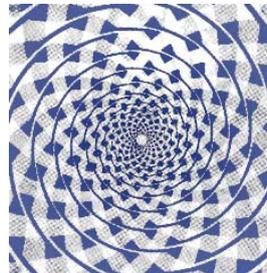


THE EU FUNDAMENTAL RIGHTS AGENCY: ITS PAST AND POSSIBLE FUTURE

Olivier De Schutter

May 2018

UCL
Université
catholique
de Louvain



Institute for Interdisciplinary Research in Legal sciences (JUR-I)
Centre for Philosophy of Law (CPDR)

La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, centre de recherches localisé au sein de l'Institut pour la recherche interdisciplinaire en sciences juridiques (JUR-I) de l'Université de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

CRIDHO Working Papers

Tous droits réservés.

Aucune partie de ce document ne peut être publiée, sous quelque forme que ce soit, sans le consentement de l'auteur.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), a research centre located in the Institute for Interdisciplinary research in legal science (JUR-I) of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

CRIDHO Working Papers

All rights reserved

No part of this paper may be reproduced in any form without consent of the author

The EU Fundamental Rights Agency: Its Past and Possible Future

by Olivier De Schutter

ABSTRACT

Article 2 of the Treaty on the European Union lists the values on which the Union is built -- including democracy, the rule of law and fundamental rights. Given the rise of "illiberal democracies" in Europe, should the ability of the EU to ensure compliance with the values on which it is built be enhanced? If so, how could such a monitoring function be organized? Against this background, this paper takes stock of the achievements of the Fundamental Rights Agency since it was established ten years ago, and asks whether its mandate should be expanded to give an explicit monitoring role. The paper first recalls the context in which the Member States decided to establish the Fundamental Rights Agency (2), and why, at the time, it was decided not to give it such a monitoring role (3). Indeed, although there are two distinct mechanisms through which the EU ensures compliance with fundamental rights (a legal mechanism, under the ultimate supervision of the Court of Justice of the European Union, and a political mechanism, in which the European Council or the Council of the EU have the final say), the Agency is involved in neither: it is a think tank, a pole of expertise, but not the Fundamental Rights Ombudsinstitution some had dreamed of (4). In order to explore whether the mandate of the Agency could be expanded to allow it to fulfil a monitoring function, the paper discusses the proposal put forward by the European Parliament in 2016, to create a new mechanism to monitor compliance with the values of Article 2 EU, based on an interinstitutional agreement between the European Parliament, the Commission and the Council of the EU (5). Finally, it presents an alternative proposal, which would consist for the European Parliament to request from the Fundamental Rights Agency that it submit a regular report on the situation of fundamental rights in the EU, allowing the institutions to assess whether in certain Member States, the threats to rights contributing to democracy and the rule of law are such that there is a risk that the values of the Union shall be breached -- but leaving it to those institutions to make the final assessment (6). The final section provides a brief conclusion (7).

The EU Fundamental Rights Agency: Its Past and Possible Future

by Olivier De Schutter*

1. Introduction

The Fundamental Rights Agency of the European Union was effectively set up in early 2008. Its mandate is, according to its founding Regulation, to 'provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights'.¹ It thus constitutes a pole of expertise, which the institutions of the European Union and the EU member States may rely upon in order to improve compliance with fundamental rights, as part of EU law. Over the past ten years, it has fulfilled its mission by publishing a number of reports and opinions, mostly informed by a comparative overview of the situation of fundamental rights in the EU Member States, and combining in its assessment legal analysis with empirical findings, informed by the methodologies of social sciences. It has made a difference.

Is it time now to expand its mandate? The emergence of self-proclaimed "illiberal democracies" in the European Union, based on what has been called "constitutional capture",² as well as the overall retrenchment of human rights in Europe following, in particular, the adoption of measures to combat terrorism or to address the financial and economic crisis, provide a strong encouragement to rethink the tools the EU has at its disposal to protect democracy, the rule of law, and fundamental rights.

When, in 1997, the Treaty of Amsterdam amended the Treaty of the European Union to include a reference to the values on which the Union is founded,³ the intention was twofold: to send a clear message to the eight countries of central and Eastern Europe that were to join the Union in the following years (and effectively did become members on 1 May 2004), that they were joining more than an economic integration project, and that the Union was also about building a Union of rights and values; and to ensure that fundamental rights would be fully taken into account in the construction of the area of freedom, security and justice, in which the powers of the Union (then the European Community) were rapidly expanding. Twenty years have passed since. The pledge made then appears now more important than ever. Yet, despite the establishment of a number of tools to monitor compliance with the values of the Union, that all Member States are expected to adhere to, it seems to have become more difficult, not easier, to ensure that the pledge is kept.

* Professor at the University of Louvain (UCL) and at the College of Europe (Natolin) ; former coordinator of the EU Network of independent experts on fundamental rights (2002-2007), and member of Scientific Committee of the Fundamental Rights Agency for the period 2015-2019. Portions of this paper build on 'The EU Fundamental Rights Agency: Genesis and Potential', which appeared in Kevin Boyle (ed.), *New Institutions of Human Rights Protection*, Oxford University Press, Collected Courses of the Academy of European Law (European University Institute, Florence), Oxford University Press, Oxford, 2009, pp. 93-135; as well as on a study prepared in 2017 at the request of Amnesty International European Institutions Office. All the opinions expressed here are of the author alone.

¹ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1 (Art. 2).

² 'Constitutional capture' strategies, it has been written, are pursued by political parties victorious at parliamentary elections which then "aim to systematically weaken national checks and balances in order to entrench their power" (*An EU mechanism on democracy, the rule of law and fundamental rights*. Study prepared by Laurent Pech, Erik Wennerström, Vanessa Leigh, Agnieszka Markowska, Linda De Keyser, Ana Gomez Rojo and Hana Spanikova at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS of the General Secretariat of the European Parliament, March 2016, p. 7).

³ Article F, § 1, of the Treaty on the European Union was amended to include a provision stating: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". This amendment entered into force on 1 May 1999, with the Treaty of Amsterdam. The original version of this clause, as it appears in the Treaty on the European Union signed in Maastricht on 7 February 1992 (in force on 1 November 1993), stated that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy".

