

UPHOLDING THE RULE OF LAW IN THE EU: WHAT ROLE FOR THE EUFRA

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This chapter considers the extent to which the EU Fundamental Rights Agency is involved in the task of guaranteeing respect for the rule of law within the EU. Article 2 of the Treaty on European Union presents the rule of law both as a foundational value of the EU and one which is common to the EU and its Member States. However, a new and growing challenge is faced by the EU in this area in the form of systemic breakdown in the rule of law in some Member States. The FRA's mandate should be revised in order to enable it to play a more meaningful role in addressing so-called 'rule of law backsliding'. In addition, a systematic involvement of the FRA in the Commission's Rule of Law Framework and a formal role in the context of the Council's Annual Rule of Law Dialogue must be organised. It is to be hoped that the forthcoming review in 2019 of these two rule of law instruments, which were both adopted in 2014 and have seen shown their many shortcomings, will result in these changes regarding the FRA being considered and agreed.

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1. The Rule of Law as a Foundational and Common Value

In a celebrated judgment known as *Les Verts*, the European Court of Justice referred to what was then known as the European Community as a ‘Community based on the rule of law.’¹ This first judicial reference was followed by multiple references made to the rule of law in the EU’s founding treaties.² These references, largely symbolic at first, became more meaningful following a series of successive treaty amendments that made clear that the rule of law, as a constitutional principle of EU law, has both an internal and external dimension. In its internal dimension, Article 2 of the Treaty on European Union (TEU) presents the rule of law both as a foundational value of the EU and one which is common to the EU and its Member States. In another noteworthy change made in the 1990s, the TEU was amended to include a new provision whose aim was to empower the EU to adopt sanctions in a situation of a serious and persistent breach of the same values laid down in Article 2 TEU. This provision was subsequently amended to also provide for the additional option of preventively censuring a Member States in a situation where these values are under a serious threat of being breached.³ Finally, in its external dimension, the rule of law is presented both as a transversal foreign policy objective and an eligibility condition for any country wishing to join the EU.⁴

While the European Treaties do not offer a definition, not an unusual trait when compared to national constitutions that explicitly refer to the rule of law,⁵ the European Commission offered the view in 2014 that this principle entails compliance at the very least with the following six core principles:⁶

- 1) Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;
- 2) Legal certainty;
- 3) Prohibition of arbitrariness of the executive powers;
- 4) Independent and impartial courts;
- 5) Effective judicial review including respect for fundamental rights;
- 6) Equality before the law.

¹ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23.

² For further analysis, see L. Pech, ‘A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *European Constitutional Law Review* 359.

³ Article 7(1) TEU, the preventive arm of this provision, was activated for the first time ever against Poland in December 2017: see D. Kochenov, L. Pech and K Lane Scheppele, ‘The European Commission’s Activation of Article 7: Better Late than Never?’, *EU Law Analysis*, 23 December 2017: <http://eulawanalysis.blogspot.co.uk/2017/12/the-european-commissions-activation-of.html>

⁴ See respectively Article 21 TFEU and Article 49 TEU. For further analysis, see L. Pech ‘The EU as a Global ‘Rule of Law Promoter’: The Consistency and Effectiveness Challenges’ (2016) 14(1) *Europe-Asia Journal* 7.

⁵ See L. Pech, ‘The Rule of Law as a Constitutional Principle of the EU’, *NYU Jean Monnet Working Papers* no. 04/09: <https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/>

⁶ European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 Final, 11 March 2014, p. 4.

This list closely reflects the six elements previously identified by the Council of Europe's Venice Commission.⁷ And while the European Commission did accept that 'the precise content of the principles and standards stemming from the rule of law may vary at national level',⁸ it also emphasised, rightly in our view, that the six elements previously listed stem from the constitutional traditions common to most European legal systems and can be said to define the core meaning of the rule of law within the EU legal order. We would also agree with the Commission's view that the rule of law must be understood as a 'constitutional principle with both formal and substantive components' and one which is also 'intrinsically linked to respect for democracy and for fundamental rights.'⁹ Similarly, the Commission was correct to stress that one should not doubt 'the usefulness of addressing the rule of law as a practical legal concept' which must be considered 'a fundamental and common European standard to guide and constrain the exercise of democratic power'.¹⁰

This contribution will not further engage in definitional issues to focus instead on the extent to which the EU Fundamental Rights Agency (hereinafter: FRA) is involved in the task of guaranteeing respect for the rule of law within the EU. In light of the new and growing challenge faced by the EU in this area, which one may call 'rule of law backsliding',¹¹ our main submission is the FRA's mandate should be revised in order to enable it to play a more meaningful role on this front. In addition, a larger involvement of the FRA in the Commission's Rule of Law Framework and a formal role in the context of the Council's Annual Rule of Law Dialogue must be organised. This contribution will also briefly address the mechanism proposed by the European Parliament on 25 October 2016 and discuss possible additional changes, not requiring Treaty change, as far as the FRA is concerned.

