportionality assessment probably has to do with the lack of the impact assessment.

When addressing the principle of proportionality, one should not deal with it in isolation of other legal principles, such as legal certainty, non-discrimination and subsidiarity. As I tend to approach the selected legal files from the point of view of both positive and negative obligations, it is good to

form of the EIO. The Government must ensure that there is an effective proportionality safeguard in the Directive, in order to ensure that the EIO operates effectively and that there are not numerous requests for information in minor cases".

[815] Hirschl, pp. 214-215. See also Beatty David M.: The Ultimate Rule of Law. Oxford University Press. Oxford 2004, pp. 2-3.

[816] See Dworkin Ronald: Law's Empire. Hart Publishing. Oxford 1998, p. 167. As for the principle of integrity in adjudication Dworkin claims that "the second principle explains how and why the past must be allowed some special power of its own in court, contrary to the pragmatist's claim that it must not".

[817] See Möller Kai: Proportionality and Rights Inflation. LSE Law, Society and Economy Working Papers 17/2013. London School of Economics and Political Science. Law Department. 2013. p. 2. In the same context Möller discusses the issue of right inflation, i.e. the phenomenon that increasingly relatively trivial interests are protected as rights and finds that proportionality is not only compatible with rights inflation, but it rather necessitates it. p. 6.

admit that in this case the negative obligations prevailed. With such visible proportionality concerns, we can hardly avoid the entanglement of negative obligation, the limitations to fundamental rights to the proportionality considerations. Nevertheless, we should not see positive and negative obligations as mutually excluding elements. We can see both these obligations even in same provisions in the same legal texts. There were also attempts to bring positive obligations into the text in this file, especially by the EP. Why did the EIO end up to some extent in difficulties with regard to the above-mentioned aspects? The absence of an impact assessment must be considered the main source of the problem. The same applies for the rather adaptive position of the Council, as well as the less significant role of the Commission in legislative files with their roots in initiatives of a group of Member States. Having no proper impact assessment whatsoever in such a fundamental right sensitive file can only lead to problems at a later stage of the process.

In terms of substance, the EP had a key role in pushing for stronger safeguards for *ne bis in idem*. In the end, the EP was able secure in the negotiation process this important fundamental right objective. Similarly, proportionality was underscored throughout this legislative process by the EP. It is worth noting that collaboration of the EP with FRA was intense regarding key fundamental right issues in the EIO. As a consequence, many positions of the FRA were introduced in the final text through EP positions. Therefore, the EIO sheds an interesting light on the practical co-operation of technical expert bodies with political EU institutions.

The role of the FRA is also fascinating in ensuring compliance with fundamental rights, especially in the Member States' legislative initiatives that are unaccompanied by impact assessments. It is particularly important to have the FRA tightly involved in the analyses of fundamental rights aspects in such cases. Probably the FRA can be especially useful in compensating for the lack of impact assessments in this fundamental rights sensitive field, also bringing the necessary institutional neutrality into the process.

IX European Protection Order

Let us now turn to European Protection Order (EPO) – a proposal for a directive initiated by a group of Member States under Article 82 (1) (d) of the TFEU.[818] This initiative concentrated on the important issue of victim protection and its application at the European level. The initiative was also a step towards the objective set out in the Stockholm programme on protection of victims of crime. Especially the scope of the proposed legislative instrument raised much discussion.

The initiative by a group of Member States was duly sent for the discussion of the EP, and the LIBE committee produced a report on the file.[819] We should consider that when limiting fundamental rights, one important criterion is the need to not touch the hard core of the fundamental right that is being limited. When providing for limitations, the very essence of the fundamental rights should always be preserved. Particularly when considering the various anti-terrorism measures that have been taken into use during the last decade, we can see that fundamental rights have very often been sacrificed in the name of anti-terrorism. A situation in which the purpose justifies the means should be avoided and the core of a fundamental rights, even in exceptional circumstances, should not be interfered with.

The EPO deals with the effective protection of the victims of crime at the EU level. The key point in the proposed legal instrument was the extension of protection measures adopted in an issuing Member State to the Member State where the protected person moves. Thus the executing State recognises protection measures of the issuing State in its jurisdiction and there is no need to start the protection order procedure from scratch in the executing state.[820]

The EPO was hence an important AFSJ initiative that aims to facilitate the recognition of protection orders at the wider EU scale. With the increasing movement of persons within the EU, the issue of preventing crimes has become more topical. The Stockholm Programme paid much attention to combatting violence, addressing the situation of victims and facilitating access

[818] Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, PE-CONS 2/10, 22 January 2010.

[819] See Draft Report on the Initiative for a Directive of the European Parliament and of the Council on the European Protection Order. 2010/0802 (COD), 20.5.2010.

[820] It should be noted that the recognised protection measures are listed in Article 2 (2) of the proposed Directive i.e. in the scope of the European Protection Order. See Initiative of the Kingdom of Belgium, the Republic Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and the Council on the European Protection Order, OJ 2010/C 69, 18.3.2010.

to justice. All of these goals were confirmed at the European Council level, thus, in this sense, the initiative of EPO was more than welcome. The positions of institutions and the EDPS in this phase are of particular interest for this study. For practical reasons, the Commission's role has remained somewhat unspecified. Interestingly, we can note that the EP was again in the driver's seat in the *ex ante* review of fundamental rights of this dossier.

1. EDPS found no major problems in the EPO proposal

The EDPS also took a stand on the EPO together with its opinion on EIO. Therefore, the arguments raised in the context of the EIO are mostly valid, also with regard to the EPO. I will concentrate on specific aspects of the EPO presented by the EDPS. Seemingly, many of the conclusions are basically the same, but there are also points and recommendations that are different. As said when discussing the EIO, the main problem identified by the EDPS is the lack of impact assessment. The same also applies for the EPO. The EDPS did not find the EPO initiative as problematic as that of the EIO, but it found the largest shortcomings in the EPO in the field of data protection. It did, however, welcome changes made to the text, particularly in the Council proceedings that introduced a reference to the Framework Decision 2008/977/JHA that was at the time of issuing the opinion lacking in the EIO text.[821]

The specific recommendations on the EPO initiative included, most importantly, the need to state in clear terms that the person causing the danger should only be given the personal data of the victim strictly relevant for the full execution of the protection measure.[822] This finding is important, because the contact data of the victim must be kept out of reach of the person causing danger. On the other hand, the EDPS also found this issue problematic because the person considered to be endangering the victim should know where he or she may go in order to ensure compliance with the Directive.[823] The EDPS did not, however, present any concrete proposal on how to tackle this problem in practice. The rest of the EPO specific recommendations dealt with recitals and are not particularly relevant for this case. Again, as for the case of the EIO, the final recommendations were addressed with regard to the need to establish a consultation procedure of the EDPS and to establish a comprehensive data protection legal framework in the field of the AFSJ.[824]

[821] See Opinion of the European Data Protection Supervisor on the Initiative of the Kingdom of Belgium, the Republic Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and the Council on the European Protection Order, Brussels 5 October 2010, p. 6.

[822] Ibid., paragraph 58, p. 13.

[823] Ibid., paragraph 48, p. 10.

[824] Ibid., paragraph 60, p. 13.

2. EP proceedings on EPO with a focus on double jeopardy rule

LIBE was the responsible parliamentary Committee in the EP working on this file, but the Committee on Women's Rights and Gender Equality was also closely involved in the work. The Committees submitted the report on EPO for the consideration of the Plenary on 7 December 2010.[825] The EP commenced with its amendments by proposing a very significant change to the text. The EP found that the legal basis of the proposal was insufficient. Internally in the EP, the Committee of Legal Affairs analysed the issue of legal basis and came to the conclusion that the proposed legal basis Article 82 (1) (d) "can be relied upon as legal basis for the draft Directive, but that in order to give the initiative its due weight as an instrument of recognition of judicial decisions, it would be appropriate to refer also to Article 82 (1) (a) TFEU".[826] From this we can see that the position of the responsible LIBE committee was stronger than that of the Committee of Legal Affairs that mainly considered the issue of legal basis from the point of view of recognition of judicial decisions. In any case, the EP ultimately suggested the extension of legal basis in its amendment.[827] Finally, the legal basis of the Directive was amended in the trialogue phase according to the suggestion of the EP.

As has become evident with other legislative dossiers discussed in this study, the EP has been keen to impart a prominent role to the EUCFR, especially in the recitals of draft legal instruments. The same is also true with the EPO.[828] Already in the preamble part, the Council Framework Decision 2008/947/JHA was also underscored in two different contexts.[829] This is obviously one of the points that the EP assimilated from the EDPS main conclusions on EPO. In this way, this expert opinion received the necessary political back-up in order to be realized in the final legal text. If we move to the operative part of the text and the EP amendments, we can see that the EP proposed a new Article 1 that is about the objective of the Directive. This new Article describes the objective of the Directive in a very clear manner, which improves the legal certainty of this directive.[830] The part in the legislation that is always crucial from the point of view of fundamental rights is the Article on definitions. It defines the terms used in the legal instrument and hence has an impact on the scope of application. Also in this case, namely in Article 1 of the EP report text, the EP amendments went largely to the final text adopted by the institutions. Additionally, the EP suggests replacing the role of the Secretariat General with the role given to the Commission in the provision concerning the designation of competent authorities.[831] The initial proposal of the group of Member States clearly aimed at keeping the Commission out of

[825] Report on the draft Directive of the European Parliament and of the Council on the European Protection Order. Committee on Civil Liberties, Justice and Home Affairs and Committee on Women's Rights and Gender Equality. A7-0354/2010, PE441.299v03-00.
[826] See EP report 2010, Opinion of the Committee on Legal Affairs on the Legal Basis, p. 44.
[827] Ibid., p. 6.
[828] Ibid., see proposed recital 6j), p. 8 and 11e), p. 11.
[829] Ibid., see proposed recitals 11a) and 11d), p. 11.
[830] See Ibid., Article 1, p. 12.
[831] See ibid., Article 4, p. 13.

the process by anchoring the designation process to the Council Secretariat i.e. in the control of the Member States. The EP wished to give this role to the Commission, in this sense guaranteeing the Union approach, which is a very natural choice of the EP in many legal dossiers. This proposal of the EP was also entered into the text – most evidently with the help of the Commission itself.

The sensitive Article 5 on the issue of the EPO included several proposals from the EP specifying the procedure of issuing the EPO.[832] Most of these clarifications were taken into the final directive text. The same applies to the important Article 6 on the form and the content of the EPO. Initially, this Article was very restricted and contained only some basic rules for the form and content, which in practical terms may become eventually quite important for the application of the provision.[833] Many of these drafting suggestions were taken on board as well. If we then look at the vital Article 9 on the grounds for non-recognition of an EPO we can identify further amendments that the EP managed to introduce into the final text. [834] The EP first suggested deleting paragraph 1 of the original proposal that sets out the obligation to give grounds to any refusal to recognise an EPO. This attempt was successful. Secondly, the grounds of refusal were complemented, a situation where the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State.[835] This is an important principle and it was included in the final text. A significant proposal from the EP that derived from the EDPS opinion dealt with the *ne bis in idem* principle.[836] This important text went into the final directive together with some less relevant clarifications on Article 9 in the EP report.

In addition to other successful EP amendments, such as in 9 a) with regard to governing law and competence in the executing Member States, it suffices here to take up the legal framework that is based on Council Framework Decision 2008/947/JHA that the EP aimed to promote in the Article text as well.[837] These points were introduced into the final text as was the case with the new Article 11 a) regarding priority in recognition of a EPO proposed by the EP. This sets the EPO on an equal footing in terms of priority with similar national cases.[838]

3. Council proceedings on EPO

The starting point of the Council was that the initiative was introduced by a group of Member States whose basic position was apparently positive. The role of the Commission is interesting in this file. It was not the initiator of the

[832] Ibid., Article 5, p. 14.
[833] See Article 6 of the initial EPO proposal vis-à-vis the EP Report in relation to Article 6, p. 15.
[834] For EP proposals, see Article on p. 17 of the EP 2010 report.
[835] See Article 9 (2) c, p. 17 of the EP report 2010.
[836] Article 9 (2) g, p. 17 of the EP report 2010.
[837] See Article 10 (1) b, p. 19 and Article 11 (1) d, p. 20.
[838] See Article 11 a), p. 20 of the EP report 2010.

legal proposal, so it had to push through its arguments during the Council discussion phase, first at the working group level and then in Coreper.

On 23 April 2010, the Justice and Home Affairs Council discussed the EPO on the basis of two Council working documents.[839] The biggest outstanding issue in the discussion was the scope of the text. In the Council discussion most of the Member States supported the idea that EPOs should be issued and executed in all Member States pursuant to their national law. Furthermore, the Council considered that EPOs should be issued by any judicial or equivalent authority. Additionally, the Council identified a three-step approach for the EPO process.[840] The line of the ministers was further elaborated at the working group level until EPO emerged again on the agenda of the JHA Council in June.