It is against this background that this paper explores whether the mandate of the Fundamental Rights Agency could be expanded to give an explicit monitoring role, allowing it to ensure compliance with the values listed in Article 2 EU -- including democracy, the rule of law and fundamental rights.⁴ The paper first recalls the context in which the Member States decided to establish a new "Human Rights Agency" for the EU (2), and why the new agency -- soon re-labelled "Fundamental Rights Agency" by the Commission -- was not given a monitoring role (3). It then explains how this results in two distinct mechanisms through which the EU ensures compliance with fundamental rights, which may be described respectively as legal and political in nature, though there exists some overlap between them (4). Next, the paper discusses the proposal put forward by the European Parliament in 2016, to create a new mechanism to monitor compliance with the values of Article 2 EU: the mechanism would be built through an interinstitutional agreement between the European Parliament, the Commission and the Council of the EU, called the EU Pact for Democracy, the Rule of Law and Fundamental Rights ("DRF") (5). Finally, it presents an alternative proposal, which would consist for the European Parliament to request from the Fundamental Rights Agency that it submit a regular report on the situation of fundamental rights in the EU, allowing the institutions to assess whether in certain Member States, the threats to rights contributing to democracy and the rule of law are such that there is a risk that the values of the Union shall be breached -- but leaving it to those institutions to make the final assessment (6). The final section provides a brief conclusion (7).

2. The context : the initial decision to establish a new "Human Rights Agency"

When the Heads of States and Governments of the Member States announced at their Brussels European Council of 13 December 2003 their intention to extend the mandate of the EU Monitoring Centre on Racism and Xenophobia (EUMC) in order to create a 'Human Rights Agency'⁵ entrusted with the mission to collect and analyse data in order to define the policy of the Union in this field, most observers were taken by surprise. The announcement was made without any feasibility study being prepared, and essentially, it would seem, to reinforce the presence of the Union in Vienna and to find a dignified solution to the need to reform the EU Monitoring Centre on Racism and Xenophobia. Indeed, understandable in retrospect, the very choice of the European Council to create the Human Rights Agency by enlarging the competences of the EU Monitoring Centre on Racism and Xenophobia (EUMC)⁶ was not necessarily obvious when that option was proposed. At the time when the European Council announced its decision, the European Commission had already concluded, on the basis of an external evaluation of the activities of the EUMC between its creation in 1998 and end 2001,⁷ that 'the Centre should continue to concentrate on racism and that an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism'.⁸ The choice to broaden the mandate of the EUMC by transforming it into a Human Rights Agency seemed to go in the exact opposite direction, although that expansion was to be accompanied, obviously, with a significant increase in the resources.

The context, luckily, was a propitious one. First, the Charter of Fundamental Rights of the European

⁴ More precisely, Article 2 of the Treaty on the European Union now lists the values on which the Union is founded as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

⁵ The expression 'Human Rights Agency' was also used in the Hague Programme on the strengthening of Freedom, Security and Justice in the Union appended to the conclusions of the European Council of 4-5 November 2004.

⁶ This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by the Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1. According to Article 2(1) of its instituting Regulation, the EUMC must 'provide the Community and its Member States (...) with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence'.

⁷ http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_en.pdf

⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97, COM(2003)483 final of 5.8.2003.

Union had been proclaimed, on 7 December 2000, at the Nice European Summit.⁹ Inspired by the fundamental rights recognized by the European Court of Justice among the general principles of law it ensures respect for, and by the international human rights instruments binding upon the EU member States, the Charter presented itself as an authoritative restatement of the *acquis* of the Union in the field of fundamental rights. But its main impact was not as a legal document – indeed, the Charter did not even have a binding force when it was initially proclaimed – ; it resided in the transformation it brought about in the culture and the practice of the institutions. On the basis of the Charter, it became possible for the European Parliament to systematically check whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles which had been proclaimed in Nice. The Commission too announced its intention to verify the compatibility of its proposals with the Charter in 2001,¹⁰ a practice which, in more recent years, it has significantly improved.¹¹ Invoking fundamental rights within the EU thus became routine in the work of the institutions, now that there existed a document, prepared under conditions which guaranteed it a high degree of legitimacy, which listed the said rights.

The second development was the entry into force, on 1 May 1999, of the Treaty of Amsterdam. This Treaty not only formulated (in what was then Article 6(1) EU) the values on which the Union was founded, which included human rights and fundamental freedoms.¹² It also backed up this affirmation by a mechanism provided for in Article 7 EU, allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values. In addition, following the crisis opened by the accession to power in Austria of a governmental coalition including a party from the far right in 2000,¹³ this mechanism was improved by the Treaty of Nice (in force since 1 April 2003), which introduced the possibility of recommendations being adopted preventively, where a ‘clear risk of a serious breach’ of those values is found to be present.¹⁴

The inclusion of such a mechanism soon raised the question whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union. The European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As it noted itself, the Treaty of Nice ‘acknowledges Parliament’s special role as an advocate for European citizens’

⁹ OJ C 364 of 18.12.2000, p. 1.

¹⁰ SEC(2001) 380/3.

¹¹ For a systematic discussion, see Olivier De Schutter, ‘The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework’, Study prepared for the Committee on Constitutional Affairs of the European Parliament, 2016; and O. De Schutter, ‘The Implementation of the Charter by the Institutions of the European Union’, in : *The EU Charter of Fundamental Rights. A Commentary*, edited by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Hart Publ., Oxford and Portland, Oregon, 2014, pp. 1627-1655.

¹² The Treaty of Amsterdam amended Article F, § 1, of the Treaty on the European Union (later renumbered Article 6(1)) to include a provision stating: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. The original version of this clause, as it appears in the Treaty on the European Union signed in Maastricht on 7 February 1992 (in force on 1 November 1993), stated that “The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy”. For the current version of this clause, now in Article 2 TEU, see above, note 4.