2. The Rule of Law in the FRA's Mandate

According to the Regulation having established the FRA,¹² its primary objective is to provide the EU institutions, bodies, offices and agencies and its Member States, when implementing EU law, with assistance and expertise relating to fundamental rights.¹³ To do this, the FRA has been empowered to perform the following main tasks: collecting and analysing information and data; providing assistance and expertise; communicating and raising rights awareness. This led the FRA being described as an 'information agency' whose primary tasks lie therefore in the provision of information

⁷ *Report on the Rule of Law*, Study No 512/2009, 4 April 2011, para 41 et seq. See also Venice Commission, *Rule of law checklist*, Adopted by the Venice Commission at its 106th plenary session (11-12 March 2016), Council of Europe, May 2016.

⁸ European Commission, *A new EU Framework*, op. cit., p. 4.

⁹ *Ibid.*

¹⁰ Venice Commission, *Report on the Rule of Law*, op. cit., para 69.

¹¹ L. Pech and K. Lane Scheppelle, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

¹² Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53/1 [2007].

¹³ For the FRA's genesis and an introduction to its mandate, see G. Toggenburg, 'The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?' (2008) 33 *European Law Review* 385; 'Fundamental Rights and the European Union: How does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?', EUI Working Paper LAW 2013/13: <http://cadmus.eui.eu/handle/1814/28658>

and communication as well as network management all in respect of fundamental rights matters.¹⁴

It follows that the competences of the FRA are limited. It has no legislative or regulatory powers or quasi-judicial powers meaning, for instance, that it cannot examine individual complaints and impose sanctions as a follow-up to the findings the FRA may make. And while the FRA may carry out its tasks at the request of EU institutions or on its own initiative, in the latter case, its ability to act on its own initiative is furthermore limited as it can only do so in accordance with the five-year Multiannual Framework. These Frameworks set out the thematic areas in which the FRA operates, which are based on institutional expertise, stakeholder requests, and impacts achieved. The thematic areas reflect core challenges for fundamental rights protection in the EU, including racism and xenophobia, integration and social inclusion of Roma, and access to efficient and independent justice. While this latter area is a principle generally recognised as a core element of the rule of law, and importantly in light of this contribution's focus, there has been no explicit mention of the 'rule of law' in any Multiannual Framework since 2007. This is perhaps unsurprising considering that Regulation 168/2007 only refers once to the principle of the rule of law and only in recital 1 which merely however refers to what is now Article 2 TEU. More surprisingly, despite growing and serious concerns for rule of law compliance at Member State level, and the potential significance of FRA contributions to addressing these concerns herein argued,¹⁵ the proposed 2018-2022 Multiannual Framework does not contain any explicit reference to the rule of law.

This has not however prevented the FRA from producing reports on issues which constitute core elements of the rule of law as previously defined.¹⁶ The FRA must, after all, take into account the EU Charter,¹⁷ which provides for a number of fundamental rights under the heading 'Justice'. More pertinently to this contribution, the FRA has consistently signalled a willingness to provide assistance to EU institutions in the context of rule of law challenges, and to engage with debates concerning the means by which rule of law issues must be addressed. For example, the Fourth Annual FRA Symposium, which took place in Vienna 2013, focused on the promotion of the rule of law in the EU.¹⁸ While highlighting the connection between the rule of law and protection of individual rights, the symposium report underlined its aim at contributing to the then ongoing discussions relating to the Copenhagen criteria. Morten Kjaerum, then FRA director, signalled the FRA's availability and institutional expertise which could be utilised in the process of consolidation of available data and analysis 'to create

¹⁴ A. Von Bogdandy and J. Von Bernstorff, "The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The legal framework and some unsettled issues in a new field of administrative law" (2009) 46 *Common Market Law Review* 1035, p. 1059.

¹⁵ *Infra* Section 4.

¹⁶ See e.g. FRA-ECtHR Handbook on European law relating to access to justice, June 2016: <http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>

¹⁷ See recital 9 of Regulation 168/2007. This regulation having been adopted before the entry into force of the Lisbon Treaty, which gave legally binding force to the EU Charter, would however benefit from a revision if only to reflect this fundamental legal change.