On 3-4 June 2010, the EPO was discussed in the Council and at the time the main issue was continuing discussions with the EP on this dossier. This approach of the Presidency was approved. Another key issue dealt with the position of the UK and the possibility of going forward with the decision-making process without the participation of the UK or Ireland.[841] The next JHA Council that dealt with EPO was in October 2010, but this occasion was mainly used for informing the ministers that the strong majority in the EP supported the general aim of the draft text.[842] On 20-21 October 2011, the Council then adopted a new text of the EPO following the political agreement on the text with European Parliament.[843] This was based on Council document 14471/11, where we can see efforts from the side of the Council to move towards the EP.[844] Then, on 24 November 2011 the Council adopted its position with a view to the approval of EPO.[845] The work of the Council was nearly done.

4. Assessment of the case in relation to the ex ante review of fundamental rights

Eventually, the EPO Directive was formally adopted on 13 December 2011, less than two years after the initiative was launched by a group of Member States.[846] Given this timeframe, we can conclude that the legislative process on the EPO was actually carried out relatively quickly. Usually, the preparatory

[839] See Council documents 8703/10 and 8703/10 ADD 1.

[840] For Council discussion Press release 3008th Council Meeting, Justice and Home Affairs, Brussels 23 April 2010, 8920/10 (Presse 88), p. 10.

[841] See Press release 3018th Council Meeting, Justice and Home Affairs, Luxembourg 3-4 June 2010, 10630/, Presse 161, PR CO 1, pp. 21-22.

[842] Press release 3034th Council Meeting, Justice and Home Affairs, Luxembourg 7-8 October 2010, 14423/10, Presse 262, PR CO 22, p. 18.

[843] Press release 3120th Council meeting, Agriculture and fisheries, Luxembourg 20-21 October 2011, 15581/11, Presse 370, PR CO 62, p. 23.

[844] See Council document 14471/11, Brussels, 21 September 2011.

[845] See Position EU No 2/2012 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the European protection order. Adopted on by the Council on 24 November 2011. OJ C 10 E/14, 12.1.2012.

[846] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order. OJ L338/2, 21.12.2011.

process of legal instruments in the field of AFSJ is longer. At first glance, one could think that an initiative that lacks proper impact assessment could end up in considerable difficulties in the discussions of the institutions. It may, however, be that for very practical reasons, it is easier to roll the draft legal text through the Council at least. This is due to the fact that the initial legal proposal already in the phase of its introduction has the unconditional support of the initiating Member States. If the Commission uses its right of initiative, with the exception of smaller decisions not implying significant changes to the legislation, it is usually the case that no Member State can support the whole proposed legal text as it stands.

Probably the most important finding in the final text was the remarkable contribution of the EP. Indeed this directive is one of the examples where the EP has exercised its power in the ordinary legislative procedure in a successful manner. This is due to the fact that an exceptionally great number of EP amendments were integrated into the text. Actually, this is not only about the number EP suggestions that were inserted, but about the significance for the whole EPO system. Many of the accepted EP amendments dealt with the very essence of the directive, such as the legal basis, objective, definitions, procedures governing the issue of EPO and above all the grounds for non-recognition of EPO. So, given the substance of the EP amendments, we can see that the EP not only steered the EPO to its preferred direction but entered many of its key amendments into the text, very often word by word. In light of this development we can conclude that in the legislative case of the EPO, the EP effectively utilized its position in the *ex ante* control of fundamental rights in the EU law-making process. Also in the EPO, the EP brought fundamental rights concerns into discussion. In some cases, these arguments originated from the EDPS, but in fact the EP was willing to go even further than the EDPS in its fundamental rights considerations. In this sense, the EP showed a great deal of independence from the opinions of expert bodies. It should also be noted that the Council was able to bring a positive contribution to the discussion on the proposal from the perspective of fundamental rights.

It important to note that in terms of the substance of the amendments proposed by the EP, the focus was on probably the most sensitive provisions, such as Article 5. It is equally important to see that, in fact, the EP was able to shift the balance of the text towards a greater acknowledgement of fundamental rights. Again, this suggests that multi-level *ex ante* review functions well. If a technical expert body does not highlight fundamental rights in the legislative process to a sufficient degree, its place can be taken by a political institution.

As for the case of the EIO, though not so strikingly, some of the key problems of the proposal originated from the lack of impact assessment. Despite this fact, a proper impact assessment would have brought a sufficient amount of neutrality to this legislative project. In the EPO we are faced with the same dilemma as in the EPO, which goes back to the role of the Commission in legislative files originating from initiatives of Member States.

X The case of Data Retention Directive

In order to better understand the role of the CJEU with regard to *ex ante* review of fundamental rights, and the limits of the EU legislator, we must turn to a legal Act adopted already before the entry into force of the Lisbon Treaty, the Data Retention Directive. This important CJEU case also originated from a request for a preliminary ruling under Article 267 of the TFEU. Despite the growing importance of the EU legislator in securing compliance with fundamental rights, we should not forget that it is the CJEU who has the final say on fundamental rights and the compatibility of EU legislation with fundamental rights. It is the duty of the CJEU to ensure observance of fundamental rights in the EU law.[847] A very recent reminder of this fact was provided in the case of Data Retention Directive, which was declared invalid by the CJEU due to infringements of the Directive with fundamental rights, namely Articles 7 and 8 of the Charter.

Proportionality should be the key driver in avoiding and mitigating negative impacts of legislation on fundamental rights. The CJEU took a firm stand on EU data protection in the recent landmark ruling in Digital Rights Ireland Ltd. and Others declaring the Data Retention Directive null and void.[848] The Court found that the Directive was against fundamental rights of respect for private life and the right to data protection as guaranteed in the EUCFR, which makes the case remarkable. The Directive was considered invalid as a result of an infringement of a fundamental right, which has not often been the case.

In addition to this strong fundamental right argumentation, the Court also interestingly concluded that the EU legislature by adoption of the Directive, exceeded the limits imposed by compliance with the principle of proportionality.[849] The Court used Article 52(1) and its case-law as a yardstick when analyzing the case. The Court verdict might represent a new start for the EU in taking fundamental rights more seriously in the legislative work. The

[847] See C-61/84 Cinéthèque [1985] ECR 2605, paragraph 26.

[848] Joined cases C-293/12 and C-594/12 Digital Rights Ireland Ltd and Others. In paragraph 64 the Court held "Furthermore, that (data retention, KF) period is set between a minimum of 6 months and maximum of 24 months, but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary." The Court continued in paragraph 65 "it follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is necessary".

[849] C-293/12, paragraph 69.

Court has now shown that fundamental rights count, and should count even more, in the law-making process of the EU. It will therefore be interesting to see what kind of impact this will have on *ex ante* review of fundamental rights.

Case Digital Rights is particularly interesting because of the fact that the Court has very seldom declared an EU act invalid basing its arguments on fundamental rights. This landmark ruling may therefore open a new era in the interpretation practice of the CJEU, with clearly more weight being given to fundamental right considerations. This particular Court case is also extremely significant because of the line taken by the Court on the limits of the EU legislature in relation to the principle of proportionality with regard to Charter.[850] In the judgment, a crucial element for this thesis is paragraph 65, where the Court states that the Directive "does not lay down clear and precise rules governing the extent of the interference with fundamental rights enshrined in Articles 7 and 8 of the Charter".[851] This highlights the importance of having some sort of sustainability criteria in place for fundamental rights.

In light of this experience, it is critical to remember that the Court has the ultimate authority in interpreting whether the secondary EU law is in line with primary law, including fundamental rights. The case law of the Court hence forms an important bulk of authoritative material necessary for a researcher on *ex ante* review of fundamental rights. We should not, however, be comfortable with the idea that the Court will always ultimately cover for the mistakes made by the EU legislator, i.e. never mind the fundamental rights in the Directives. This would be a dangerous path and the position of fundamental rights should receive widespread support to further strengthen its position in the legislative process, bearing in mind limits set on the legislature of the CJEU.

In this judgment, the Court sent a very clear set of messages to the EU legislature: First, bearing in mind its previous case-law, the Court reminded that "the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives."[852] Second, the Court drew the attention to the limited nature of the extent of EU legislature's discretion in the consideration of interferences with fundamental rights.[853] Third, and in light of its case IPI[854], the CJEU held that derogations and limitations with

[850] Ibid. In paragraph 69 the Court concludes, that "Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in light of Articles 7, 8 and 52(1) of the Charter".

[851] Ibid., paragraph 65. Building on this conclusion the Court continues: "It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary".

[852] Ibid., paragraph 46.

[853] Ibid., see paragraph 47. Reinforcing this argument the Court found in paragraph 48 that in the case at hand "the EU legislature's discretion is reduced, with the result that review of that discretion should be strict".

[854] See C-473/12.

regard to the protection of personal data apply only in so far is strictly necessary.[855]

The Data Retention Directive must be understood as part of a wider EU fundamental right discussion. At this stage, we should also note problems related to national implementation of the Directive. The Commission referred some Member States, such as Sweden, to the Court for non-implementation of the directive. Discussion at the national level was vivid due to a visible breach of provisions of the directive with fundamental rights. There has also been strong resistance from the part of EU Member States. Constitutional courts played a major role in this and considered that the act was in breach with national constitutions.

1. The unproblematic handling in the EU institutions

In the Data Retention Directive at issue was the need for rules guaranteeing availability of traffic data for anti-terrorism purposes in the EU. This was in the wake of the terrorist attacks in Madrid (2004) and London (2005). The European Council had underscored the need for legal instrument in its various Conclusions.[856]

The Data Retention Directive can be considered to have originated from a proposal for a Framework Decision on the retention of communications data submitted by France, the United Kingdom, Ireland and Sweden.[857] This initiative by a group of Member States, however, was stuck in the handling of the EP due to contradicting views on the legal basis, as well as on the content of the proposed Framework Directive. The EP held that the legal basis was wrong and co-decision procedure should be applied. The EP also had some serious misgivings as to the provisions of the draft Framework Decision.[858]

The terrorist acts of London in 2005 politically revived the idea of legislation in this field. The Commission took the issue of competence in the legislative process seriously and in September 2005 presented its draft data retention Directive, having the internal market Article 95 TEC as the legal basis. This allowed the EP to enter the negotiations on an equal footing as a consequence of the proposed co-decision procedure.[859] The initiative of the four Member States was hence buried.

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[855] C-293/12, paragraph 52.

[856] The data retention instrument was also an important element in the Hague Programme, see Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, Brussels, 10.5.2005

[857] Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism, 8958/04, 28 April 2004.

[858] One can note that the proposal failed to include a proper impact assessment, but only a relatively general explanatory note, see addendum to the cover note, 8958/2004 ADD1, 20 December 2004.

[859] Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC, COM(2005) 438 final, 21.9.2005.

2. The inadequate preparation in the Commission

The Commission very much argued in its explanatory memorandum accompanying the draft Directive that the proposal was in line with Community law and with the Charter, although an impact on Articles 7 and 8 of the Charter was detected by the Commission. The Commission, nonetheless, justified the interference with the need to limit these rights in this special case, according to Article 52 of the Charter. The objective preventing and combating terrorism and crime was considered to justify these limitations, which for their part were held to be proportionate and necessary.[860] Similarly, the purpose limitation was considered adequate as was limiting the categories of data which need to be retained and limitation on the period of retention. These arguments were later to be deemed invalid by the CJEU.

In the explanatory memorandum, the Commission highlighted the public consultation that was conducted. Furthermore, the Commission carried out an impact assessment. The most important line taken in the impact assessment in light of recent developments was that the Commission held its approach as proportionate. The main justification in terms of proportionality was, according to the Commission, the strict purpose limitation and the approach adopted with regard to the retention period. In the context of proportionality the Commission did not foresee any problems in the field of fundamental rights.[861]

3. EP and the important minority opinion

The EP finalized its position on the Data Retention Directive in late November 2005.[862] The forming of the position occurred mainly in the LIBE committee. It is noteworthy that the EP started with a call for an impact assessment which ought to be conducted before the entry into force of the Directive.[863] In the proposed Amendment 3, the EP suggested a new recital recognizing Articles 7 and 8 of the Charter to be added to the Directive.[864] This recital did not, however, make it to the final text of the Directive as the EU legislature adopted a standard recital stating that the Directive respects the fundamental rights, particularly those covered by Articles 7 and 8.[865] This phrasing was already proposed by the Commission in the first place. This quite

[860] Explanatory memorandum, p. 3.

[861] Ibid., p. 7. The Commission stated "The respect of fundamental rights and freedoms, and in particular the right to life, and the strict limitation of the invasion of privacy has been the key driver to find the most appropriate balance between all interests involved, such as the social, economical, security and privacy context".

[862] Draft report.

[863] Ibid., paragraph 2, p. 5.

[864] Ibid., p. 6.

[865] See recital 22 of the final Directive text. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services of public communications networks and amending Directive 2002/58/EC. OJ L 105/54, 13.4.2006.

small detail also hints that the Commission and the Council can be rather keen on sticking to standard formulations with regard to fundamental rights, which may prove too rigid.[866] The EP did not restrict itself to commenting on the recitals. It wanted to clearly bring the right to privacy and the right to data protection to the Article 1 of the Directive, setting out the important subject matter and scope.[867] Again, this effort was in vain.