¹³ The crisis was opened by the entry into the Austrian governmental coalition of the Austrian Freedom Party (FPÖ) of Jörg Haider in early 2000. This led the EU Member States to suspend all bilateral contacts with the Austrian government, thus expressing their discontent about allowing an extreme-right political party to be trusted with governmental responsibilities. The crisis could only be overcome after a committee of three “Wise Persons” delivered an opinion in which they concluded that, although Austria had not been acting in breach of the values on which the Union is founded, a preventive mechanism should be inserted in Article 7 TEU, allowing the Council of the EU to address recommendations to a Member State where such a risk is deemed to be present. On this crisis, see M. Merlingen, C. Muddle and U. Sedelmeier, ‘The Right and the righteous? : European norms, domestic politics and the sanctions against Austria’, *Journal of Common Market Studies*, vol. 39 (2001), p. 59; M. Happold, ‘Fourteen against One : The EU Member States’ Response to Freedom Party Participation in the Austrian Government’, *International and Comparative Law Quarterly*, vol. 49 (2000), p. 953; and E. Bribosia, O. De Schutter, T. Ronse and A. Weyembergh, ‘Le contrôle par l’Union européenne du respect de la démocratie et des droits de l’homme par ses Etats membres : à propos de l’Autriche’, *Journal des tribunaux – Droit européen*, March 2000, pp. 61-65. On the insertion of Article 7(1) EU by the Treaty of Nice, see G. de Búrca, ‘Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU’, in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruxelles, Bruylant, 2005, pp. 245-278, at pp. 259-262.

¹⁴ This preventive mechanism is now described in Article 7(1) EU.

by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach.¹⁵ But even before that Treaty entered into force, the European Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union. The adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000 facilitated that practice, making it both easier and more legitimate by providing a clearer grid of analysis by which to analyze the practice of the EU Member States.¹⁶ The monitoring role of the Parliament was justified by the consideration that, ‘following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)’, and that ‘it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee [the LIBE Committee] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter’.¹⁷

Little by little, thus, a ‘fundamental rights culture’ was being established within the EU institutions. But a number of different directions were being explored at the same time, and when the European Council announced that a ‘human rights agency’ would be established in Vienna, it was still unclear which of these such an agency would support. First, the idea had taken root that neither the EU institutions, nor the EU member States when they implemented EU law, could afford to ignore the requirements of fundamental rights in the course of their activities. The adoption of the Charter of Fundamental Rights, by the large visibility it soon gained, served essentially that purpose : it provided guidance and legal certainty, thus facilitating self-monitoring by the institutions. Secondly, the preparation by the European Parliament of annual reports on the situation of fundamental rights in the EU on the basis of Article 7 EU by the European Parliament gave birth to the idea that the EU might progressively develop a monitoring role, in order to identify at an early stage whether certain member States might be adopting a conduct which would threaten the mutual trust on which the area of freedom, security and justice, was to be built. Third, finally, was the idea that such a systematic comparison could constitute a condition for the development of an active ‘fundamental rights policy’ of the EU. This was linked to the idea that a systematic comparison of the developments of fundamental rights in the Member States might lead to identify the situations where an initiative from the EU is required, or the emerging good practices which could be diffused ; it was expressed most explicitly in the ‘open method of coordination’ proposed by the EU Network of Independent Experts on fundamental rights, a group of experts established in September 2002 at the request of the European Parliament to support its monitoring role, but that also advised the European Commission on the implementation of the Charter.¹⁸

¹⁵ See the Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) (rapp. J. Voggenhuber), para. 6 of the proposal for a resolution ; this passage has been maintained without amendment in the European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004 (see para. 6 of the operative part of the resolution).

¹⁶ See the Report on the situation as regards fundamental rights in the European Union (2000) (rapp. Th. Cornillet), PE 302.216/DEF, EP doc. A5-0223/2001 (2000/2231(INI)); the Report on the human rights situation in the European Union (2001) (rapp. J. Swiebel), PE 311.039/DEF, EP doc. A5-0451/2002 (2001/2014(INI)) (and Resolution of 15 January 2003 on the situation concerning fundamental rights in the European Union (2001), OJ C 38 E, 12.2.2004, p. 174); Report on the situation as regards fundamental rights in the European Union (2002) (rapp. F. Sylla), PE 329.881/DEF, EP doc. A5-0281/2003 (2002/2013(INI)) (and Resolution of 4 September 2003 on the situation as regards fundamental rights in the European Union (2002), P5_TA(2003)0376); Report on the situation as regards fundamental rights in the European Union (2003) (rapp. A. Boumediene-Thiery), PE 329.936/DEF, EP doc. A5-0207/2004 (2003/2006(INI)). The resolution proposed on the basis of the report by Ms A. Boumediene-Thiery was rejected by the European Parliament. The Cornillet Report was the first one to use the EU Charter of Fundamental Rights as its template. However, the practice of preparing an annual report on the situation of fundamental rights of the Union predated the adoption of the Charter : see Resolution on the annual report on human rights in the EU (1998-1999), (rapp. Haarder) of 16 March 2000 (EP doc. A5-0050/2000).

¹⁷ Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), paras. 2-3.

¹⁸ See in particular on this suggestion O. De Schutter, “The Implementation of Fundamental Rights through the Open Method of Coordination”, in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?*, Bruxelles, Bruylant, 2005, pp. 279-343; O. De Schutter and V.

What should the new ‘Human Rights Agency’ focus on? Was it to support the EU Member States to ensure that they would implement EU law in compliance with fundamental rights? Was it to perform a monitoring role, extending beyond the scope of application of Union law, to ensure that the values on which the Union is built would be complied with? Or was it to develop as a pole of expertise, to help shape a fundamental rights policy of the EU? The European Council had decided that they new agency should be established in Vienna; the rest was left remarkably open. Indeed, it is perhaps telling that despite two particularly active presidencies of the Council of the EU on this subject,¹⁹ three more years of discussions were necessary in order to arrive at an agreement on the tasks, structure, and relationships to other bodies or organizations of the Fundamental Rights Agency for the European Union. In large part, this is to be explained by the coexistence in the discussions of these three distinct rationales, to which correspond different tools, different degrees of independence, and different institutional balances.

3. Defining the mandate of the Agency: the initial debate

When the European Council requested that the European Commission make a proposal on the establishment of a ‘Human Rights Agency’ for the EU, the Commission therefore had no preconceived opinion about the structure such an Agency should be given, nor even about its precise mandate. Understandably, the Commission chose, prior to making a formal proposal, to organize a wide-ranging consultation in order to identify more precisely where the added value of a Fundamental Rights Agency for the European Union might reside, how it should be structured, and how its tasks should be defined. The Commission presented a public consultation document on 25 October 2004.²⁰ In reply to this consultation document, the Commission received contributions from a wide range of actors and, in order to discuss the modalities of the proposed institution, a public hearing was held on 25 January 2005.²¹ The proposals made by the Commission on 30 June 2005²² thus reflected the result of more than a full year of debate, which involved a remarkably large number of stakeholders.