¹⁸ FRA Symposium: Promoting the rule of law in the EU, 7 June 2013: <http://fra.europa.eu/en/event/2013/fra-symposium-promoting-rule-law-eu>

a sort of “one-stop-shop” for measuring the rule of law’ as well as the possible assessment of rule of law indicators.¹⁹

Linked to this, the FRA 2013 Annual Report directly commented upon the Commission’s Rule of Law Framework (then just adopted), suggesting the broadening of the scope of the Framework to other Article 2 TEU values (including fundamental rights), the subjection of the EU to monitoring for rule of law compliance, and the involvement of other EU institutions.²⁰ Underlying these suggestions is the correct assumption that proactive protection of fundamental rights is a means to prevent rule of law crises.²¹ This conclusion is echoed in the 2016 FRA Opinion on the development of an integrated tool of objective fundamental rights indicators, wherein the FRA argued for the overarching nature of human rights for Article 2 TEU values.²² The Opinion then compellingly outlined the possibility of utilising existing information and data for the population of indicators to measure compliance with shared EU values. Underlining the synergies between Article 2 TEU values, and the scope of the FRA institutional expertise in data collection and analysis, the FRA has consistently signalled willingness to assist EU institutions in monitoring compliance with these values.

Despite such clear and positive signals, the FRA’s mandate has not been expanded. The severe limits on the FRA’s mandate by Regulation 168/2007 can and have been criticised. The absence of a strong investigatory or legislative scrutiny role has been for instance a long-time concern with the UK House of Lords, in 2006, arguing that the FRA should be ‘more than just a “postbox” for collecting and sorting data.’²³ The Lords further recommended the extension of both the geographical scope of the FRA’s investigatory powers, and the provision of powers to actively seek information from EU Institutions and Member States necessary to achieve the tasks it has been set.²⁴ While the Lords recognised that systemic assessment of EU legislative proposals would be too onerous for the limited size and resources of the FRA, it nevertheless recommended a mechanism for referral to the FRA of any draft proposals which raise human rights concerns.²⁵ Pertinently, the House of Lords supported an Article 7 TEU remit for the FRA, though accepted Member State opposition to any expansion of powers for the FRA in this area. This opposition from a number of countries, not least the UK, having been for a long time strongly opposed the creation of a specialised EU agency for fear that it may overlap with, and possibly undermine, the activities of the Council of Europe, explains why none of the recommendations made by the House of Lords never materialised. The European Commission’s support for a bigger role for the

¹⁹ Welcome speech at FRA symposium on promoting the rule of law, 7 June 2013: <http://fra.europa.eu/en/speech/2013/opening-speech-morten-kjaerum-fra-symposium-promoting-rule-law-eu>

²⁰ FRA, Fundamental rights: challenges and achievements in 2013 – Annual report 2013, June 2014: <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013-annual-report-2013>

²¹ G. Toggenburg and J. Grimheden, ‘Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights’ (2016) 54(5) *JCMS* 1093, p. 1098.

²² FRA Opinion No 2/2016, 8 April 2016: <http://fra.europa.eu/en/opinion/2016/fra-opinion-eu-shared-values-tool>

²³ UK House of Lords, EU Committee, *Human Rights Protection in Europe: the Fundamental Rights Agency*, 29th Report of Session 2005–06, HL Paper 155, para. 45.

²⁴ *Ibid*, para. 70.

²⁵ *Ibid*, para. 73.

FRA has been similarly lukewarm. This appears to explain why, despite a flurry of new rule of law initiatives, neither the Commission nor the Member States have sought to give any formal and significant role to the FRA on the rule of law front or to significantly involve it in practice when the new rule of law mechanisms adopted in 2014 were implemented.

3. The Marginal Involvement of the FRA in the EU's Rule of Law Mechanisms

Considering the limits imposed on the FRA by Regulation 168/2007, it is perhaps unsurprising that the FRA has only been marginally referred to and involved in the new mechanisms adopted in 2014 by both the Commission and the Council. Known as the Rule of Law Framework, the Commission's mechanism aims to 'address and resolve a situation where there is a systemic threat to the rule of law' in a Member State 'before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met'.²⁶ As will be explained below, this instrument only provides for a potential and marginal involvement of the FRA if and when activated. Regrettably, the national governments of the EU Member States, rather than fully supporting the Commission's Rule of Law Framework, decided instead to establish a new annual rule of law 'dialogue among all Member States within the Council'.²⁷ While the involvement of FRA was not explicitly foreseen, a consensus appears to have since emerged amongst national governments for an increased role for the FRA. The continuing deterioration of the rule of law situation in both Hungary and Poland is however yet to lead to concrete changes, with the European Commission seemingly more inclined to rely on the Council of Europe's Venice Commission for assessment purposes and the Council seemingly unable to move beyond nice words.

3.1 The Commission's Rule of Law Framework

The adoption of the Rule of Law Framework in March 2014 reflects the Commission's diagnosis that the instruments available to it such as Article 7 TEU and the enforcement procedure laid down in Articles 258-260 TFEU were not adequate to deal with the increasing number of rule of law crises of a systemic nature identified by the former President and Vice President of the European Commission.²⁸ While we do not entirely share the Commission's conservative diagnosis when it comes to the limits of the instruments available to it, the Commission was right to consider the nature of the rule of law threat which began materialising in the early 2010s as unprecedented. In a nutshell, starting in Hungary following the victory of Viktor Orban's party in the parliamentary elections of April 2010, the EU has seen the development and spreading of rule of law backsliding, that is, a 'process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party'.²⁹

²⁶ European Commission, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final.