The EP also took a stand on the issue of proportionality in its amendment 14, where it wanted to state that it is unclear whether the Directive "does not go beyond what is necessary and proportionate in order to achieve those objectives, as also pointed out by the European Data Protection Supervisor".[868] It would indeed be interesting if the legislator would in legal act outspokenly state that it may be the case that the act is not proportionate or necessary. It is therefore no surprise that this part of the text was ultimately scrapped. We now know that the EP was on the right track with this but some later changes to the text convinced the EP that this problem was solved. Throughout its position, the EP also sought a more accurate focus on serious criminal offences.[869] One major bulk of EP proposals was related to the access to retained data and the categories of data to be retained. These useful additions, bringing preciseness to the Directive, were mostly rejected, however.

Finally, let us consider the minority opinion attached to the EP report.[870] The minority rejected the report and found that the legislation contravenes the proportionality principles, even with the amendments proposed in the EP report. The minority held that the Directive was neither necessary nor effective. According to those MEPs, the proposed data retention period was too long and the types of data to be retained were too ambiguous. The conclusion was therefore that the "proposal for a directive seriously impinges on the fundamental rights of citizens".

In its impact assessment, the Commission strongly argued that the proposal was in fact in line with community law and fundamental rights, even though an interference with Articles 7 and 8 existed. The Commission also defended its approach on longer data retention periods. Finally, the Commission concluded that it "is convinced that its proposal can stand the test of compatibility with fundamental rights and freedoms".[871]

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[866] In this standard *considerant,* the EP pushed unsuccessfully for including a reference to the case law of the ECtHR but this did not fly. See EP report p. 11. Judgments in cases Amann v. Switzerland and Malone v. the United Kingdom were especially mentioned.

[867] See ibid., p. 12, amendment 19.

[868] Ibid., p. 10.

[869] See ibid., pp. 6, 9 and 13.

[870] See minority opinion pursuant to Rule 48(3) of the Rules of Procedure by Giusto Catania, Ole Krarup, Sylvia-Yvonne Kaufmann and Kathalijne Maria Buitenweg.

[871] See Annex to the Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic Communication Services and amending Directive 2002/58/EC. SEC (2005) 1131 made public as Council Document 12671/05 ADD 1, 27 September 2005, pp. 20-21.

4. An uncontroversial discussion in the Council

The Council proceeded quite rapidly with its position. The Presidency was ready to launch the first phase of negotiations already in November 2005. The single biggest issue with the first trialogue was about data retention periods.[872] Generally, the EP had a more ambitious agenda for the data retention Directive than the Council. The Presidency returned to report to the Coreper on the outcome of the trialogue. The Presidency noted the various amendments put forward by the EP but it seems the Presidency was successful in defending the center of gravity achieved in the Council.[873]

The second trialogue was held on 22 November 2005.[874] Central to the EP position in this trialogue were concerns about provisions on access, criminal sanctions and most notably the need for additional safeguards for data protection. The Council was ready to offer the EP some concessions in the form of quite cosmetic changes in the text highlighting the importance of the Charter in the recital and the role of the CJEU and the position of the ECHR and the ECtHR in the Article on obligations to retain data. As a response to the EP claims, administrative or criminal sanctions were included in the Article on sanctions. Coreper was convened on 30 November 2005 to discuss the new Presidency compromise text. The above-mentioned changes were accepted as a result of the proceedings. The compromise package was now in place and the institutions were ready to proceed on this basis. In the Council, the Directive was adopted at the ministerial level on 21 February 2006. Only Ireland and Slovakia voted against.[875] Later, Ireland took the Council and the EP to the CJEU, questioning the legal basis of the Directive. The Court found contrary to the Irish position that the then Article 95 concerning the internal market was an appropriate legal basis.[876]

5. EDPS identifies the inadequate level of proportionality and necessity

The EDPS was consulted on the draft Directive and issued an opinion in November 2005.[877] In the beginning of the opinion, interference with data protection and privacy was recognized.[878] The tone was very critical towards the proposal: it was found that "it is essential to the EDPS that the proposal respects the fundamental rights. A legislative measure which would harm the protection guaranteed by Community law and more in particular by the case-

[872] See Council Document 14023/05.
[873] See Ibid., p. 5.
[874] See Council Document 14935/05, 24 November 2005.
[875] See Council Document 6598/06, ADD 1, 27 February 2006.
[876] C-301/6 Ireland v Parliament and the Council.
[877] Opinion of the European Data Protection Supervisor on the proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC. 29.11.2005.
[878] See opinion, paragraphs 3-4.

law of the Court of Justice and the European Court of Human Rights is not only unacceptable, but also illegal".[879]

More importantly, the EDPS drew attention to the importance of finding a balance between necessity and proportionality in relation to interference with data protection.[880] According to the EDPS, the proportionality and necessity of the obligation to retain data must be demonstrated.[881] The EDPS concluded that more safeguards were needed in order to ensure compliance with the right to data protection and in fact proposed to set strict conditions for the text to comply with necessity and proportionality.[882] In light of the necessity of the proposal, the EDPS was unconvinced.[883] This applied especially to the retention of traffic data. In the EDPS opinion it is interesting that he considered that if the EP and the Council - after a careful balancing of interests - found that necessity of the retention of traffic and location data is demonstrated, the retention can only be justified under Community law in so far as proportionality is respected.[884]

Let us now tackle the issue of proportionality. To start with, the EDPS found that retention of traffic and location data was insufficient and further safeguards were needed.[885] In order to fulfill the proportionality requirement, the EDPS worked out three proposals. The proposal should:

1) limit the retention periods. The periods must reflect the demonstrated needs of law enforcement.

2) limit the number of data to be stored. This number must reflect the demonstrated needs of law enforcement and it must be ensured that access to content data is not possible.

3) contain adequate safety measures. So as to limit the access and further use, guarantee the security of data and ensure that the data subjects themselves can exercise their rights.[886]

With a view to improve the text, the EDPS presented a great number of drafting proposals, which brought considerable limitations to the data retention periods, data access and the erasure of data. In the forefront of the recommendations was the highlighted need to demonstrate proportionality and necessity.

6. Lessons learned from a difficult implementation phase

Especially Sweden came under fire of the Commission due to non-implementation of the Directive. In fact, the Commission sued Sweden and the CJEU held in its judgment of C-185/09 that Sweden had not transposed the

[879] Ibid., paragraph 8.
[880] See ibid., paragraph 5.
[881] Ibid., paragraph 10.
[882] See ibid., paragraph 13.
[883] See ibid., paragraphs 17 and 22.
[884] Ibid., paragraph 23.
[885] Ibid., paragraph 26.
[886] Ibid., paragraph 27.

Data Retention Directive and thus identified the breach of EU law.[887] In the ensuing case and in the face of Sweden's continued lack of transposition, the Court found an infringement of EU law in case C-270/11 Commission v Sweden and consequently imposed a lump sum payment for Sweden.[888] The legislation was debated in Sweden to a great length. There was, for example, a special investigation with an appointed investigator tackling the options for implementation of the Directive. The proposals did not come into existence within the timeframe prescribed in the Directive, however. A rather heated debate took place also in the Swedish Parliament.[889] The Constitutional Law Committee of the Swedish Parliament in its opinion annexed to the Legal Affairs Committee's report rose to the discussion Article 8 of the ECHR and the case law of the ECtHR according to which for limiting this right there has to be a pressing social need. Significant concerns were raised.

By the same token, Austria had similar problems in the implementation of the Data Retention Directive. Serious concerns were raised throughout the process and in fact the Austrian Constitutional Court referred these legal issues to the CJEU for a preliminary ruling in order to obtain interpretation of whether Article 8 of the EUCFR is violated.[890] When the CJEU finally invalidated the Data Retention Directive in 2014, the Austrian Constitutional Court was the first to declare that national data retention law was in breach of Article 8 of the EUCFR and ECHR.[891]

The implementation phase of the Directive raised considerable concerns at the national level and received fierce criticism. The main participants in this discussion at the national level were the Constitutional Courts of Germany, Romania and the Czech Republic. The main line in the judgments of the Constitutional Courts was that the national law implementing the directive was unconstitutional. The reason for this was that the proposed legislation was in breach of fundamental rights. The main problem was, however, in the Directive itself and there was no easy way to circumvent the Directive.

To analyze the situation, and to fulfill the reporting obligations set out in the Directive, the Commission issued an evaluation report to the Council and the EP on the Data Retention Directive, where it looked at the transposition of provisions of the Directive.[892] The general conclusion presented in the report was that data retention is a useful tool for criminal justice systems and for law enforcement in the EU.

The Commission gave an update of the implementation situation in Member States, stating that notifications of transposition were received from 25 Member States. According to the Commission, Belgium had only partially

[887] C-185/09 Commission v Sweden.

[888] C-270/11 Commission v Sweden.

[889] See The Legal Affairs Committee report of the Swedish Parliament, Justitieutskottets betänkande 2010/11:JuU14. Lagring av trafikuppgifter för brottsbekämpande ändamål - genomförande av direktiv 2006/24/EG.

[890] Der Österreichische Verfassungsgerichtshof, Beschluss G-47/12-11, 28. November 2012.

[891] Der Österreichische Verfassungsgerichtshof, Entscheidung G47/2012-49, 27 Juni 2014.

[892] Report from the Commission to the Council and the European Parliament; evaluation report on the Data Retention Directive (Directive 2006/24/EC), COM(2011) 225 final, Brussels 18.4.2011.

implemented the Directive. What is more important is that Austria and Sweden had not transposed the Directive by the implementation deadline and the discussion on national legislation in this regard was still on-going. Equally important was that the Czech Republic, Germany and Romania had transposed this EU legal instrument, but the Constitutional Courts of these Member States had annulled the respective national legislation.[893] Consequently, the Directive was not implemented in these Member States and alternative methods of transposition, in line with constitutional provisions, had to be analyzed.

The Romanian Constitutional Court held that the national law implementing the Directive and particularly the obligation to retain all traffic data for six months was in breach with Article 8 of the ECHR. The edge of the ruling of the German Constitutional Court was the surveillance which could impair the free exercise of fundamental rights. Furthermore, the proportionality of the data retention period was questioned. Its Czech homologue particularly criticized the purpose limitation included in the national legislation. Furthermore, similar constitutional concerns were raised in the constitutional courts of Bulgaria, Cyprus and Hungary.[894]

In the evaluation report, the Commission put pressure on those Member States who had not yet transposed the Directive and those Member States whose constitutional courts had annulled the transposing legislation. Moreover, it reminded that the CJEU found that Austria and Sweden had violated their obligations under the EU law and made it clear that the Commission decided in April 2011 to refer Sweden for the second time to the CJEU with a view to putting financial penalties in place due to the decision of the Swedish Parliament to postpone the transposing legislation for 12 months.[895]

As a conclusion, the Commission expressed its intention to revise the data retention framework based on an impact assessment. It is noteworthy that in at the conclusion of the report the Commission had raised the issue of proportionality and fundamental rights to a very prominent position in relation to this review.[896] At this stage, the Commission had identified the potential fundamental right concerns and the burning issue of proportionality, but it had to keep looking for a face-saving way out in terms of a credible enforcement of implementation of EU law. The Directive had been approved a long time ago and politically the Commission had no other choice but to push forward with the implementation.

[893] Ibid., pp. 5-6. See Decision no 1258 of 8 October 2009 of the Romanian Constitutional Court, Bundesverfassungsgericht verdict, 1 BvR 256/08 and judgment of the Czech Constitutional Court of 22 March on Act No. 127/2005 and Decree No 485/2005.

[894] Commission evaluation report, pp. 20-21.

[895] See CJEU cases C-189/09 and 185/09 and evaluation report, p. 21.

[896] See evaluation report, pp. 32-33.

7. Assessment of the case in relation to ex ante review of fundamental rights

The EP did not get much out of negotiations and the text largely went the Council way. Concerns about fundamental rights and proportionality were indeed taken up during the legislative process, especially by the EDPS and the EP, but these legitimate misgivings were not necessarily taken into account. Even the EP majority was ready to accept the compromise. Why was this the case? It is possible to explain why the EU legislature went against fundamental rights only with the great political pressure to strike a deal on this legal instrument. It is always easy to speak wisely after the course of events is known, but the case of Data Retention Directive signaled the political objectives prevailing for even general principles of constitutional law.

The case Digital Rights can be regarded as a bold move by the CJEU in bringing fundamental rights into consideration if a legal act is in line with the EU law. Declaring the legal act null and void is a strong measure, but it is indeed necessary in ensuring the coherence of the legislation with fundamental rights. It is good that the Court has also taken use of this option. Another point that proved the failure of the EU legislature in *ex ante* review of fundamental rights in the case of the Data Retention Directive was the negligence of proportionality in the face of political bargaining.

The line taken by the Court in its ruling on the Data Retention Directive was a very classical one. At the first stage, the CJEU identified which fundamental rights are at stake. The second phase was to ask the question of whether the fundamental rights concerned were restricted. Third, the Court analyzed if the case passed the test on permissible limitations to fundamental rights. The main strand of the Court arguments was well recognizable already in the opinion of AG Villalón Cruz on the case.[897] He took one step further in relation to previous case law by assessing proportionality in depth in the case.[898] A key consideration in the opinion was the proportionality with regard to Article 52(1) of the Charter, which remained the overarching argument also in the eventual Court ruling.