In the end however, despite the number of options explored, continuity prevailed. Most of the structural features of the Fundamental Rights Agency, both in the proposals put forward by the Commission in June 2005 and in the final Regulation adopted in February 2007, closely link it to the EUMC. Although some form of monitoring the situation of fundamental rights in the EU Member States had developed in 2000-2006, through the combined and partly overlapping practices of the European Parliament’s LIBE Committee and of the EU Network of Independent Experts on Fundamental Rights, this task clearly was not entrusted to the Agency. The founding Regulation does not confer upon the Agency the mandate to supervise compliance with fundamental rights in the Union, even as regards the activities of the institutions or bodies of the Union or of the Member States when they implement Union law. Rather, the Agency is to be seen as a pole of expertise in human rights, which will provide advice to the institutions and the Member States, in order to improve their understanding of the requirements of fundamental rights and to better inform any initiatives they adopt in this field.²³

Moreno-Lax (eds), *Human Rights in the Web of Governance. A Learning-Based Fundamental Rights Policy for the EU*, Bruxelles, Bruylant, 2010; and

¹⁹ The Austrian presidency of the first semester 2006, for obvious reasons, was particularly eager to achieve an agreement, and mostly effective in moving towards finding a consensus. Germany was due to succeed Austria in 2006 but stepped aside in favor of Finland, the next in line, as general elections were scheduled in Germany for that period. Agreement on the Fundamental Rights Agency was thus reached under the Finnish presidency of the second semester 2006, again, thanks to an effective presidency.

²⁰ COM(2004) 693 final.

²¹ For a discussion of the various views expressed in the course of this consultation, see P. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Hart Publ., Oxford, 2005.

²² Proposal for a Council Regulation establishing a European Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM(2005)280, 30.6.2005.

²³ See Art. 2 of Regulation No. 168/2007 : ‘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 measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights’.

The Paris Principles on national institutions for the promotion and protection of human rights recommend that such institutions choose freely which issues to take up, provided they relate to their role in the promotion and protection of human rights.²⁴ But the Paris Principles failed to influence the proposals of the European Commission on this point. Neither the initial proposals of the Commission, nor the final Regulation, authorized the Agency to decide for itself what issues it should focus on, and whether it should address recommendations to the institutions on pending legislative discussions. Instead, it was agreed that the annual workprogramme of the Agency would be based on a Multi-Annual Framework adopted by the Council on a proposal of the Commission.²⁵ And the possibility for the Agency to intervene in the legislative process was severely constrained by Article 4(2) of the founding Regulation, which stated that the conclusions, opinion and reports the Agency could adopt :

may concern proposals from the Commission (...) or positions taken by the institutions in the course of legislative procedures *only where a request by the respective institution has been made* (...). They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty [concerning actions for annulment of Community acts] 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 [concerning infringement proceedings against member States for failure to comply with their obligations under EC law].

The latter restrictions imposed on the Agency were the combined result of a faithful replication and consolidation of what had been the practice of the EUMC during its nine years of operation, and of a desire of the institutions not to see their legislative work disrupted by interferences by the Agency – although it was clear from the start that the European Parliament would be tempted to rely on the Agency in all cases where serious doubts are expressed about the compatibility of a legislative proposal with the requirements of fundamental rights –.

The exclusion of any role of the Agency in the monitoring of the member States was largely influenced by the very active role of the Council of Europe in the debate on the establishment of the Fundamental Rights Agency. Through various channels, the Council of Europe expressed the fear that it would risk being marginalized if the EU Fundamental Rights Agency were to duplicate the monitoring performed by the Council of Europe bodies.²⁶ The initial reaction of the Council of Europe to the decision by the European Council to set up a ‘Human Rights Agency’ for the European Union was not openly hostile ; but it was clearly defensive. In her intervention at the public hearing organized by the European Commission on 25 January 2005, the Deputy Secretary General of the Council of Europe Ms de Boer-Buquicchio sought to distinguish the function the EU Fundamental Rights Agency could fulfil – crafted along the lines of a national institution for the promotion and protection of human rights for the Union – from the tasks entrusted to the Council of Europe monitoring bodies, by emphasizing the difference between monitoring as *collection and analysis of data* on the one hand (what might be called ‘advisory monitoring’), and monitoring as *evaluation of compliance* with certain standards on the other (or ‘normative monitoring’).²⁷ Although to deny to the EU Fundamental Rights Agency any role in

²⁴ The Paris Principles on national institutions for the promotion and protection of human rights were approved by the United Nations General Assembly in 1993 in resolution 48/134 of 20 December 1993 (A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, ‘National institutions for the promotion and protection of human rights’). After having been initially adopted in 1991, at a conference convened by the French Commission nationale consultative des droits de l’homme – the earliest of such institutions to be established, in 1947 – and the Office of the High Commissioner for Human Rights, these principles were approved by the Commission on Human Rights in resolution 1992/54 of 3 March 1992 before being submitted to the UN General Assembly.

²⁵ See Article 5 of the founding Regulation.

²⁶ On the relationship during that period between the EU and the Council of Europe, see O. De Schutter, ‘The Two Europes of Human Rights. The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe’, *Columbia Journal of European Law*, vol. 14, No. 3, Summer 2008, pp. 509-561.

²⁷ Monitoring ‘can also be understood as comprising the verification of actual compliance, identifying violations, shortcomings and best practices as well as addressing recommendations to individual states. It is in this latter sense that monitoring is understood and carried out within the Council of Europe’ (Public Hearing on the Agency on Fundamental Rights of 25 January 2005, statement by Ms de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, available on

‘normative monitoring’ thus understood might seem contradictory with the idea that it should be an independent institution for the promotion and protection of human rights for the EU – indeed, under the Paris Principles, NHRIs should, *inter alia*, adopt opinions on ‘situation of violation of human rights which it decides to take up’²⁸ –, the preoccupation behind this distinction was clear enough : the Agency should not duplicate the work of the monitoring bodies of the Council of Europe, it was suggested, since this might undermine their efforts and diminish their authority ; it should constitute a think tank, a pole of expertise on human rights issues for the EU institutions, but not some appeals tribunal for the evaluation performed by the Council of Europe.