²⁷ Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, 16 December 2014, pp. 20-21.

²⁸ For further references, see D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11(3) *European Constitutional Law Review* 512.

²⁹ Pech and Lane Scheppelle, 'Illiberalism Within', op. cit., pp. 10-11.

To address this challenge, the Commission adopted a new instrument taking the form of an early warning tool whose primary purpose is to enable the Commission to enter into a structured dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law. As predicted at the time of the Framework's adoption³⁰ and as demonstrated by the failed attempt to prevent a deterioration of the rule of law situation in Poland,³¹ the Commission's belief in the self-correcting virtues of a discursive approach was naïve and the Framework bound to fail in a situation where a ruling party aims to dismantle all checks and balances and play for time while doing so.

As far as the FRA is concerned, however, the Commission's Framework positively acknowledged the benefits of basing its preliminary assessment of the rule of law situation in any EU country 'on the indications received from available sources and recognized institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights'.³² The possible involvement of judicial networks such as the Network of the Presidents of the Supreme Judicial Courts of the EU was also positively stressed.³³ The Commission's rule of law probe of Poland under the Framework has shown however the Commission's apparent preference to rely on the Council of Europe's Venice Commission rather than the FRA. This was actually made explicit by the 2014 Communication which stressed that the Commission would 'as a rule' seek to coordinate its analysis with the Council of Europe and/or its Venice Commission 'in all case where the matter is also under their consideration and analysis'.³⁴ In the Polish case, relying on the expertise of an experienced non-EU body with a well-established reputation in rule of law matters has proved, as expected, helpful not only in terms of assessing compliance of Poland's ruling party's 'reforms' with European standards, but also in terms of reinforcing the weight of the Commission's negative findings and counter criticism from Warsaw in a situation where the Commission's legitimacy, authority and impartiality are defiantly challenged as they have been by the Polish government.³⁵ While it has been good to see the European Commission and the Venice Commission rely on one another's analysis and demand the implementation of each other's recommendations,³⁶ this is not to say that

³⁰ Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU', *op. cit.*, p. 532: The Commission's Framework 'is based on the presumption that a discursive approach ... is bound to produce positive results. The validity of this presumption is questionable. Indeed, once we move towards really problematic cases, i.e. the countries where the ruling élite has made a conscious choice not to comply with EU values, then a totally different picture emerges. If such a conscious choice has been made, socialisation in the framework of a new pre-Article 7 TEU procedure is unlikely to bring about any meaningful change and an end to any systemic attempt to breach EU values in the relevant member state.'

³¹ See Pech and Lane Scheppele, 'Illiberalism Within', *op. cit.*

³² European Commission, *A new EU Framework*, *op. cit.*, p 7.

³³ *Ibid.*, p. 9.

³⁴ *Ibid.*

³⁵ One should however note that the Polish government ended up challenging the Venice Commission's impartiality when it became clear that its legal assessment would reinforce the European Commission's findings. See e.g. European Commission's Article 7 reasoned proposal, *op. cit.*, recital 32: 'The Polish Government decided not to participate in the sitting of the Venice Commission on 14 October 2016 as it considered that the opinion of the Venice Commission was one-sided.'

³⁶ See e.g. European Commission Recommendation regarding the rule of law in Poland, C(2017) 9050 final, 20 December 2017, para. 48: 'The Commission also encourages the Polish authorities to implement the opinions of the Venice Commission on the law on the National Council for the Judiciary, the law on the Ordinary Courts Organisation and the law on the Supreme Court as well as to seek the views of the Venice Commission on any new legislative proposal aiming to reform the justice system in Poland.'

the ongoing procedure against Poland would not have benefited from the assistance and expertise of the FRA.

Looking beyond the case of Poland, it would be positive in our view to systematically involve the FRA at the assessment stage of the Rule of Law Framework. Similarly, a more systematic and meaningful role for the FRA in the context of the Council's Annual Rule of Law dialogue, whose main features are described below, should be organised. One may however note that the Commission still does not appear anxious to involve the FRA in its rule of law mechanisms. With respect to the proposed new mechanism to suspend EU funding in situations of "generalised deficiencies as regards the rule of law", the Commission for instance envisages 'the use of external expertise from the Council of Europe' but no explicit mention is made of the FRA.³⁷