After the Court decision, one has a good reason to ask if there are any possibilities for the EU data retention legislation to become materialized. In this issue, we come across with the competence which the Court has probably not fully taken into consideration. The competence with regard to the data retention rests with the Member States and this should be highlighted. Moreover, the institutions involved in the legislative process and *ex ante* review failed to apply Article 52(1) correctly. The data retention directive experience highlighted that the legislator cannot exceed its limits in the law-making process. Consideration of how to limit fundamental rights clearly went out of bounds in this case. This ruling will most probably have a significant impact on the *ex ante* review. The EU legislature is now aware of the fact that

[897] Opinion of Advocate General Cruz Villalón delivered on 12 December 2013 on case C-293/12 Digital Rights Ireland.

[898] Ibid., see in particular paragraphs 102, 133, 151 and 152.

the Court remains vigilant in controlling the proportionality and fundamental right aspects of legal texts. The Court does not clearly allow that the political objectives of safety and security and anti-terrorism measures are given a priority over fundamental rights.

Regarding the essence of fundamental rights, one must pay attention to its limits. The CJEU held in its judgment Digital Rights Ireland that the Data Retention Directive did not entail violation of the essence of fundamental rights: in this case, the right to privacy and the right to data protection. As stated by fundamental right experts in SURVEILLE project Paper Assessing Surveillance in the Context of Preventing a Terrorist Act, this line taken by the CJEU can be criticized for being too conventional.[899] This critique mainly stems from the blurred distinction between "content data" and metadata of today.[900] Given the argumentation of the Court, we can conclude it was a close call but overstepping boundaries of essence was not detected.

It is important to note that, as stated in the SURVEILLE paper, the fact that the CJEU has declared the Directive invalid is not the end of the story. Quite the opposite, the CJEU decision imposes a positive obligation on the EU legislator to remedy the situation. In the same vein, a similar positive obligation falls also on the Member States in relation to their national legislation implementing the Directive.[901] The positive obligation therefore applies both to national and EU level and consequently legislatures at both levels have to step in, in order to put the legal framework in line with fundamental rights.

Giovanni Sartor points out that in addition to the normative models of adjudication, there are also normative models of legislation, which are to some extent adopted by the participants in the legislative process and which consequently motivate the legislators' behavior.[902] As Sartor suggests, it is often explained how judges later on correct the wrong legislative choices of the legislator and thus protect fundamental rights. This view is plausible but in the case of Digital Rights Ireland, nonetheless, the CJEU demonstrated that the Court has its place in having the final word on European constitutional issues. Even if *ex ante* review should be strengthened in the EU, there is no way of changing the architecture drastically, in my opinion. *Ex ante* review and judicial review should rather be seen as complementary arrangements. The *ex ante* review should be the first line of defence and practicing defence of depth thinking the Court should have the final say and take care of — hopefully — the very few legislative wrongs and mistakes that have passed the first line.

[899] SURVEILLE Paper, p. 40.

[900] Ibid. The authors of the paper justify this point of view by considering that "the processing of metadata cannot any longer be invariably seen as falling within such "peripheral areas" of privacy and data protection where limitations would always be legitimate and permissible".

[901] Ibid., pp. 42-43.

[902] Sartor Giovanni: A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review. EUI Working Papers. LAW 2009/07. Department of Law. European University Institute. p. 25.

The case of Data Retention Directive should also be seen within the wider frame of European constitutionalism and plurality of review mechanisms and institutional actors. Political institutions and expert bodies were not able to guarantee sufficient observance of fundamental rights. This failure very much culminated in the failure to apply necessary test of permissible limitations based on Article 52 (1) of the Charter. In this case, the court has to step in to fill the vacuum. This illustrates how useful it is to have review mechanisms in place at different levels of the EU legal cycle with the ultimate line of defence being the CJEU.

We can expect that the case of Data Retention Directive and the subsequent court case Digital Rights Ireland will provide important inputs to the EU legislature on how to conduct *ex ante* review. In the core of these lessons learned is how to avoid such a situation again by means of better observance to proportionality and Article 52 (1) of the Charter. Eventually, these impacts can be purported to be very positive in the long run for legislator's activities.

XI Case Schrems: the finest hour of CJEU giving guidance to the legislature?

In Autumn 2015 the CJEU came out with an extremely important ruling in the case of Schrems.[903] It can be regarded as one of the most important rulings of the Court ever made. This landmark ruling is paramount in terms of promoting data protection and right to privacy, but less attention has been paid in various commentaries to its importance for providing guidance to the EU legislature on how to address fundamental right problems in the legislation. This guidance is of indirect nature, but nonetheless clearly visible, which is why Schrems to some extent makes an exception to series of CJEU judgments which are focused on invalidating pieces of EU legislation. Declaring the Commission's US Safe Harbour decision invalid is naturally at the apex of the judgement. Nevertheless, the CJEU arguments regarding problems of different provisions of the decision are extremely enlightening for the EU legislature on how to overcome fundamental rights-based problems.

The Commission's US Safe Harbour Decision was all about acknowledging that in the cases of data transfers from the EU to the US, the level of data protection of the US corresponded to that of the EU.[904] Pursuant to the data protection Directive, the Commission can make the decision about the level of protection and the Commission used this option in going forward with the US Safe Harbour Decision.

The consequent revelations of Edward Snowden and public discussion about intelligence services' access to personal data intensified all over the world. Mr. Schrems concerned with the data transfers of Google from Ireland to Google in the United States took the case to the national court which in turn referred the case to the CJEU for a preliminary ruling. The High Court of Ireland presented questions to the CJEU which were related at least indirectly to the legality of the safe harbour regime set up by the Commission decision.

For the analysis, one needs to look into both the ruling and the AG opinion. Let us start with the latter one which eventually became the basis for the Court's line in the ruling. Throughout his opinion, AG Bot raised serious concerns about breaches of fundamental rights. It is worth underscoring that especially the limitation Article 52(1) plays a decisive role in the analysis of AG. In particular, he draws much attention to the respect of the essence of Articles 7 and 8 of the Charter and finds that especially broad wording of limitations of the decision, which may lead to disapplying safe harbour principles and compromise the essence of right to protection of personal data. Furthermore, he also took up the issue of US intelligence services' access to data transferred which compromises the essence of right to privacy.[905] The basic conclusion of

[903] C-362/14 of 6 October 2015 Maximilian Schrems v Data Protection Commissioner.

[904] 2000/520/EC Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

[905] Opinion of Advocate General Bot delivered on 23 September 2015 on case C-362/14 Maximilian Schrems v Data Protection Commissioner. Paragraphs 176-177 and 181.

AG was that the Commission's decision must be declared invalid. He had a very clear position that data transferred to the United States from the EU does not ensure an adequate level of protection of personal data. The vague wording of limitations set out in the provisions and based on national security, public interest or law enforcement requirements did not convince AG in light of Article 52(1) of the EUCFR.[906]

Moreover, it is important that AG considered that mass surveillance is inherently disproportionate and hence unwarranted interference with the right to privacy and right to data protection as stipulated in the Charter.[907] This can be regarded as a reflection of a critical view generally on the access of intelligence authorities' to personal data that cannot be found sustainable and that such access constitutes an interference with the rights guaranteed in the Charter. Unwarranted interference with right to an effective remedy pursuant to Article 47 of the Charter was also detected. These issues, together with the fact that the Commission exceeded the limits of proportionality, led AG to conclude that the Commission Decision should be declared invalid.[908]

In line with the AG opinion, the Court observes in the ruling that the data protection Directive, which forms the basis for the Commission's decision, lacks a definition of the concept of an adequate level of protection.[909] This leads the Court to argue that "the high level of protection guaranteed by Directive 95/46 read in light of the Charter could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries".[910] It follows from the fact that there is no definition of adequate level of protection that the Commission essentially has a *carte blanche* in determining what is an adequate level of protection in transfers of personal data to third countries. Sufficient criteria for such an assessment do not exist.

The Court draws particular attention to the Decision, which raises national security, public interest and law enforcement requirements to a primary status vis-à-vis safe harbour principles. The Court finds that the Decision hence enables interference with fundamental rights of persons whose personal data is or could be transferred from the EU to the United States. The basis of such interference could be the above-mentioned national security, public interest or US domestic legislation.[911] This is extremely problematic from a fundamental rights point of view. It is hard to imagine that it would be sustainable to have such vague reasons legitimizing interference with and, in an extreme case, limitation of fundamental rights.

Building on the interpretation practice utilized in judgment Digital Rights Ireland, the Court takes a strong stand on the need of derogations and

[906] See ibid., paragraphs 183-184.
[907] Ibid., paragraph 200.
[908] Ibid., paragraphs 215 and 237.
[909] C-362/14, paragraph 70.
[910] Ibid., paragraph 73.
[911] Ibid., paragraphs 86 and 87.

limitations to the protection of personal data to be strictly necessary.[912] Furthermore, the Court holds that "legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter".[913] In addition to these major concerns about right to data protection and the right to privacy, the Court states that legislation that does not contain legal remedies with regard to an individual's access to personal data and obtaining the rectification or erasure of such data does not respect the essence of Article 47, which enshrines the right to an effective judicial protection.[914] On the basis of these findings, the Court concludes that Article 1 of the Commission's decision fails to comply with Article 25(6) of the data protection directive and read in light of the EUCFR is hence invalid.[915]

The court then turns to another key provision of the Commission's decision, namely Article 3. In its conclusion, the Court reminded that the EU legislature has not given competence to the Commission by the means of implementing powers to restrict national supervisory authorities' powers. Therefore, the Commission has acted *ultra vires* and this being read in light of the Charter, Article 3 of the decision was also considered invalid.[916]

It is important for the overall consideration that Articles 2 and 4 and annexes to the Decision are interlinked and this being the case, the validity of the Decision has to be assessed in its entirety. The conclusion of the Grand Chamber of the Court was that the Decision is invalid. A particular weight has been put on deliberations with regard to Articles 7, 8 and 47 of the Charter.[917]

1. Assessment of the case in relation to the ex ante review of fundamental rights

The judgment in case Schrems came out in the aftermath of case Digital Rights Ireland which had a considerable impact on the outcome of Schrems. It can be argued that in Schrems the Court went one step further in giving guidance to the EU legislator with regard to various provisions of the decision.

We can hence conclude that the significance of Schrems is two-fold: it is obvious that the most important issue is the substance of the argumentation which brings a considerable input to stronger data and privacy protection. These fundamental rights can be regarded as having now even more weight in the EU legal order.

[912] Ibid., paragraphs 93-94.
[913] Ibid., paragraph 94.
[914] Ibid., paragraph 95.
[915] Ibid., paragraph 98.
[916] Ibid., paragraph 104.
[917] Ibid., paragraphs 104-106 and the concluding paragraphs 1 and 2.

The ruling is also important process-wise. With these substantial arguments, the Court points out which provisions of the ruling are problematic and furthermore hints, albeit indirectly, how to change the text in order to put it in line with the fundamental rights in question.

Schrems turns out to be very significant, because of the effective utilization of the limitation test deriving from Article 52(1). Against this background, the Court ascertained that any interference of fundamental rights must respect the essence of those rights.[918] At the heart of this assessment, carried out first by the AG and then the Court, is above all the essence dimension of the rights concerned. Moreover, proportionality plays a significant role in these considerations. The omnipresence of Articles 7 and 8, and to some extent also 47, is also very visible indeed.

This case study differs from the other cases utilized in this study in a way that it sheds light on the court case without opening up the legislative process which led to the adoption of the Commission Safe Harbour Decision. It is obvious that, similar to other cases of this study, something went wrong with this law-making process but the reason why I have chosen Schrems as one of the case studies is related to its substantive importance for data protection. Even more significant is the how the Court in its argumentation tackles the problematic issues in the Articles of the Decision. Therefore, the value of case Schrems is not only to be found in invalidating the Decision considered problematic from a fundamental rights point of view, but also pointing out to the legislature how to carry out *ex ante* review. In this guidance, the mind-set is rightly on the substance of the legal act and the utilization of the test of permissible limitations. The most important lesson that the legislature should draw from the judgment is how to utilize the test of permissible limitations. In this sense, Digital Rights Ireland and Schrems can be regarded as an interpretative continuum, which signals to the legislature that a test of permissible limitations should be utilized. Building on the limitation Article of the Charter the Court elaborates the content of this provision and demonstrates how to utilize this test in practice. I envisage that these two cases will have a far-reaching impact on the functioning of the EU legislature, in particular in fundamental right sensitive legislative files.

[918] According to Ojanen "these statements display that, as legal norms, fundamental rights protected by the Charter should not only be treated as principles that may be balanced and weighed against other competing principles.", Ojanen 2016, p. 5.