Those concerns were further expressed by the Parliamentary Assembly of the Council of Europe (PACE).²⁹ Acting on the basis of the McNamara report prepared within the Committee on Legal Affairs and Human Rights,³⁰ the Parliamentary Assembly adopted on 18 March 2005 a resolution in which it recalled the human rights acquis developed by the Council of Europe through intergovernmental cooperation, the monitoring by the Council of Europe of compliance with these standards by its member states,³¹ and the practical assistance work by the Council of Europe designed to facilitate attainment of the requisite standards, as well as its activities in the field of human rights education and awareness-raising. While welcoming the establishment of a Fundamental Rights Agency of the EU, the PACE insisted that ‘there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers’ money’.³² Like the Council of Europe Deputy Secretary-General, the PACE concluded that the role of the agency should be limited to ‘collect[ing] and provid[ing] to the EU institutions information about fundamental rights that is relevant to their activities, and thus contribut[ing] to mainstreaming human rights standards in the EU decision-making processes’.³³

The Parliamentary Assembly in particular insisted that the EU Fundamental Rights Agency should have a mandate limited to the scope of application of Union law, including the implementation by EU Member States of Union law, but should not intervene in areas outside EC/EU competence, where member states act autonomously. In other terms, although the mutual trust on which mutual recognition mechanisms within the Union are built presupposes that the EU Member States comply with fundamental rights in general rather than only in the implementation of Union law, the Agency should not monitor fundamental rights beyond the situations to which the fundamental rights recognized as general principles of Union law already apply under the supervision of the European Court of Justice,

http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm.

²⁸ See para. 3, a), ii), of the Paris Principles (Principles Relating to the Status of National Institutions, annexed to UNGA Res. 48/134, ‘National institutions for the promotion and protection of human rights’, 20 December 1993).

²⁹ It should be noted however that the president of the Parliamentary Assembly, the Dutch René Van der Linden, seemed to adopt a rather more radical attitude of opposition towards the very establishment of a Fundamental Rights Agency of the EU. As a result of his opposition, which he saw as a means of defending the monitoring bodies of the Council of Europe against the risk of marginalization, the Dutch Senate – of which Mr Van der Linden is a member – adopted by unanimity a motion in March 2006 in which it took the view that, since an agreement could be concluded between the EU and the Council of Europe in order for the EU to benefit from the monitoring systems already established in the framework of the Council of Europe, the proposal to establish a Fundamental Rights Agency for the EU did not pass the test of subsidiarity. On 31 March 2006, the President of the Dutch Senate, Ms Yvonne Timmermann-Buck, wrote to the speakers of the national parliaments of the other EU member States as well as to the speaker of the European Parliament urging them to use the tools of ‘parliamentary diplomacy’ in order to oppose the establishment of the Fundamental Rights Agency.

³⁰ ‘Plans to set up a Fundamental Rights Agency of the European Union’, Doc 10241, Draft resolution and draft recommendation adopted unanimously by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 27 January 2005.

³¹ Resolution 1427 (2005) notes in this regard : ‘Such monitoring is carried out by several well-established independent human rights bodies with recognised expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically. Through these mechanisms, the Council of Europe monitors compliance with all the human rights obligations of its member states (including the twenty-five member states of the European Union), identifies issues of non-compliance, addresses recommendations to member states and, in the case of the European Court of Human Rights, issues judgments binding on states parties whenever these standards are not respected’ (at para. 4).

³² At para. 10.

³³ At para. 13.

and which define scope of application of the EU Charter of Fundamental Rights.³⁴ Second, the Agency should work on a thematic, not a country-by-country basis, focusing on certain specified themes having a special connection with EC/EU policies. While this restriction does not follow from the definition of the Fundamental Rights Agency as a ‘national institution for the promotion and the protection of human rights’ for the Union, it was put forward, presumably, to limit any risk of the Agency competing with the monitoring bodies of the Council of Europe, and in particular of the Agency arriving at different conclusions than those of these bodies as regards specific situations arising in the Member States. Indeed, in a later recommendation, the PACE stated very clearly that ‘the agency should be explicitly excluded, in its mandate, from engaging in activities that involve assessing the general human rights situation in specific countries, in particular those that are members of the Council of Europe’.³⁵ Thirdly, the PACE considered that the future Agency should include within its reference instruments not only the European Convention on Human Rights, but also the other human rights instruments of the Council of Europe.³⁶ The PACE also recommended that the Council of Europe be included in the management structures of the Agency, and that a cooperation agreement be concluded to that effect between the Council of Europe and the Union.³⁷

There were two reactions by the governments of the Member States of the Council of Europe to the position thus expressed by the Parliamentary Assembly. At their Third Summit held in Warsaw on 16-17 May 2005, the Heads of State or government of the Member States of the Council of Europe adopted a Declaration on the future relationship between the EU and the Council of Europe,³⁸ and they agreed on a set of guidelines on the relations between the Council of Europe and the European Union, which stated in particular that : ‘The future Human Rights Agency of the European Union, once established, should constitute an opportunity to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity’.³⁹ The Heads of State or government also requested Prime Minister of Luxembourg, Jean-Claude Juncker, that he prepare, in his personal capacity, a report on the relationship between the Council of Europe and the European Union, on the basis of the decisions adopted at the Summit and taking into account the importance of the human dimension of European construction.⁴⁰

Second, the Committee of Ministers of the Council of Europe replied on 13 October 2005 to Recommendation 1696 (2005) of the Parliamentary Assembly.⁴¹ After recalling the results of the

³⁴ On the precise delineation of the situations in which the Member States are bound by fundamental rights as general principles of EC or EU law, see esp. J.H.H. Weiler, ‘The European Court at a Crossroads: Community Human Rights and Member State Action’, in: *Du droit international au droit de l’intégration. Liber amicorum Pierre Pescatore*, Baden-Baden, Nomos Verlagsgesellschaft, 1987, p. 821; J. Temple Lang, ‘The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles’, *L.I.E.L.*, 1991/2, p. 23; J.H.H. Weiler, ‘Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights’, in N. Neuwahl et A. Rosas, *The European Union and Human Rights*, Martinus Nijhoff Publ., Kluwer, The Hague-Boston-London, 1995, p. 56 ; and K. Lenaerts, ‘Le respect des droits fondamentaux en tant que principe constitutionnel de l’Union européenne’, *Mélanges en hommage à Michel Waelbroeck*, Bruxelles, Bruylant, 1999, p. 423. The wording of the Charter of Fundamental Rights is more restrictive than what the case-law of the European Court of Justice would suggest, since it refers not in general to the scope of application of Union law – which would include situations where the Member States act under exceptions provided by EC/EU law (see, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24) ; Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (para. 81)) – but only to the situation where the EU Member States *implement* Union law (see Article 51 of the Charter).