3.2 *The Council's Annual Rule of Law Dialogue*

In December 2014, the Council of the EU and the Member States meeting within the Council committed 'themselves to establishing a dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties'.³⁸ This dialogue is supposed to be based 'on the principles of objectivity, non-discrimination and equal treatment of all Member States' and be 'conducted on a non-partisan and evidence-based approach', which is obviously preferable to a debate conducted on a partisan and evidence-free approach. This initiative may be understood as an answer to the Commission's Rule of Law Framework and a possible attempt to pre-empt the activation of a mechanism, which was criticised *inter alia* by the UK government on the ground that it may enable the EU to look into rule of law issues beyond the areas governed by EU law.³⁹ Be that as it may, no role was initially foreseen for the FRA. Instead, this dialogue was supposed to be exclusively prepared by the Permanent Representatives Committee (COREPER), following an undefined 'inclusive approach'.⁴⁰

The first dialogue was organised by the Luxembourg presidency and took place on 17 November 2015. Its main point of focus was the rule of law in the age of digitalisation. The second dialogue took place in May 2016 under the Netherlands presidency and focused on migrants' integration and EU fundamental values. The first two editions of the Council's rule of law dialogue led some to (justifiably) regret 'the Council's lamentable inaction in the face of this profound crisis of the EU's values'.⁴¹ Seemingly aware of the toothless if not useless nature of the Council's new instrument, the Slovak

³⁷ European Commission proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, 2 May 2018, p. 3.

³⁸ Council of the EU, press release no. 16936/14, op. cit., p. 20.

³⁹ See e.g. UK Government, *Review of the Balance of Competences between the UK and the EU – EU Enlargement* (December 2014), para. 2.116: 'the Government does not accept the need for a new EU rule of law framework applying to all Member States. There are already mechanisms in place to protect EU common values and a further EU mechanism would risk undermining the clear roles for the Council and the European Council in this area.'

⁴⁰ Council of the EU, press release no. 16936/14, op. cit., p. 21.

⁴¹ P. Oliver and J. Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) *Journal of Common Market Studies* 1075.

Presidency circulated in September 2016 a questionnaire to evaluate the ‘experience acquired on the basis of the dialogue’.⁴²

The Member States’ replies reveal a broad consensus regarding a possible increasing role for the FRA in the Council’s dialogue with the following countries explicitly in favour of a more ambitious dialogue with a stronger involvement of the FRA: Austria, Belgium, Finland, Ireland, Croatia, Italy, Luxembourg, Netherlands, Slovenia, and Sweden. A number of countries (the Czech Republic, Cyprus, Estonia, France, Greece, Latvia, Lithuania and Spain), which expressed their opposition to the idea of turning the dialogue into a more structured periodical review process, also favoured the involvement of the FRA. Out of all the submissions, Austria’s is perhaps the one offering the most food for thought (possibly due to its familiarity with the FRA which is based in Vienna), with its recommendation to ‘strongly involve’ the FRA in the dialogue’s preparatory phase:

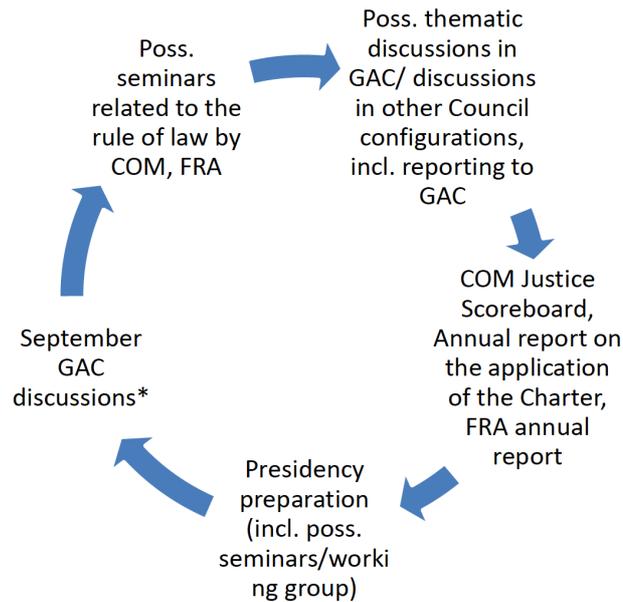
The FRA could be tasked by the Council to analyse existing information material and distil from it the most frequently addressed topics including recommendations thereon and prepare a summary and/or issues paper on it. This summary could be used by the Council as a basis for further discussions. In a next stage the FREMP, as the competent Council working group on an expert level, could discuss the FRA summary/issues paper and prepare a report to be forwarded to the Council.⁴³

Finland’s submission proposing the reorganisation of the dialogue is also worth noting as it similarly offers in our view another potentially promising path for reform:⁴⁴

⁴² Presidency questionnaire (document 12205/16) as well as the replies to this questionnaire (document 13230/1/16 REV 1) were made public following a successful request for access to documents submitted to the Council in December 2016 by one of the present authors (reference Ref. 16/2401-ld/ns).

⁴³ Council of the EU, compilation of replies to the Presidency questionnaire, document 13230/1/16 REV 1, p. 66.