XII Horizontal aspects

1. Violations of fundamental rights looming large in the austerity measures

It is also important and topical to briefly discuss the impact of the financial crisis on fundamental rights, especially on social and economic rights. This is because economic pressure resulting from harsh austerity measures can be identified as a horizontal driver affecting legislation, both in Member States and at the EU level, with far-reaching repercussions on fundamental rights for almost a decade. For years, there has been an ongoing discussion about the future of "Social Europe".[919] The case of the International Transport Workers' Federation and Finnish Seamens' Union had to do with a conflict situation between internal market rules and social rights in the enlarged EU. At issue here was the question of possible social dumping. In this case, the CJEU found that "the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty and that the protection of workers is one of the overriding reasons of public interest recognized by the Court".[920] The CJEU, however, stressed that there are limits for these collective actions. These notions were further confirmed in Laval un Partneri which touched upon basically the same theme as the International Transport Workers' Federation and Finnish Seamens' Union.[921]

The austerity measures and handling of the financial crisis has on many occasions meant prioritization of the budget over economic and social rights of the individuals. In this connection, it should be noted that ICESCR sets clear conditions for limiting fundamental rights.[922] Article 5 of the Covenant even diminishes further the scope for restrictions.[923] Given these provisions in the

[919] For further discussion on the social dimension of the EU see de Búrca Gráinne and de Witte Bruno: Social Rights in Europe. Oxford University Press. Oxford 2005.

[920] C-238/05 International Transport Workers' Federation and Finnish Seamens' Union, paragraph 77. See also paragraphs 44, 45 and 46.

[921] C-341/05 Laval un Partneri, paragraph 103. As the issue of proportionality is particularly interesting for the theme of this thesis an exhaustive analysis on the proportionality aspects of cases Laval and Viking has been set out in Hös Nikolett: The Principle of proportionality in the Viking and Laval Cases: An appropriate standard for judicial review? EUI Working Papers. LAW 2009/06. Department of Law.

[922] Article 4 of ICESCR stipulates: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

[923] Article 5 of the ICESCR reads as follows:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing

in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

international regulatory framework, it is possible to conclude that room for restrictions is rather limited.

In 2010, in the aftermath of the first wave of the European financial crisis, FRA issued a working paper titled "Protecting fundamental rights during the economic crisis".[924] The document focused on the various negative impacts of the economic crisis on the protection of fundamental rights. In response to the challenges of the crisis, both the EU and the Member States introduced fiscal consolidation measures, budget cuts and different kinds of austerity measures that had far-reaching impacts on fundamental rights, particularly in those Member States hit hardest by the economic downturn or in some cases even free-fall. In relation to the challenges of the crisis, FRA did not only pinpoint phenomena touching the wider walks of life, such as less-public spending and unemployment, but it also rightly pointed out the exposure of certain particularly vulnerable groups to the effects of the crisis.[925] Again, the basic point of departure for the FRA in its analysis was the Charter.[926]

An extremely interesting point in the FRA working paper was the criticism addressed especially to the Member States for the lack of *ex ante* impact assessments concerning the impact of fiscal consolidation measures on different population groups.[927] Later in the document, FRA recommended the EU and the Member States to carry out these impact assessments in order to ameliorate the situation. In this work, FRA foresaw a role for national human rights institutions.[928] Human rights can be deemed to enable the institutionalization of the process of self-governance of individuals.[929]

Although the impacts of the economic crisis fall outside the scope of this study, it is nevertheless important to acknowledge that legal and policy measures springing from the search for the exit from the economic crisis in Europe has significantly affected the protection of fundamental rights. We should also bear in mind that after the FRA working paper the economic slump has continued in spite of quite premature conclusions on the end of the crisis drawn in the working paper. This has quite naturally triggered further austerity measures and continued to challenge fundamental rights.

When discussing the impacts of the economic crisis, we must also note decisions of the European Committee of Social Rights (ECSR) under the CoE on the austerity measures introduced by Greece. In spring 2013, the ECSR in its five decisions found that the cumulative effect of the Greek austerity

[924] European Union Agency for Fundamental Rights: Protecting fundamental rights during the economic crisis. December 2010.

[925] See FRA working paper 2010, pp. 3 and 7.

[926] Ibid., p. 5.

[927] Ibid., pp. 4. and 20.

[928] Ibid., p. 47.

[929] Günther Klaus: Von der gubernativen zur deliberativen Menschenrechtspolitik - Die Definition und Fortentwicklung der Menschenrechte als Akt kollektiver Selbstbestimmung. In Haller Gret, Günther Klaus, Neumann Ulfrid (Hg.): Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormunde der Demokratie? Campus Verlag GmbH. Frankfurt am Main 2011, p. 57.

measures constituted a violation of social rights.[930] This decision can be considered to be an important contribution to the discussion on the relation between the austerity measures and fundamental rights by such an authoritative European body. Simultaneously, it reveals the problems of actions designed to meet the terms of the international bailout.

It is also possible to see interesting strands of development at the national level in Member States suffering most from the economic crisis. In Portugal, the Constitutional Court found in its ruling in August 2013 the new austerity measures of Portugal unconstitutional.[931] This judgment was actually a part of a series of rulings stating the unconstitutional nature of Portuguese actions in the containment of the economic crisis. In spring 2013, the Court found the budget including severe budgetary cuts unconstitutional.[932] On the basis of these findings, it is relatively easy to associate oneself with the understanding of social constitution as an eternal loser in the turbulent times caused by economic downturn.[933] The constitutional constellation produced by the crisis is in many respects unsatisfactory.[934]

2. Remarks on the duration of ex ante review processes

Another matter that may not have been sufficiently covered in the legal research has to do with temporal duration of EU legislative processes. As practical, and perhaps unimportant, this may look like *prima facie* for research focusing mainly on the contents of the legal text, I posit that this notion is unjustified. Time pressure and strict deadlines for the proceedings often have a direct impact on the quality of legal texts. As a consequence, the content and the quality also affect the position of individuals. We should therefore not overlook the time factor, which constitutes an important general issue when analyzing *ex ante* review.

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[930] See the decisions of the European Committee on Social Rights of the Council of Europe on the merits of the following complaints: Federation of Employed Pensioners of Greece (IKA–ETAM) v. Greece, Complaint No. 76/2012,Panhellenic Federation of Public Service Pensioners (POPS) v. Greece, Complaint No. 77/2012, Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece, Complaint No. 78/2012, Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece, Complaint No. 79/2012, Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece, Complaint No. 80/2012, published on 22 April 2013.

[931] See Ruling of the Constitutional Court of Portugal, Acórdão N. 474/2013, Lisboa 29 de Agosto de 2013. In this judgment the Court made clear that the proposed measures on deteriorating employment conditions of civil servants constituted a violation of constitutional provisions on job security and proportionality. "Pelo exposto, o Tribunal Constitucional decide: a) Pronunciar-se pela inconstitucionalidade da norma constante do n.º 2 do artigo 18.º do Decreto n.º 177/XII, enquanto conjugada com a segunda, terceira e quarta partes do disposto no n.º 2 do artigo 4.º do mesmo diploma, por violação da garantia da segurança no emprego e do princípio da proporcionalidade, constantes dos artigos 53.º e 18.º, n.º 2, da Constituição da República Portuguesa;".

[932] Ruling of the Constitutional Court of Portugal, Acórdão N. 187/2013, Lisboa 5 de abril de 2013. It should be noted that the constitutional review of both these cases was initiated by the President of Portugal.

[933] See for example Tuori Kaarlo and Tuori Klaus: The Eurozone Crisis. A Constitutional Analysis. Cambridge University Press. Cambridge 2014, pp. 231-241.

[934] Ibid., p. 265. This is the case although major economic initiatives discussed in the context of the crisis pay at least lip service to the central values of political constitution, namely democracy, legitimacy and accountability. See ibid., p. 256.

In this section, I will carry out a mapping exercise and concentrate on the duration of AFSJ files. A more exact issue to which I seek an answer is how long *ex ante* review processes of fundamental rights have lasted? Does this have a significant impact on the overall duration of legislative process? This question is important, also because in the concluding remarks of this study I will make some suggestions for the development of the *ex ante* system and in this exercise a mandatory *ex ante* review has an important role to play. It is therefore worth gauging whether *ex ante* review processes that can be extremely helpful for realization of fundamental rights, genuinely make the difference in terms of time factor. Legal initiatives falling under the AFSJ are already time consuming. In the analysis, I will compare the duration of AFSJ legal initiatives with that of files from other policy areas. I will first attempt to identify and define an average duration of a legislative process and then reflect the time period in the AFSJ on the average duration. It is challenging to determine the average duration required for a directive to pass through the EU law-making process. Even EU legal acts with the same legal form have such varying contents that it is very hard to extract some kind of normal duration for the process from the multiple legislative processes.

I will also try to address the question of how long the *ex ante* procedure/s takes in the overall legislative process. It is clear that a well-integrated and comprehensive *ex ante* review always takes some time. I will attempt to carry out a certain kind of cost-benefit analysis – a method used especially in the analysis of costs and benefits in economics. With costs, however, I do not refer to financial costs of the *ex ante* process, but the quality of the legislation. Similar to the previous section, we must bear in mind that the time span from the entry into force of the Lisbon Treaty is still quite short. Thus, these findings should be considered as initial outputs from the new legal framework and its impact on duration of AFSJ legal files.

The Commission has analyzed the length of the legislative processes under the co-decision procedure for the European parliamentary term 2004-2009. For the first reading files, the duration ranged from 2 to 48 months. In the same time period, the shortest time for a legislative proposal to become an adopted piece of EU legislation in the second reading was 12 months, and the longest 108 months. To conclude the legislative process with the conciliation phase took from 29 to 159 months.[935]

Unfortunately, there is no further statistical information on the years after 2009, but in light of these statistics we can easily gauge the average duration of the co-decision procedure, which has formally been replaced by the ordinary legislative procedure. The increasing tendency for first reading agreements was already clearly evident in 2004-2009. This trend has continued also during the last few years, even though questions have been raised, especially in the EP, regarding the democratic coverage and legitimacy of first reading

[935] See The co-decision procedure. Analysis and statistics of the 2004-2009 legislature. Available at www.ec.europa.eu/codecision/statistics/docs/report_statistics_public_draft_en_pdf. Visited on 3.7.2013.

agreements, which have greatly empowered the role of single rapporteurs in different legal dossiers. When looking back to the years up until 2009, we should note once again that during that time, the third pillar initiatives did not fall under the co-decision procedure. As has been stated several times before, it was only after the entry into force of the Lisbon Treaty and the creation of the AFSJ, that ordinary legislative procedure started to apply to initiatives in this policy area.

If we first turn to the European protection order, one of the few legislative initiatives originating from a group of Member States after the entry into force of the Lisbon Treaty, we can see that closing the case took about 20 months. This is not bad for a legislative dossier under the AFSJ. It is impossible to say anything about the duration of the impact assessment phase before the proposal was introduced. We should, however, bear in mind that although a check of compatibility with fundamental rights must have been carried out by the drafter, i.e. administrators of national administrations involved, but this does not satisfactorily substitute the non-existent impact assessment. In the case of the EPO, the most interesting contributions from the point of view of fundamental rights came from the EDPS and the EP.

Negotiations on the European investigation order were on-going for a long time. If we juxtapose the EIO and EPO, we can see that the EIO was the more sensitive file since the beginning. In addition to contributions from the EDPS, the FRA also submitted an opinion on the proposed text. The opinion of the EDPS on EIO ensued swiftly after the introduction of the draft directive. It took less than four months for the EDPS to analyze the proposal and submit the opinion. It is not a record time, but given one lost month, August when the EU is closed, it is not a bad performance. As the Proposal for an EIO directive was published in the official journal in late June 2010, the FRA opinion was given out less than 8 months after the introduction of the EIO proposal. One should remember that FRA did not start formulating its position directly after the directive proposal was published, but it needed some push from the institutions, in this case from the EP. The EIO Directive was published in the Official Journal of the EU in May 2014. It therefore took almost four years for the EIO to be adopted.

The case of ACTA is a strange one in terms of the duration of the process. The process of international negotiations on this topic was time-consuming, as is standard. Then, when the ACTA text was negotiated, everything happened quite rapidly. In the EU adoption process that failed in the end, the *ex ante* review of fundamental rights was at issue. At the EU level, the fundamental rights preview happened in a speedy fashion, mainly because of the rapid proceedings of the EP. It only took a couple of months for the EP to analyze and discuss the proposed the text and subsequently to land to a conclusion to reject the ACTA. The fundamental right considerations in the Council on the other hand were incomplete and inadequate.

In conclusion, I consider that the *ex ante* phase does not take that much time compared with the overall benefits it provides for the quality of legal texts. The *ex ante* process could even be strengthened at the cost of extended duration of

the legislative process. *Ex ante* review brings such benefits to the law-making process in terms of taking fundamental rights more seriously in the legal texts that it is worth exploring if *ex ante* review could even be reinforced. In order to avoid delays in the legislative process caused by the strengthened *ex ante* mechanism, it would be advisable to introduce some kind of deadlines for the *ex ante* phase.

PART THREE: CONCLUSIONS

XIII Conclusions and implications of the study

1. Ten key findings of the study

Ten key findings of this study are presented here, related to the research questions and in light of the cases analyzed:

1) Of all the EU institutions, the Commission has been the initiator in systematic *ex ante* review of fundamental rights in the EU law-making process. In spite of this, the Commission has sometimes gone out of bounds in terms of permissible limitations to fundamental rights.