³⁵ PACE Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, adopted on 13 April 2006 on the basis of the report prepared within the Committee on Legal Affairs and Human Rights (doc. 10894, rapp. Mr Jurgens) (see para. 11.4. of the recommendation).

³⁶ PACE Resolution 1427 (2005), para. 14, ii).

³⁷ *Id.*, para. 14, iii). These elements are summarized in Recommendation 1696 (2005) adopted by the Parliamentary Assembly on the same day.

³⁸ See the Declaration adopted at the Warsaw Summit (Third Summit of the Heads of State and Governments of the Member States of the Council of Europe), http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp (last visited 15 January 2008).

³⁹ Para. 8 of the guidelines.

⁴⁰ ‘Council of Europe – European Union; a sole ambition for the European continent’, report by Jean-Claude Juncker to the Heads of State and government of the Member States of the Council of Europe, 11 April 2006.

⁴¹ CM/AS(2005)Rec1696 final, adopted at the 939th meeting of the Ministers’ Deputies.

Warsaw Summit, the Committee of Ministers referred to the proposals made in the meantime by the European Commission on the establishment of a Fundamental Rights Agency,⁴² which (it considered) ‘take several of the recommendations made by the [Parliamentary Assembly of the Council of Europe] and the Secretary General into account. Many of the tasks foreseen for the agency would indeed be complementary to the activities carried out by the Council of Europe. As regards co-operation with the Council of Europe, the Committee of Ministers acknowledges that the draft regulation [establishing the EU Fundamental Rights Agency] provides for a close institutional relationship, including provisions that the agency shall co-ordinate its activities with those of the Council, that a bilateral co-operation agreement shall be concluded and that an independent person shall be appointed by the Council to the management board of the agency’. It also stated, in para. 4 of its reply, that it ‘agrees with the Assembly that the agency’s mandate should focus on human rights issues within the framework of the European Union, address its advice to the EU institutions and ensure that unnecessary duplication with the Council of Europe is avoided’; and it expressed its hope ‘that these points will be fully reflected in the future Community regulation’.

These statements did not fully reassure the Secretariat and the Parliamentary Assembly of the Council of Europe. After his meeting in July 2005 with Vice-President F. Frattini, in charge within the Commission of Justice, Freedom and Security, the Secretary General of the Council of Europe, Mr Terry Davis, agreed to provide the Commission with an analysis, by the Secretariat of the Council of Europe, of the proposals on the establishment of the EU Fundamental Rights Agency. This memorandum was finalized on September 8th, 2005.⁴³ Many of the themes evoked above are reiterated, in particular the idea that, in order to avoid duplication with the missions of the Council of Europe, the Agency should not systematically monitor the human rights performance of non-EU Member States who are Member States of the Council of Europe. These concerns were again reiterated by the Parliamentary Assembly of the Council of Europe in April 2006.⁴⁴

How justified were these concerns ? The question of whether the establishment of the Fundamental Rights Agency risked undermining the efforts of the Council of Europe monitoring bodies should be put into proper perspective. The primary task of the Agency was to provide advice to the institutions of the Union in the field of fundamental rights. This task was not fulfilled, either at the time or now, by the Council of Europe bodies⁴⁵ – an important lacuna which the establishment of the Agency, in part, will help compensating for. That alone would have justified setting up the Agency, in order to ensure that fundamental rights are taken into account *ex ante* on a systematic basis in the legislative procedure of the European Union, rather than only *ex post*, through judicial review mechanisms. However, leaving aside that important function of the Agency, the focus will be here on the role of the Agency vis-à-vis the national authorities of the Member States of the Council of Europe – since it is here, of course, that the risk of overlap with the tasks fulfilled by the Council of Europe bodies is greatest. Should the Fundamental Rights Agency be given such a mandate, or would this create a risk of overlap, thus undermining the kind of supervision of the EU Member States’ human rights obligations performed by Council of Europe monitoring bodies ?

Predictably perhaps, the concerns expressed by the Council of Europe bodies were well received by the EU member States within the Council of the EU, since they provided the Council with a welcome justification for narrowing down the competences of the Agency, and for strictly restricting, in particular, its ability to examine the situation of fundamental rights in individual countries. The founding

⁴² See above, n. 22.

⁴³ This document is on file with the author. It will be referred to hereafter as the ‘Council of Europe Memorandum of 8 September 2005’.

⁴⁴ PACE, Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, cited above n. 35.

⁴⁵ Of course, the international responsibility of the EU Member States may be engaged if they fail to ensure that human rights are respected within their jurisdiction, even in situations where the alleged violation has its source in European Union law. See, e.g., Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32 ; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

Regulation did not task the Fundamental Rights Agency with a monitoring mission, in the sense of ‘normative monitoring’ – evaluation of compliance on the basis of a preexisting normative grid⁴⁶; its role is, rather, to provide technical advice on the basis of its collection and analysis of information pertaining to the situation of fundamental rights in the Member States. In practice, it has not always been possible to maintain a watertight division between these two functions: even mere fact-finding, after all, necessarily consists in highlighting certain situations, and thus putting pressure on the actors concerned to remedy any deficiencies found to exist. In addition, even though the emphasis or formulations may differ – with expert bodies of the Council of Europe explicitly evaluating certain situations for their compliance with the relevant standards, and the Fundamental Rights Agency more cautiously reporting about what it has found to occur and making certain recommendations of a general nature about trends –, it remains the case that the same situations may be considered under both mechanisms. The EU Fundamental Rights Agency is allowed under the founding Regulation to publish annual reports and formulate conclusions and opinions on fundamental rights dimensions of the implementation of EU law by the Member States. Although the adoption of reports or recommendations on *individual Member States* is not defined as one of the tasks of the Agency in Article 4 of the Regulation – on the contrary, Article 4(1)(d) specifically mentions that the Agency shall ‘formulate and publish conclusions and opinions *on specific thematic topics*, for the Union institutions and the Member States when implementing Community law’, a formulation which seems to be calculated to exclude conclusions and opinions on individual Member States or on specific events or measures⁴⁷ –, it would have been clear from the start that the Agency could not fully abstain from at least naming in its thematic reports or annual reports specific Member States, when describing the situation of fundamental rights in the Union.⁴⁸ Nevertheless, the tasks of the Agency remain distinct from those of a monitoring body in the classic meaning of the expression, such as those established under Council of Europe instruments.