⁴⁴ *Ibid.*, p. 91.



*Without prejudice to ordinary discussions within different Council compositions on rule of law related issues.

Unsurprisingly, Orbán’s Hungary and Kaczyński’s Poland have indicated their opposition to any ‘upgrading’ of the Council’s dialogue. For the Hungarian government, the current dialogue ‘can only be effective and keep its balanced character if no evaluation by other EU bodies or actors follow the exchange of views and experiences’.⁴⁵ As regards the Polish government, its key concern is not to allow for any discussion ‘directed against an individual Member State’.⁴⁶ In line with its previous stance on this issue, the UK also expressed its opposition to ‘replacing or supplementing the existing exchange with a review element would duplicate the process that already takes place in the Council of Europe, and thus is unlikely to add additional value.’⁴⁷ As the saying goes, nothing new under the sun and national governments have since continued to discuss topics having little direct connection with the rule of law: media pluralism was for instance the topic of the third annual rule of law dialogue which took place in October 2017.⁴⁸ This latest dialogue or rather this set of multiple monologues did not lead, once again, to any measure or action against the rogue governments which have been busy undermining media freedom and attacking journalists at home while paying lip service to media pluralism in Brussels.⁴⁹

4. A New Role for the EUFRA

⁴⁵ Ibid, p. 55.

⁴⁶ Ibid, p. 71.

⁴⁷ Ibid, p. 96.

⁴⁸ Council of the EU, Presidency conclusions after the annual rule of law dialogue on the topic ‘Media pluralism and the rule of law in the digital age’, 13609/17.

⁴⁹ See e.g. European Parliament, Committee on Culture and Education, Opinion on the situation in Hungary, 17 May 2018, 2017/2131(INL), para. 9: ‘is outraged by the fact that the media council has failed to guarantee even the minimum level of balance in the media’, or para. 17: ‘Is concerned that the Hungarian government, after Hungary’s last independent regional newspapers were taken over by oligarchs close to the government, has recently further extended its control over the media, with media concentration in Hungary reaching an unprecedented and grotesque level’.

Having rightly noted that the failure of a Member State to meet the standards required of candidate countries ‘has little consequence in practice’⁵⁰ and the contrast with the Union’s ‘intransigence and firmness’ when it comes to Member States’ failure to properly implement economic and fiscal rules,⁵¹ the European Parliament recommended in October 2016 the adoption of a new EU pact on democracy, the rule of law and fundamental rights. A brief overview of the suggested involvement of the FRA in this context will be offered below after which a number of additional suggestions will be made.

4.1 *The European Parliament’s proposed new mechanism*

Prior to the adoption of a resolution calling for an Union Pact for democracy, the rule of law and fundamental rights, whose main features will be reviewed below, the European Parliament had recommended in its Resolution of 10 June 2015 on the situation in Hungary that the Commission begin carrying out an ‘impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States, indiscriminately and on an equal basis, involving an evaluation by the EU Agency for Fundamental Rights, together with appropriate binding and corrective mechanisms, in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level’.⁵² In December 2015, the European Parliament reiterated this call in another Resolution regarding the situation in Hungary.⁵³

This finally led the Parliament, on 25 October 2016, to call for the establishment, ‘until a possible Treaty change’, of a new mechanism in the form of an interinstitutional agreement in order to more effectively monitor EU countries’ continuing adherence to the values laid down in Article 2 TEU post accession.⁵⁴ It would do so via a new permanent monitoring mechanism to which all EU Member States would be subject as a matter of principle and which would also involve all relevant stakeholders.

As far as the FRA is specifically concerned, the European Parliament’s resolution directly provides for its involvement when it comes to identifying potential breaches of the values laid down in Article 2 TEU. In other words, the proposed new annual report on democracy, the rule of law and fundamental rights (European DRF Report), which is supposed to include country-specific recommendations, would incorporate ‘the reporting done by the FRA, the Council of Europe, and other relevant authorities in the field’.⁵⁵ This would be accompanied by an annual inter-parliamentary debate to be

⁵⁰ European Parliament resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), Recital R.

⁵¹ *Ibid.*, Recital Q

⁵² European Parliament resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), para. 12.

⁵³ European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)).

⁵⁴ European Parliament resolution of 25 October 2016, *op. cit.*, para. 1.