2) The EP, which obtained an equal footing with the Council in the legislative dossiers under the AFSJ as a consequence of the entry into force of the Lisbon Treaty, has taken fundamental rights most seriously when drafting EU legislation. FRA and EDPS legal opinions have often found their way to the legislative process through the EP positions, bringing considerable added value to the legal instruments concerned.

3) The biggest gap in the *ex ante* review of fundamental rights can be found in the Council. Despite some positive developments the Council, it is still lagging behind.

4) Taking the argumentation to the national level, it should be noted that Member States' *ex ante* review bodies have been, in some cases, very effective in detecting fundamental right problems and dealing with them.

5) *Ex ante* review of fundamental rights has been significantly strengthened after the entry into force of the Lisbon Treaty. This change illustrates European constitutionalism in its pluralistic form, with many actors carrying out *ex ante* review at different levels of EU polity.

6) Proportionality has been a key concern in the preparation of many sensitive EU legal acts. Unfortunately, these concerns have not always made it through to a thorough consideration of the EU legislature, despite continuous attempts of i.a. FRA and EDPS.

7) Negative obligations, i.e. restrictions of fundamental rights, have been a predominant feature in the handling of fundamental rights in the EU law-making process.

8) In order to improve legislative actions related to negative obligations, an EU test for permissible limitations to fundamental rights based on Article

52(1) of the EUCFR and building on recent case law of the CJEU should be fully utilized.

9) Positive obligations in the EU legislative process have become more important, but are still over-shadowed by the negative obligations. The consistent implementation of positive obligations has not yet been achieved, but steps have been taken in the right direction.

10) Co-operation in the review of fundamental rights should be reinforced, not only among institutions involved in *ex ante* review but also between them and the CJEU. The CJEU is increasingly providing guidance to the EU legislature on how to overcome fundamental rights problems. A good starting point for a deeper co-operation can be found in the AFSJ legislative files, most notably in dossiers related to anti-terrorism and data protection.

The common thread in these mainly positive developments is the impact of the Charter. It has been a major driver in involving EU institutions and other stakeholders in the *ex ante* review of fundamental rights in terms of the process. Additionally, the Charter has been important content-wise in providing a substantive yardstick for review. Yet there is still a lot of potential in the Charter to be unleashed.

2. The obliging Charter and institutional implications within the frame of constitutional pluralism

Fundamental rights aspects of EU legislative proposals will be taken into account in several phases of the law-making process. Furthermore, there are many legal technical practices in carrying out the review. This remains insufficient, however, even though the initiative of better regulation and especially the Charter have provided extremely positive inputs to the *ex ante* review. We still cannot speak about an effective mainstreaming of fundamental rights as *ex ante* review continues to be somewhat fragmented in its scale and depth with regard to different EU policy sectors. The biggest gap that remains is the omission of initiatives put forward by EU Member States under co-operation in police and judicial matters. The institutions of the EU should collaborate further to bridge this gap. What should be done next is to think about the best practices in dealing with fundamental rights aspects in the EU legislative process in a manner that duly takes into account the specific features of the EU as a supranational organization that produces legislation.

From the results of the analysis, we can see that strengthening *ex ante* control mechanisms at all levels of the EU legislative process would provide considerable advantages. Placing more efforts on preparatory phase control would make it less probable that an EU legal instrument would be annulled by the CJEU after its adoption for being in breach with fundamental rights. With a stronger preparatory phase control it could be possible to ease the current workload of the CJEU by providing better quality of legislation and more thorough consideration of fundamental rights aspects of draft statutory texts.

If we then think about the national level and the protection of fundamental rights guaranteed by the national legal system and its relation to the EU fundamental rights system, we can note that a reinforced *ex ante* control at national level would decrease tension between national and EU law.[936]

A stronger preview favourably affects an individual's position because it can be foreseen that with more focus on preparatory phase of fundamental rights related legislation, an individual's rights would be taken more thoroughly into account as a whole. Fundamental rights oriented preview can thus contribute positively to the consideration of the impact of the proposed EU legal instrument on an individual's rights springing from the national, EU and ECHR legal systems.

The EU should strive for less, but better regulation. It should be accepted that putting more efforts to analysing fundamental rights aspects of draft EU legislation may prolong decision-making process on the text. Niilo Jääskinen makes the following very correct observations on the characteristics of EU legislation and the decision-making that gives rise to it. He considers that two antithetic principles, the objective-rational preparation and negotiation-culture reflecting national interests, are combined more easily in the EU than in the nation-state. EU decision-making lacks the rationality ensuing from parliamentarism that in the nation-states establishes the political line to steer legislative projects all the way to political decision-making. Especially within the Council and the EP, the rationality possibly exercised by the Commission in the preparation encounters the decision-making that is characterized mainly by negotiation culture and compromising with no common values or political outsets in the background.[937] Sometimes there may be a danger that these fundamental rights aspects remain insufficiently addressed due to the need to break a political deadlock in some EU dossier. It may well happen that in these kinds of cases, for instance, fundamental rights issues may appear only at the point of national implementation of EU law, such as adopting a parliamentary act that amends current national legislation in order to achieve harmony with an EU directive. Finding a way out of a diplomatic impassé may sometimes have its consequences.

Ex ante review at the EU level was disregarded for many years. *Ex ante* review has mainly taken place in the form of internal procedures of the Commission which is probably not the best solution seen from the perspective of openness and transparency. However, there have been positive developments overall under the auspices of the better regulation initiative that has broken through to the EU legislation. Nevertheless, the Charter is a much more important factor in strengthening *ex ante* review across the wide spectrum of EU institutions. It is binding on EU institutions also when

[936] For example the cases of Data Retention Directive and European Arrest Warrant indicate that with more focus on *ex ante* review of fundamental rights of the implementation phase problems could have been at least partially avoided.

[937] Jääskinen, p. 46. According to Jääskinen these general features of the decision-making reflect in the legal-technical, linguistic and systematic quality of the EU legislation. Moreover, it is not possible to reconstruct the will of the legislator and this also makes the *travaux préparatoires* a less useful source in the application of law.

legislating and it therefore obliges the institutions to pay more attention to fundamental rights in the legislative process.

The Council has somewhat enhanced its performance in *ex ante* review of fundamental rights but this remains insufficient. The Council can be regarded as having been the loser in terms of competence with regard to law-making in the AFSJ. The Europeanisation of this fundamental right sensitive policy field has probably led to the situation in which the Council has opted in for resorting to the CJEU and strong judicial review as powers slip towards the Commission and particularly to the EP. The Council has resorted to strong *ex post* review with anticipation of preserving the traditional third pillar policy driven by the Member States. In this sense, Hirschl's theory is very valid and catching. The Council has not found it pressing enough to put an emphasis on the Council proceedings even in cases where the original proposal has changed significantly. Another problem is that, in some cases, even very effective national level mechanisms carrying out *ex ante* review fail to deliver their message to the Council proceedings. Furthermore, if the message reaches the Council, it is pushed aside by the momentum to go forward with political decisions.

I welcome the recent developments within the EP to exercise preview of fundamental rights in the draft EU legislation. Great leaps forward have been taken in promoting fundamental rights in legal texts and preventing serious breaches of fundamental rights in the pursuit of limiting them in the course of the legislative process. FRA and EDPS still have not been utilized enough as expert bodies in the preview but we can see recent improvements in this. Very often, the EP has taken the positions and suggestions of the FRA and EDPS seriously.

The EU has throughout its history been a legal system strongly dependent on the ultimate authority of the CJEU in constitutional review. The EU is nonetheless taking steps towards increasing the role of the EU legislature in constitutional review. It may be premature to talk about a strong hybrid model of constitutional review but this appears to be the direction we are moving in. The direction which was detected by Gardbaum in his new commonwealth model is not necessarily the only one and there may be a certain kind of reverse flow towards increased role and impact of the legislature in constitutional review. Why have we witnessed this development? The main reason can be found in the strengthening of supranational and Union elements of the EU legislative process.[938] The increased competence of the EP is a practical expression of this. The same goes for the status of the Charter. Especially the impact of the EUCFR on the EU legislative process has been much greater than generally perceived. The fragmentation and diversification of the EU legislature as a consequence of consecutive enlargements and changes in the competences of the institutions in fundamental right sensitive legislation has simply increased the pressure towards the legislative phase in order to

[938] In this connection especially important are different postures of transnational law. See Jackson Vicki C.: Constitutional Engagement in a Transnational Era. Oxford University Press. New York 2010, pp. 8-9.

establish a constitutionally coherent legal framework. Various fundamental right problems in the implementation phase of the EU legislation and strict reactions of the CJEU on the validity of some pieces of EU legislation that are clearly in breach with fundamental rights are concrete examples of this pressure.

With the expansion or sprawl of review of compliance with fundamental rights at different levels a justified question is: are juridics in fact running the legislative process? An answer to this question can be found somewhere in the margins of democracy and fundamental rights. I would not consider that the legal aspect has a predominant role in law-making. One should of course acknowledge that there has to be a strong part to be played by legal considerations when entering, for example, such a fundamental right-driven policy area, as the AFSJ. I would in fact rather deem various methods of *ex ante* review to be in line with and to strengthen democratic dimensions of policy-making, just to mention the EP, the Council and national parliaments. It is a different question if a certain extent of democratic deficit exists. Having said this, it should be recognized that we need to utilize all methods available in the review, be they *ex ante* or *ex post*, or may they spring from democratic or juristocratic control. Let us not forget that coordination is the key in this sense.

A question that can be raised at this point is whether binding EU legislation underscoring the need for comprehensive impact assessments would be feasible. I think that we do not need any more "empty legislation" that can be regarded as gesture politics in promoting *ex ante* review. What we need instead is deeper understanding of fundamental rights aspects of legal texts in the preparation of EU legislation. In the longer term, there is neither need for more codes of conduct nor hollow legal obligations. An alternative solution is to establish adequate structures for impact assessments in a coordinated way. Additionally, fundamental rights issues deserve more attention especially from the people drafting horizontal legislation. Further educational measures would be necessary for drafters in order to achieve the objective of being sensitive towards fundamental rights aspects of EU legislation. Even more important would be to make the preparation process on EU legislation more sensitive towards fundamental rights especially in cases that do not seem to be touching upon fundamental rights directly, at first glance. What is needed at the level of the EU is a brand new culture of observance of fundamental rights at the preparatory phases of the legislative process. Seeds for this culture have probably been sown thanks to the continuously growing importance of the Charter but it is obvious that this is a long process for all the institutions of the EU.

What is quite challenging for this work in the future is the complexity of different legal and also political cultures involved in the EU law-making and policy-making processes. There are currently 28 EU Member States that have their own specific social, political, legal and economic traditions and institutions. Additionally, these countries also have their own notions of fundamental rights and fundamental values of the EU as the experience

of value discussion in the margins of the failed Constitutional Treaty showed.

A practical problem that may also appear as a consequence of the great number of actors in the EU decision-making process is the tendency to prepare decisions as far as possible in informal negotiations carried out in smaller groups of countries having a special interest on the dossier concerned. Lobbying and bilateral as well as multilateral talks are of course not new in the EU framework, but it is a reality that, for example, practical agreeing upon more complex and difficult issues in the Council working groups is more difficult and time-consuming than it once was. It is therefore very natural that decision-making will be quite automatically steered to more informal channels. The most challenging task is how to integrate continued observance of fundamental rights aspects of texts in this informal type of interaction.[939]

Regarding the position of a national parliament in EU affairs, Carol Harlow very correctly notes that "the degree of control depends essentially on two variables: the balance of power inside the national system between parliament and government; and the degree of parliamentary control over the conduct of foreign affairs, in effect an aspect of the first, larger question."[940] As Norton observes we are facing a dilemma. It is obvious that national parliaments should play a more significant role in EU affairs but until now there is no agreement on which form this evolution should take.[941] It is important, however, that national parliaments will be kept informed of the great variety of EU affairs. More effective information flow concerning decision-making processes at various levels of the EU is key for enabling all relevant stakeholders to present their views on EU instruments, be they legally binding or non-binding.

Regarding evaluation of the current state of affairs, one can notice that in the field of fundamental rights the present balance of power between spheres of national and European legal systems remains. In today's climate, it is possible to note that Member States are all the more keen on preserving the current *status quo*. In spite of Member States' reluctance to provide the EU with more competence in the field of fundamental rights, it is obvious that the European fundamental rights system has penetrated into the traditional sphere of the national fundamental rights system. This can be seen as a one-way movement with the international legal system

[939] This is particularly interesting for the following reasons related to practical conduct of international negotiations. First, when faced with a part of a text on which countries indicate to have severe problems, the Presidency usually urges these countries or institutions to engage in small group negotiations. If this will not help, the issue can be taken to a higher political level which means the Coreper, Council meeting at the ministerial level or even the European Council. If a deal will be brokered in one of these fora between the interested stakeholders in the decision-making process it is unlikely that the text will be opened. This is exactly the point where one has to beware of neglecting fundamental rights aspects of draft EU legislation.

[940] Harlow Carol: Accountability in the European Union. Oxford University Press. Oxford 2002, p. 85.