But the second limitation imposed by the founding Regulation to the tasks entrusted to the Agency plays an equally decisive role. The EU Member States and only assisted by the Agency (and ‘monitored’ through the opinions and reports of the Agency) *in the implementation of Community (now Union) Law*. This seems to exclude any role for the Agency in ensuring that EU Member States comply with democracy, the rule of law and fundamental rights -- all values listed in what is now Article 2 EU --. Is this interpretation correct? If so, should the founding Regulation be amended to expand the mandate of the Agency?

4. Monitoring compliance with the values on which the Union is founded

a) The legal and political monitoring tools

The European Union currently has two, quite distinct sets of tools at its disposal to ensure that the EU Member States act in accordance with the values now listed in Article 2 TEU -- democracy, the rule of law and fundamental rights.⁴⁹ First, in all situations where the Member States act in the scope of application of EU law (in particular, when they implement a directive, apply a regulation, execute a decision or restrict an economic freedom stipulated in the Treaties), they are bound to comply with the Charter of Fundamental Rights⁵⁰ as well as with fundamental rights recognized as general principles of Union law.⁵¹ Cases of non-compliance can be brought before the Court of Justice of the European Union,

⁴⁶ On this distinction, see Martin Scheinin, ‘The Relationship between the Agency and the Network of Independent Experts’, in Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, at pp. 73-90.

⁴⁷ In the original proposal of the Commission, this provision read : ‘[the Agency shall] formulate conclusions and opinions *on general subjects*, 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 of the Commission’ (emphasis added).

⁴⁸ Indeed, on various occasions, the Fundamental Rights Agency did in fact assess country-specific situations, delivering an opinion on 29 November 2016, for instance, on fundamental rights in the ‘hotspots’ in Greece and Italy.

⁴⁹ More precisely, Article 2 of the Treaty on the European Union lists the values on which the Union is founded as “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”.

⁵⁰ Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 1.

⁵¹ Article 6(1) and (2) TEU, respectively.

either through infringement proceedings -- filed by the European Commission, as the guardian of the Treaties, under Article 258 of the Treaty on the Functioning of the European Union (TFEU) --, or, more generally, by challenging the measures adopted by the State before domestic courts, which shall refer the question of interpretation of the requirements of EU law to the Court of Justice in the conditions stipulated by Article 267 TFEU.

Secondly, a political mechanism may be triggered where a Member State adopts measures that may be inconsistent with the values on which the Union is founded. Article 7 TEU provides for three possibilities, which are both preventive ((a) and (b), both described in paragraph 1 of Article 7 TEU) and remedial ((c), described in paragraphs 2 and 3 of Article 7 TEU)⁵²:

(a) The Council of the EU may decide, by a majority of four fifths of its members (i.e., if at least 21 Member States agree, or 20 Member States following the withdrawal of the United Kingdom), and with the consent of the European Parliament (acting act by a two-thirds majority of the votes cast, representing the majority of its component Members), to address recommendations to a Member State, even prior to any finding that there is a "clear risk of a serious breach" by that Member State of the values listed in Article 2 TEU, if the situation is considered to be serious enough to justify such a move.⁵³ (Article 7 TEU does *not* in fact provide for any substantive condition for such recommendations to be adopted, though the emergence of a "systemic threat to the rule of law" is one example of where such recommendations may be warranted.⁵⁴ It is incorrect to state, as the Commission does, that "the preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach"" of the values of Article 2 TEU⁵⁵).

The Council may adopt such recommendations on a "reasoned proposal" by one third of the Member States (i.e., by at least 9 States, or 8 States after the United Kingdom shall have left the EU), by the European Parliament (acting with the same two-thirds majority as described above), or by the European Commission. Each of these institutions may therefore trigger the procedure, taking the initiative in this regard. The reference to a "reasoned proposal" suggests the institution in question explains the grounds of its concern; Article 7 TEU does not provide more details, however, on the kind of motivation that is required.

(b) The Council of the EU may also determine, according to the same procedure and with the same majority, that "there is a clear risk of a serious breach by a Member State of the values referred to in Article 2".⁵⁶ Because of its clearly condemnatory nature, the Treaty provides that the Member State in question shall be heard before such a determination is made. This determination may be made even if no recommendations were initially addressed to the Member State concerned.

(c) Finally, the European Council, acting by unanimity (minus the voice of the Member State concerned by the procedure) on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a "serious and persistent breach" by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.⁵⁷ Once such a determination is made, the Council of the EU, acting by a qualified majority, "may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".⁵⁸

⁵² See, in addition to Article 7 TEU, Article 354 TFEU, which defines how the majorities required for the decisions referred to in Article 7 TEU are to be calculated.

⁵³ Article 7(1) TEU.

⁵⁴ See Communication of the Commission on a new EU Framework to strengthen the Rule of law, COM(2014) 158 final of 1.3.2014.

⁵⁵ Comp. Communication of the Commission on a new EU Framework to strengthen the Rule of law, at p. 5.

⁵⁶ Article 7(1) TEU.

⁵⁷ Article 7(2) TEU.

⁵⁸ Article 7(3) TEU.

b) The exercise by the Commission of its powers under Article 7 TEU

While the European Parliament may only trigger the preventive mechanisms stipulated in Article 7(1) TFEU ((a) and (b)), the Commission may trigger both the preventive ((a) and (b)) and the remedial (c) mechanisms. On 11 March 2014, in order to clarify the steps it would take before relying on Article 7 TEU to ensure compliance with the values of Article 2 TEU (although not committing itself to necessarily rely on this procedure prior to exercising its powers under Article 7 TEU), the Commission issued a Communication on a new EU Framework to strengthen the Rule of law.⁵⁹ This "Rule of Law Framework" is often presented as a new tool that the Commission has established in order to allow it to answer situations that, while not rising to the level that would justify the use of Article 7 TEU, nevertheless does seem to call for a reaction of the EU institutions⁶⁰: the Commission refers in this regard to "situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law ... The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress".⁶¹

The idea of the Rule of Law Framework has its source in a joint demarche towards Mr Barroso, at the time the President of the European Commission, by the Foreign Affairs Ministers of Denmark, Finland, Germany and The Netherlands.⁶² In a letter addressed to Mr Barroso on 6 March 2013,⁶³ these ministers proposed the establishment of "a new and more effective mechanism to safeguard fundamental values in Member States". "Such a mechanism", they wrote,

should be swift and independent of political expediency. We propose that the Commission as the guardian of the Treaties should have a stronger role here. It should be allowed to address deficits in a given country at an early stage and – if sufficiently supported by Member States – require the country in question to remedy the situation.