⁵⁵ Article 2 of the draft institutional agreement included as an annex in the European Parliament resolution of 25 October 2016. See also Article 6: ‘The European DRF Report shall be drawn up using a variety of sources and the existing tools for assessment, reporting and monitoring of Member States’ activities, including: ... the FRA, in particular the EFRIS instrument; ...’

conducted on the basis of the European DRF Report, and which would also involve civil society, the FRA and the Council of Europe.⁵⁶

The involvement of the FRA in the actual drafting of the ‘European DRF Report’ is not however foreseen. Instead, supposedly in order to guarantee an independent assessment of EU countries’ records, the European Parliament called for the setting up of a new expert panel entitled ‘DRF Expert Panel’⁵⁷, which would be responsible for drafting the DRF report. In situations where evidence supports the conclusion that there are breaches of core elements of Article 2 values, the Commission would then start a dialogue with that Member State. However, in situations where there are sufficient grounds for invoking Article 7(1) or 7(2) TEU, the Parliament’s resolution then calls for the European Parliament, the Council and the Commission to promptly discuss the matter and for each institution to adopt and publish their reasoned decisions on whether activation of Article 7(1) or (2) is warranted.

Rather disappointingly, the Commission has since expressed its opposition to the Parliament’s proposal as it doubts ‘the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of "experts" and about the need for, feasibility and added value of an inter-institutional agreement on this matter.’⁵⁸ Accordingly, the Commission suggests instead making ‘the best possible use should be made of existing instruments, while avoiding duplication’.⁵⁹

Positively, the Commission’s response does however welcome ‘the underlying idea of the resolution to make the variety of existing data and reports more accessible and visible, also at national level’⁶⁰ and explicitly refers in this context to the work done by the Council of Europe and its Venice Commission, the FRA, and NGOs. With respect to the FRA, the Commission explicitly acknowledges that it ‘has a role to play by making easily accessible a clear overview of existing information and reports relating to Member States or particular themes, as reflected in the Agency’s programming document for 2017-2019’.⁶¹ It remains to be seen to what extent if any the Commission’s positive assessment of the FRA will result in any concrete actions to support an increased role for it, in particular in the rule of law area.

4.2 Possible additional reform avenues

A number of legislative and non-legislative avenues deserve to be explored. To begin with, respect for the rule of law should be included among the thematic areas mentioned in the FRA’s multiannual framework. The current reference to ‘judicial cooperation, except in criminal matters’ is both too narrow and also incompatible with the changes

⁵⁶ Article 10, draft institutional agreement, *ibid.*

⁵⁷ The proposal to involve a new expert body is reminiscent of the proposal to set up a ‘Systemic Deficiency Committee’ which was made by A. von Bogdandy et al, ‘Protecting EU values’ in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017), p. 228 et seq.

⁵⁸ European Commission, Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP(2017)16, adopted by the Commission on 17 January 2017.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

made by the Lisbon Treaty regarding what used to be known as the ‘Third Pillar’.⁶² Its absence from the list of thematic areas for the period 2018-2022 beggars belief considering the Commission’s own reference to the FRA in its 2014 Rule of Law Framework and the broad consensus among EU national governments, as noted above, regarding a larger role for the FRA in the context of the Council’s annual rule of law dialogue, not to mention the existential threat that the process of rule of law backsliding poses for the EU, a danger which has been regularly highlighted by the European Parliament since the ‘Tavares report’ of 2013.⁶³

The FRA should also be provided with ‘the power to seek specific information from EU institutions and Member States and to probe them should they delay in providing it’.⁶⁴ Related to this, the FRA should be entrusted with a general legislative scrutiny role, which would not require the Agency to carry out ‘a systemic assessment of the human rights implications of every legislative proposal’ but allow it ‘to carry out legislative scrutiny as it sees fit’.⁶⁵ We realise that this would require expanding the Agency’s mandate and amending its founding regulation, but an expanded role with adequate resources for the FRA would help bridge the gap between the EU institutions’ strong rhetoric and the more limited reality of their policies and actions when it comes to upholding compliance with the values laid down in Article 2 TEU.

We also support the adoption of the EU DRF pact, which put forward by Dutch ALDE MEP Sophie in 't Veld,⁶⁶ and in particular the idea of a new interparliamentary rights dialogue.⁶⁷ This interparliamentary dialogue could rely on data already gathered and analysed by institutions such as CEPEJ and FRA in order to develop ‘country fiches’ which would then be used as starting points for this dialogue.⁶⁸ This task could be facilitated by the creation of a database, a European Fundamental Rights Information System (EFRIS), that is, an electronic system providing information gathered by different actors on the situation of fundamental rights on a country-by-country or right specific basis.⁶⁹ This would however also require a revision of the FRA’s mandate as it currently does not have the competence to collect data outside the scope of EU matters.⁷⁰ More radically, we would suggest to no longer use the notion of ‘scope

⁶² See European Commission proposal for a Council decision amending Decision (2008/203/EC) of 28 February 2008 implementing Regulation (EC) No 168/2007, COM(2010) 708 final, section 1.2: ‘The legally binding nature of the Charter of Fundamental Rights and the suppression of the so-called “pillars” make a stronger case of the addition of [judicial cooperation in criminal matters and police cooperation] to the activities of the Agency.’