[941] Norton, p. 221. In my opinion, reinforcement of national parliaments' role in the EU decision-making process may undermine the role of the EP in the legislative process and thus indirectly strengthen intergovernmental nature of the EU.

providing inputs to the national legal system that undertakes to adopt and implement them. Nevertheless, an evolution, not a revolution, in this field can be foreseen as Member States stick to their interpretation of Member States having the ultimate authority, with some considerable restrictions though, in the field of fundamental rights. In my opinion it is thus difficult to identify some kind of *Primat* of the international legal system in a traditional sense, especially if we deal with the ultimate question of competence-competence. Despite this, in the field of fundamental rights supranational elements can be expected to gain more ground.[942]

Kaarlo Tuori argues that political constitutionalization should be seen as a reaction to the preceding economic and juridical constitutionalization. For him, political constitutionalization contains claims of democracy and democratic legitimacy. It should be noted, however, that the issue is not transnationalization (of legal order and polity, KF) but transnationalization with a promise of democratization.[943] The AFSJ, together with empowerment of the EP and national parliaments, can be seen within the frame of this kind of political constitutionalization with a considerable inherent aspect of democracy. This requires that the next steps to be taken should be very concrete actions in strengthening *ex ante* review mechanisms. For example the FRA could be given a more effective role in *ex ante* review functions by extending its mandate and allocating it adequate resources to fulfil its increased tasks. In tandem with these considerations, EU institutions should also examine whether the FRA should be given a more significant role with issues related to Articles 6 and 7 of the TEU. Another – more radical – option might be to establish a European level quasi-judicial body dealing with *ex ante* review of draft EU legislation. At this point one could take stock of the work of the strengthened FRA and possibly build further on it. This would enable a partial move away from the Commission's internal procedures oriented formula of *ex ante* review towards a more transparent and credible system of *ex ante* review of fundamental rights. Making this idea real could be, however, a difficult task.

With the change in the constitutional framework of the EU the empowerment of the EP in the AFSJ has mainly happened at the expense of the Council. The right of initiative also tends to move towards the Commission. Apparently, this will have strong impact at the Member State level. Despite this, the Council seems to have approved the strengthened role of the FRA in the evaluation of fundamental right aspects of legislative texts. This is of course due to the expertise and neutrality of the Agency but it may also be one way of balancing especially the ever-growing powers and political aspiration

[942] Another perception of the consitutionalization process of the EU has been presented by de Búrca and Aschenbrenner. They argue from a Kelsenian perspective that "a change in the *Grundnorm* would imply a move away from the international legal order in which the Member States are the masters of the Treaties, towards the recognition of a new *pouvoir constituant*, and giving a rise to a self-sustaining constitution and a genuinely autonomous legal order". See de Búrca Gráinne and Aschenbrenner Beatrix: European Constitutionalism and the Charter. In Peers Steve and Ward Angela (eds.): The EU Charter of Fundamental Rights. Politics, Law and Policy. Oxford and Portland, Oregon 2004. p. 12.

[943] Tuori Kaarlo: The Many Constitutions of Europe. In Tuori Kaarlo and Sankari Suvi (eds.): The Many Constitutions of Europe. Ashgate Publishing Limited. Farnham 2010. p. 21.

of the EP in this particularly sensitive field. For the *ex ante* control of fundamental rights we can notice that no great improvements have taken place although the need for impact assessments has been kept quite high on the agenda. The Council record in this sense is ameliorating. We should nevertheless recognize that the first part of the control from the Council comes from the level of Member States that provides inputs to the Council *ex ante* control. This control springs from national preparation mechanisms of the Member States and often national parliaments are involved in this. The second part of the control comes from the institutionalized bodies of the Council, namely the Council Secretariat and notably the Legal Service of the Council.

Practical expertise can also be found at the Member State level: However, sometimes this becomes intertwined with political objectives of the Member States. Nevertheless, we should not omit the fact that the Member State level is more closely involved in the implementation of EU instruments and is thus the practical domain where realization of fundamental rights takes place. Council Secretariat and particularly Council Legal Service are able and objective bodies, but sometimes maybe too keen to declare, in the face of challenge cast by the Member States, some legal issue as a political question. This may pave the way for political compromise that is badly needed in the current heterogeneous EU, but this may also have unexpected legal consequences and may prove detrimental when it comes to legal certainty.

Generally speaking, *ex ante* review of fundamental rights in the law-making process has been highlighted at the level of political statements, but concrete measures in the Council have been scarce and ineffective. Even though the Secretariat delivers good work, the practical commitment of the Member States in the process has not been strong enough. It is also the case that often the input for constitutionally important elements of pieces of legislation comes too late, when the pieces of the legislative puzzle are already finding their way to the right slots and when the final compromise is about to be approved. Even still, transparency could be further improved within the Council.

In the previous chapters we have covered *ex ante* review that takes place within the institutions. The real valley of death continues to be the phase when substantial changes are made to the Commission original proposals.[944] The question remains: who should carry out the impact assessment and how should it be done? This should be the institutions' common responsibility. I nevertheless strongly believe that FRA should have a stronger role in the legislative phase with regard to fundamental rights. The role of the national *ex ante* review systems, such as national parliaments, is also crucial in assessing the compatibility of draft legislation with national, EU, and international human and fundamental rights. The Commission, the Council and the EP

[944] Although the right of initiative is still, to some extent, shared with Member States under the AFSJ, the Europeanization of the AFSJ will probably steer the methods of launching EU legislation in this field towards the Commission.

should take their responsibility in *ex ante* review more thoroughly into account.[945]

3. De lege ferenda conclusions

Although the judicial activity by the CJEU has been, and continues to be, the most significant contributor to the development of fundamental rights, especially as general principles of law, the legislative action to which also *ex ante* review is interlinked has gained more ground during the last decade. In the *ex ante* review it is often difficult to find a panacea but in the following I have identified some possible solutions. We should bear in mind that democratic institutions can provide, from the point of view of legitimacy of the whole system, an essential counterweight for review springing from case-by-case review exercised by independent courts.[946] In today's EU, this applies to EP and the Council with the first institution representing a direct form of democracy and the latter one indirect, although it may be an even stronger form of democracy. It also involves the national parliaments in a more robust way.

I strongly believe that *ex ante* review of fundamental rights has to be strengthened, especially because ordinary legislative procedure has become a general rule, also in the fundamental right sensitive AFSJ. The EP is now involved in the AFSJ as a co-legislator and qualified majority decisions will be made in issues with utmost constitutional importance and a great deal of potential for constitutional collisions. AFSJ also contains initiatives launched by groups of Member States and in these initiatives impact assessments are non-existent. With these remarks, it is easy to conclude that a reinforced *ex ante* review is very important for normative coherence of fundamental rights in the AFSJ legal instruments. In these initiatives an obligatory consultation of FRA could be envisaged but this would of course require a change in the Treaty.

There is a danger of using fundamental rights as a political emergency break to halt unpopular legislative initiatives. This is because the EU legislative process is always a political game with conflicting political interests. It cannot therefore be ruled out that the reinforced EUCFR and its substantive fundamental rights could be used as barriers to stall law-making processes and even excluding them from the political agenda. In this case, we may even encounter political arguments raising some fundamental right related problems in order to hinder the promotion of fundamental rights. In this kind of case, the policy is clearly getting out of bounds and the proportionality should step into this phase so that fundamental rights can be promoted. The evidence does not seem to support this argument. In light of the selected cases, we can see that *ex ante* review has mainly taken place during the legislative

[945] The European Council is clearly not meant for *ex ante* review but it functions as the last and highest political resort, should serious fundamental rights concerns arise in the context of the legislative process.

[946] See Lavapuro, p. 238. Lavapuro refers in this context to the CLC of the Finnish Parliament.

process and not caused delays for the overall legislative process. For example, the FRA has prepared it on the legislative proposals when the discussion on these legal instruments has been on-going. Quite naturally, it has taken some time to consider the contributions of the FRA and possible other stakeholders, such as the EDPS, but this has not led to delays. If we consider the "costs" and "benefits" of the *ex ante* processes we can easily come to the conclusion that benefits outnumber and outweigh the costs. It is the quality of the legal text that is the winner of this process. By taking fundamental rights comprehensively into account already in the pre-adoption phase of legislation, we can avoid thorny problems in the later phases of the legal cycle, most importantly in the courts. If a comprehensive *ex ante* review integrated into the law-making process takes a couple of months more time, but simultaneously considerably ameliorates the quality of the legal text it is worth it.

I think that FRA would make a significant contribution to the *ex ante* review if it was to be developed to have a greater say and competence in legislative proposals, including limitation of fundamental rights. When curtailing these rights, the FRA could, for example, have a bigger role in assessing the proportionality of the proposal as well fulfilment of requirements of limiting fundamental rights. This would require a change in the Agency regulation and it might be confronted with negative positions from some Member States. It could also be the case that the CJEU would not see this change favourably due to the eventuality of partial crumbling of the CJEU competence and the shift away from *ex post* review towards a stronger *ex ante* review mechanism. A solution might be that the revision of the FRA would include robust safeguards for at least consultation of the Agency when limiting fundamental rights is at stake, even if the position of the FRA would not have a binding effect on the EU legislature, which would be difficult to carry out in the current legislative framework. Another practical option to strengthen consultation and hence *ex ante* review of the Agency would be that the institutions would adopt an inter-institutional agreement on the need to thoroughly consult FRA in fundamental rights-sensitive EU dossiers. Alternatively, some kind of short-term guidelines-solution might reinforce the FRA role in the legislative process. Even if this would be a clear soft-law solution, it could serve the purpose of a code of conduct for the EU legislator and in the long run it might become a real operational guideline. Even a step by step approach would be welcome if a great leap forward, the least probable option, would not be doable. By the means of a mandatory consultation of the FRA, it could develop into a rather independent and neutral *ex ante* review mechanism with a focus on limiting fundamental rights. This would offer potentially big advantages for the realization of individuals' rights and by doing this, often lengthy procedures in the back end of the legal cycle could be avoided.

For improvement in how the EU *ex ante* review mechanism functions, one could consider introducing a fundamental rights early warning mechanism. With this I do not simply mean the mandatory consultation of FRA in case the piece of legislation is given under certain Treaty Articles, but the obligation of the FRA and maybe the EDPS, too, to examine fundamental right aspects of those proposals which are given out under certain Treaty Articles. This would

create two categories of legislative proposals, on the one hand those falling under the mandatory consultation obligation, and on the other hand those not requiring a consultation but would simply alert the FRA of the eventuality of potential fundamental right problems. In order to establish this kind of two-tier mechanism, one would either need to change primary or secondary EU law. This, especially the first option, may however be far from reality due to the difficulty of amending the Treaty and even secondary legislation, such as the Agency Regulation governing the competences and tasks of the FRA. Another less complicated legal solution could be to proceed on a basis of an inter-institutional agreement on the need to consult the FRA on fundamental rights sensitive files. In case this would not work out there would be the possibility of adopting some EU soft-law, such as resolutions or guidelines, or some political decisions such as Council conclusions in this regard.

The resources of the Agency are still insufficient to cover various activities within its remit in an effective way. It is equally important to note that the FRA has not been operational for many years, yet and in the life of EU Agencies it always takes some time to get things up and running. This has reflected also on the work of the Agency on fundamental rights. Despite this, we can expect the widening of the role and competence of the FRA as a consequence of upcoming changes in legislation. One of the *de lege ferenda* conclusions that could ameliorate the situation is the following: One should have a mandatory consultation of the FRA in fundamental right sensitive legislative files. Of course the current legal framework already now seeks to involve FRA but this aspect could be strengthened. A counter-argument for this may be that this would significantly slow down law-making in the EU. I would however argue that this obligation could be restricted to legislative proposals under only certain AFSJ Articles of the Treaty[947] and one could also link to the process deadlines for different actors to conclude their processes.[948] We should also not put concerns about duration before the quality of legislation, especially when fundamental rights are at stake. One could even consider giving the FRA the right to halt the process if fundamental rights are not taken adequately into account, perhaps at least for a given period of time. I can however see critics raising possible problems related to the institutional balance and in particular the relationship of the FRA and the CJEU. It is also clear that the EU legislator cannot introduce fundamental changes in the regime with the means of secondary EU law, but Treaties would probably need to be amended. This is not a popular theme in today's EU with memories of turbulent phases of recent Treaty reforms in mind.

It is fair to say that probably the thoughts presented here may give rise to tension between the legislative institutions and the CJEU. Surely enough, the

[947] This procedure could, for instance, be applied to legislative proposals launched by a group of Member States under the AFSJ.

[948] We should bear in mind that Recital 32 of the Agency Regulation sets out that "Nothing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters". After the entry into force of the Lisbon Treaty and the subsequent constitutional changes made to the competences of EU institutions in the AFSJ it is apparent that FRA can no longer be excluded from activities in the AFSJ, including *ex ante* review of EU legislation under the AFSJ.