⁶³ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, A7-0229/2013.

⁶⁴ House of Lords, Human rights protection in Europe, op. cit., para. 70.

⁶⁵ Ibid., para. 73.

⁶⁶ Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), LIBE Committee, Rapporteur: Sophie in 't Veld, A8-0283/2016, 10 October 2016.

⁶⁷ This idea was first put forward by I. Butler, ‘How the European Parliament can protect the EU’s fundamental values: An interparliamentary rights dialogue’, *Liberties.eu*, 15 January 2016: <https://www.liberties.eu/en/news/european-parliament-protect-eu-values/6831>

⁶⁸ Ibid., pp. 12-15.

⁶⁹ Hearing of the LIBE Committee of 10 December 2015, Presentation by Gabriel Toggenburg.

⁷⁰ Ibid. See also M. Kjaerum, FRA Director, Farewell speech to the European Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE), Brussels, 5 March 2015: <http://fra.europa.eu/en/speech/2015/fra-director-speaks-fundamental-rights-achievements-and-challenges-european-parliaments>; ‘Fundamental Values and the Rule of Law’, Address to the European

of/implementation of' EU law in order to define the remit of the Agency. The notion of 'scope of/implementation of' EU law was indeed devised by the Court to decide on a case-by-case basis when national measures can be subject to EU review on fundamental rights grounds. It is too complex and non-static a standard to be used to define the data-gathering and monitoring remit of an EU agency.

Last but not least, and connected to our previous point, we would recommend to explicitly confer on the FRA an Article 7 TEU remit. This provision, as noted by the Commission in a 2003 Communication 'is not confined to areas covered by Union law'.⁷¹ It is worth noting in this respect that the Commission initially foresaw in 2005 the possibility of having the FRA making its technical expertise available to the Council in an Article 7 TEU situation.⁷² While Regulation 168/2007 ultimately did not grant any explicit Article 7 remit to the FRA, it is worth noting that the Council, in a Declaration on Proceedings under Article 7, did however expressly state that it

considers that neither the Treaties nor the Regulation establishing the [FRA] precludes the possibility for the Council to seek the assistance of the future [FRA] when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met.⁷³

Neither the Commission nor the Council have however requested the involvement of the FRA in the ongoing Article 7 proceedings against Poland. This is regrettable but may also merely reflect the fact that having agreed a multi-annual framework which does not ask the FRA to focus on respect for the rule of law, it would have been odd to ask for FRA's involvement in a procedure which is primarily justified by the existence of a clear risk of a serious breach of the rule of law by Poland.

It is in any event time to provide the FRA with an Article 7 remit as well as enable it to monitor all relevant issues regardless of whether they may fall outside of the scope of EU law. The FRA should also be provided with the resources to strengthen its expertise on rule of law issues. If anything, the regular consolidation and analysis of data from Member States could help negate accusations by Member States of any possible unfair or inconsistent application of Article 2 standards in any Article 7 process. More generally, the regular provision of data and analysis by the FRA could enhance the operational effectiveness of the EU in monitoring fundamental values, while also helping to prevent the perception and materialisation of double standards.⁷⁴

5. Concluding remarks

Affairs Committee hearing at the Danish Parliament, Copenhagen, 12 March 2015: <http://fra.europa.eu/en/speech/2015/fundamental-values-and-rule-law>

⁷¹ Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is founded, COM(2003) 606 final, section 1.1.

⁷² House of Lords, op. cit., paras 74-76.

⁷³ Council of the EU, Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, document no 6166/07, 12 February 2007.

⁷⁴ G. Toggenburg and J. Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights' (2016) 54(5) *JCMS* 1093. For an arguable example of double standards, see L. Pech and K. Lane Scheppele, 'Why Poland and not Hungary?', *Verfassungsblog*, 8 March 2018: <https://verfassungsblog.de/why-poland-and-not-hungary/>

As recalled by the European Commission in its Article 7 reasoned proposal regarding the situation in Poland, ‘respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU [...] it is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States’.⁷⁵ If so, it is difficult to understand why the FRA is yet to be clearly mandated to monitor compliance with the rule of law within the EU and help detect the emergence of systemic threats or breaches in this area.

When the FRA was first established, rule of law backsliding was not the pressing issue it has become today. As noted by Commissioner Jourová, in a speech given at an event celebrating the ten-year anniversary of the establishment of the FRA, we are now ‘seeing fundamental democratic freedoms questions. The rule of law, the freedom of the press, the independence of the judiciary are at risk again.’⁷⁶ Based on the evidence, this risk is acute. However, it is also evident that far more is to be gained in benefiting from the expertise and support of the FRA than is worth risking by continued reticence and disregard for the challenges here outlined.

⁷⁵ European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 2017/0360 (APP), recital 11.

⁷⁶ 10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law, Vienna, 28 February 2017, Speech/17/403.