CJEU will remain as the ultimate interpreter of the EU law and none of the institutions wants to contest the authority of the court. We should, however, further improve the *ex ante* control of draft EU legal acts in the law-making process. I am certain that there is room for improvement. In the center of all this activity we should place the Charter. It is the Charter that makes the difference compared with previous years. The position of fundamental rights was strong already before the Lisbon Treaty but I would argue that also for the legislator it is in practical terms easier to ensure the compliance with the rights set out in the Charter than if the fundamental rights were "scattered" in the ECHR and the of course the interpretation practice of both the ECtHR and the CJEU.

In order to take fundamental rights enshrined in the EUCFR more effectively into account I would also encourage the Commission – and in some cases under the AFSJ, a group of Member States – to insert some fundamental rights safeguard clauses in draft legislative proposal texts. This is not concerning standard clauses that re-inserted time and time again using the same formula in all legal texts, but tailor-made solutions that could stem from impact assessments on fundamental rights aspects of legislative proposals. It is also unnecessary in the legal act to deal with the whole list of fundamental rights under the Charter but it would be useful to elaborate, for example, in the recitals the proposal's relation to substantial fundamental rights closely bound with the proposal. Of course, this does not take away the legislator's obligation to adopt a legal text, whose Articles are totally in line with the EUCFR.

For the Council, I would recommend speeding up the better regulation initiative and giving more impetus to integrating fundamental right considerations in these processes. The Council should furthermore take the full use of the expertise of particularly the FRA when drafting Council positions for legal texts. I also urge the Council to further develop impact assessment processes when it makes considerable fundamental rights relevant changes to the Commission's original proposals. Otherwise, the Council will remain the lame duck in the *ex ante* review of fundamental rights.

When it comes to the EP I recommend it to continue its efforts to address fundamental rights in the legal texts and to provide amendments strengthening the fundamental rights dimension of the legal texts. It can well be argued that the EP was able to stop the inertia in the *ex ante* review at the EU level and set things into motion.[949]

Regarding FRA, I encourage it to continue producing concrete drafting proposals either on its own initiative or at the request of institutions in order to solve fundamental right related problems. Even if the FRA is still in its consolidation phase and tries to find its way and place also in the legislative process, we can see clear indications of the reinforcement of its role. The EP

[949] A quite recent example of the high level of ambition of the EP in the field of fundamental rights can be found in European Parliament Resolution of 2 April 2014 on the mid-term review of the Stockholm Programme. 2013/2024(INI), P7_TA(2014)0276.

has provided useful support for the Agency in providing it with a practical possibility to do some double-checking of draft legal instruments. This has taken the EU *ex ante* review forward.

As a conclusion in terms of substance of the cases discussed, we can see that limiting fundamental rights has been the main source of discussion in the related law-making procedures while promoting fundamental rights has not received similar attention. There are of course differences between EU institutions in this, but in light of the evidence of this study the balance seems to be clearly in favour of negative obligations at the cost of positive obligations. Another key recommendation would be to use and apply the test of permissible limitations to fundamental rights. A possible explanation is that in light of its stronger role in the AFSJ, the Commission has had a mission of carrying out stronger policies in this field. The pursuit of strong AFSJ policies has sometimes caused pressure to limit fundamental rights and, as we have seen in the case studies, this has also given rise to overstepping proportionality considerations, an essential element to be respected in the restriction. I believe that there is room for improvement, especially in the positive obligations. Similarly, the Commission could aim at stronger AFSJ policies by proposing positive obligations and not simply by concentrating on the limitations.

A shortcoming in the EU legislative process in terms of *ex ante* review of fundamental rights is the visible absence of proportionality considerations at the later stage of the law-making process. The discussion on proportionality is usually focused in the early phase proceedings, such as dealing with legal basis. As has been stated before, the legal texts can change significantly in the course of the process and therefore my recommendation would be to have proportionality in mind all the way throughout the legislative route. It would be recommendable to have some kind of stocktaking at a later stage of the process and ask the question: does the legal text in its current form comply with the principle of proportionality? If we take this down to the level of practice this check could be made by a simple question of the Council working group chairman or the EP committee chair at the final stages of the handling. Proportionality should be the key driver in avoiding and mitigating negative impacts of legislation on fundamental rights. The CJEU took lately a firm stand on EU data protection in the recent landmark ruling in Digital Rights Ireland Ltd. and Others declaring the Data Retention Directive null and void.[950] The Court found that the Directive was against fundamental rights of respect for private life and the right to data protection as guaranteed in the EUCFR, which makes the case remarkable. The Directive was considered

[950] Joined cases C-293/12 and C-594/12 Digital Rights Ireland Ltd and Others. In paragraph 64 the Court held "Furthermore, that (data retention, KF) period is set between a minimum of 6 months and maximum of 24 months, but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary." The Court continued in paragraph 65 "it follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is necessary".

invalid as a result of an infringement of a fundamental right, which has not often been the case.

In addition to this strong fundamental right argumentation the Court also interestingly concluded that the EU legislature by adoption of the Directive exceeded the limits imposed by compliance with the principle of proportionality.[951] The Court used Article 52(1) of the Charter and the related case-law as a yardstick when analyzing the case. This Court verdict and the ensuing case Schrems might really be a new start for the EU taking fundamental rights more seriously in the legislative work. The Court has now shown that fundamental rights count and should count even more in the law-making process of the EU. It will therefore be interesting to see what kind of impact this will have on *ex ante* review of fundamental rights. One of the firmest conclusions of this study is that proportionality is the key aspect in the *ex ante* review of fundamental rights in the EU legislative process. The case of Data Retention Directive demonstrates how important the role of the CJEU still is in ensuring the observance of fundamental rights. Despite all the positive developments in the EU *ex ante* review a further change would be needed so that the CJEU would not have to come to the rescue of the EU legislator.

In order to avoid excess limitations to fundamental rights in the EU legislative process Article 52(1) of the Charter should be central to EU legislative activities. If limitation of fundamental rights occurs in draft legislation, the participating institutions in the law-making should apply this provision of the Charter and reflecting on case law utilize a European test of permissible limitations. Very good guidelines can be found in the above-mentioned CJEU cases. The legislature should not consider case-law of the court as a separate parcel belonging to the back-end of legal cycle. It is not forbidden to go further in considering what kind of directions to follow can be found in the CJEU argumentation in legislative cases, which have gone wrong.

A fruitful soil for the application of this test can be found especially in the policy Area of Freedom, Security and Justice. As has been demonstrated in the previously-discussed cases, very often the fundamental right problems have emerged in the context of legal dossiers related to data protection and anti-terrorism measures. In the wake of the European economic crisis, the fundamental right implications of the economic crisis related legislation should be duly addressed. Whenever discussing fundamental rights we should not only deal with the limitation of fundamental rights. The EU legislature should moreover attach increasing weight in its legal texts on its positive obligations – the promotion of fundamental rights. It is exactly the promotional aspect that has been lacking, or at least lagging behind, in the EU fundamental rights discussion. Bold moves by the EU legislature are hence required towards positive obligations in light of the Charter.

As it is the institutions that try to strike final deals on pieces of EU legislation, fundamental rights should be kept in play. In these cases, a big

[951] C-293/12, paragraph 69.

responsibility falls on legal services of the institutions both in Coreper when the Council prepares its negotiating mandate, and in the EP when the rapporteur seeks mandate from especially the responsible parliamentary committee. I think that it would be appropriate to ask if some kind of alarm bell procedure could be developed for trialogues if fundamental rights are compromised by the pursuit of a political compromise. This could nevertheless be very difficult, mainly because this kind of procedure could be used for political purposes to block the decision-making. It could therefore be worth considering to establish some kind of independent panel through which fundamental right sensitive EU dossiers should go when a final compromise has been found. This should be a very technical body and it should be as independent as possible from political pressures. A potential danger in this model would be the position the CJEU who has the ultimate right to carry out judicial review of secondary EU law with the Treaties. This way to go could probably also awaken resistance from the part of the co-legislators probably arguing that this limits the legislative functions and prerogatives of the EU legislator.

The information and data gathered during this research journey indicates that we have a good reason to believe that traditional neo-functionalist theories can have their merits also when analysing the impact of fundamental rights on the EU legislative process.[952] In the course of the strengthening of the internal fundamental rights dimension of the EU, we can detect a spill-over of Charter-based fundamental rights into sectorial pieces of EU legislation. In order to encourage the positive impact of this spill-over effect, we need *ex ante* review of fundamental rights. Similarly, and even more so, we need the *ex ante* review to identify fundamental right related problems in draft EU legislation.

Finally, the Commission, the Council and the EP should increasingly put efforts and resources to training and education in fundamental rights issues. This is especially important for officials dealing with sectorial policies, to whose portfolio fundamental right issues do not at first glance seem to belong. In any case, fundamental rights problems may emerge in rather unexpected places. More importantly, in the EU law the devil is often in details. In order to avoid problems related to fundamental rights and to spur realization of such rights, due attention should be paid to proportionality, utilization of European test of permissible limitations and promoting fundamental rights when drafting EU law.

4. Perfect remedy - a strengthened institutional co-operation in ex ante review

The importance of fundamental rights and *ex ante* review has strengthened in the EU legislative process over the years. This is very much due to the great

[952] Generally, on the issue of neo-functionalism and spill-over in the early European integration process, see Haas Ernst B.: Uniting of Europe: political, social, and economic forces 1950-1957. UMI books. Ann Arbor, Michigan 1996.

impact of the Charter on the EU law-making. It also has connotations with European constitutionalism and constitutional pluralism. According to Tuori "legal pluralism enters European legal space together with transnational law. Diversity turns into pluralism when state law's exclusive jurisdiction is challenged".[953] This is exactly what has happened in the field of fundamental rights. Furthermore, a multi-level system of European law needs an adequate degree of flexibility and adaptability, to maintain its basic unity in respect of plurality.[954] In this multi-level framework an important dimension of fundamental right protection is the interplay of *ex ante* and *ex post* review. One can try to visualize this inter-relationship by examining for example the weight of CJEU's rulings with regard to *ex ante* review and the weight of the references of the EU legislature to the relevant court rulings.

First, I would say that probably the most important series of CJEU rulings with a paramount importance with regard to *ex ante* review consists of cases Schecke, Test Achats, Digital Rights Ireland and Schrems discussed in previous parts of this study. Moreover, the cases Pfizer Animal Health, Spain v Council, Kücükdeveci, Afton Chemical, Chatzi, Åkerberg Fransson and El Dridi also have interesting interlinkages with *ex ante* review.[955] Review has been touched upon in many judgments, but this is not the case specifically with *ex ante* review. When the CJEU has annulled a piece of secondary legislation, for example on the grounds of proportionality, it often has simply declared the act null and void and not given much guidance to the legislature regarding how to remedy the situation in the ensuing legislative process in terms of the *ex ante* review.

We have however witnessed a change in this regard in cases Digital Rights Ireland and Schrems. The Court surely is not against data retention as such, but had some major concerns how relevant EU legislation tackles the issue and how key provisions are formulated. This can be seen in the argumentation of the judgments where the court is providing in an increasing manner guidance to the EU legislature how to overcome fundamental rights-based problems in the legal acts. This guidance is not direct but it is certainly there.

Second, so far the legislature has for very obvious reasons been more enthusiastic in referring to CJEU case law with regard to the review of fundamental rights. This can be seen for example in explanatory memoranda of legislative proposals where justifications for legislation are given. Of course, case law is essential in these deliberations. I could imagine that recent judgments of CJEU have contributed to a stronger acknowledgement of fundamental rights in the preparation of EU legislation. In this way, the dialogue has been stronger and the EU legislature has offered greater consideration to the positions of the CJEU in the legislative phase. Especially proportionality has been raised higher on the agenda as a consequence of the case Digital Rights Ireland. References to the Court's case law have been made

[953] Tuori 2015, p. 86.

[954] Moccia Luigi: The Making of European Private Law: Why, How, What, Who. Sellier European Law Publishers. Munich 2015, p. 61.

[955] See T-13/99 Pfizer Animal Health, C-310/04 Spain v Council, C-555/07 Kücükdeveci, C-343/09 Afton Chemical, C-149/10 Chatzi, C-617/10 Åkerberg Fransson and C-61/11 El Dridi.

in many legislative exercises and the importance of the CJEU has been highlighted from the angle of legislative process in many EU policy documents, as shown in the discussion on *ex ante* review carried out by the EU institutions involved in EU law-making.

In the pages of this dissertation, the evolution of positions of different EU institutions has also been discussed. Nevertheless, *ex ante* review is not only a power-related game with potential winners and losers but also a framework for true co-operation for institutions which take fundamental rights seriously. Fundamental rights-based review is in the center of this activity. In fact, it is possible to see signs of a deeper co-operation between the legislature and the CJEU in the field of *ex ante* review. This is very much due to the impact of the Charter. The interplay of different EU institutions and other actors involved in *ex ante* review of fundamental rights in the EU legislative process also manifests the growing importance of European constitutional pluralism. In tandem, it reflects intermediary theories of constitutional review as presented by Gardbaum. The mutual consideration of EU institutions has developed significantly, despite the fact that CJEU still is, and should continue to be, the driving force for the review of fundamental rights. A strong judicial review complemented by a reinforced rights-based *ex ante* review can significantly contribute to achieving stronger fundamental rights in the EU. The Charter counts in the EU law-making and this holds the promise of making fundamental rights real.

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