A variety of options could then be explored to foster compliance, including introducing a structured political dialogue, bringing the issue to the Council at an early stage, or concluding binding agreements between the Commission and the relevant Member State. As a last resort, the suspension of EU funding should be possible.

The procedure established one year later under the Rule of Law Framework does not go as far as was initially proposed by these four Member States. It does provide however for such an "early stage" intervention at the initiative of the Commission. The Treaty on the European Union tasks the Commission with "promot[ing] the general interest of the Union" and with "oversee[ing] the application of Union law under the control of the Court of Justice of the European Union".⁶⁴ The position of the Commission as guardian of the Treaties, and as dedicated exclusively to the general interest of the Union, is seen as allowing it to use its powers with the required impartiality.

The procedure established by the "Rule of Law Framework" is summarized in figure 1. It is important to note that the effectiveness of this procedure depends in fact on at least the possibility that the majorities required under either the preventive or the remedial branches of Article 7 TEU may be found. Indeed, even though the initial phase of the procedure described by the Rule of Law Framework

⁵⁹ COM(2014) 158 final.

⁶⁰ For an assessment, see D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540.

⁶¹ COM(2014) 158 final, at pp. 6-7.

⁶² It is worth noting that Mr Frans Timmermans was, at the time, Foreign Affairs Minister of The Netherlands.

⁶³ See <https://www.rijksoverheid.nl/documenten/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetting-rechtsstatelijkheidsmechanisme> (last consulted on 5 July 2017).

⁶⁴ Art. 17(1) TEU.

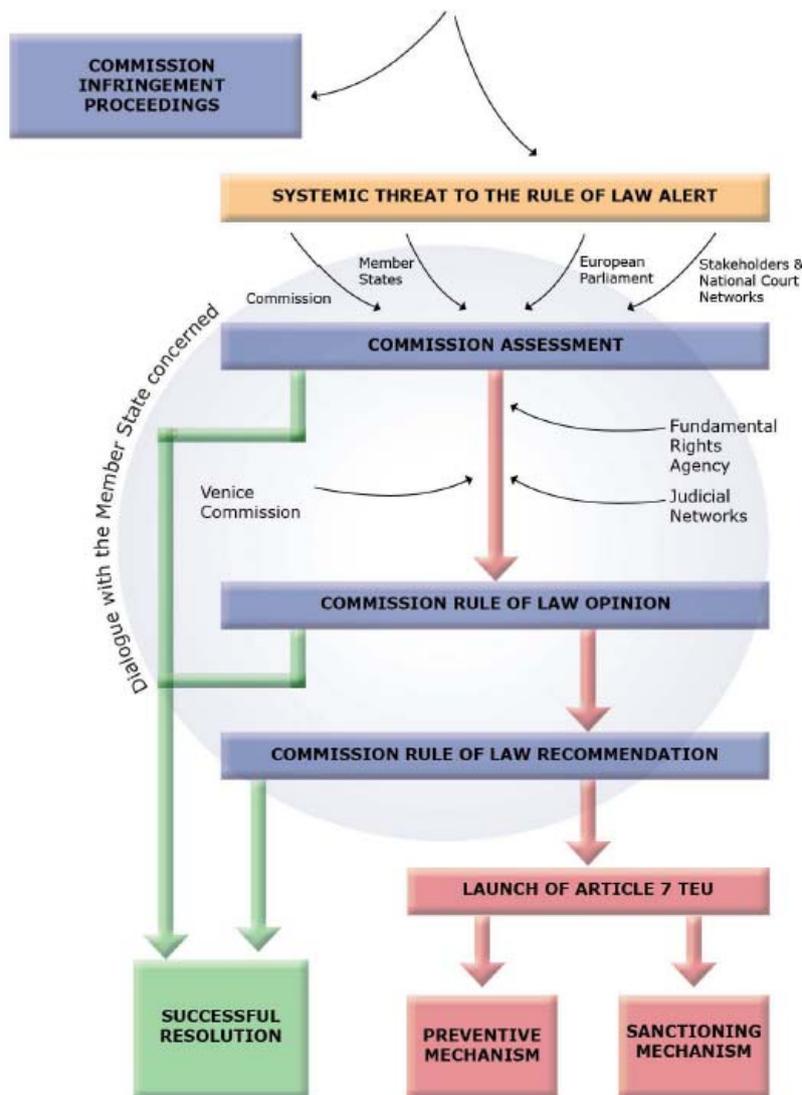
presented in the March 2014 communication is partly hidden from the public, insofar as the responses by the Member State and the dialogue with the Commission are in principle confidential, the launching of the assessment by the Commission and the sending of the "Rule of Law Opinion" expressing the conclusions of the Commission, shall be made public.⁶⁵ Therefore, there is little incentive for the Member State to whom such an opinion is addressed to re-examine the course of action it has taken, unless there is a realistic possibility that the Commission shall be able to rely on Article 7 TEU at a later stage of the process: the reputation of the Member State shall have been dealt a serious blow simply as the result of the announcement by the Commission that it is assessing a Member State and, later, that it has decided to address a "Rule of Law Opinion" to that State, and the visibility given to these announcements do not offer to that State the easy escape route that confidential proceedings would otherwise have provided. In other terms, as it is currently conceived, the Rule of Law Framework tends to rely more on the public pressure exercised on the State (and the pressure from the peers -- the other governments of the EU Member States), than on the powers of silent diplomacy.⁶⁶

Figure 1. The stages of the Rule of Law Framework. Source: European Commission, Annex 1 to the Communication from the Commission to the European Parliament and the Council. A New EU

⁶⁵ See *id.*, at p. 8 (where the Commission states that whereas "the launching of the Commission assessment and the sending of its opinion will be made public by the Commission, the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution").

⁶⁶ This may be one reason why, relying on rather unconvincing legal arguments of its Legal Service, the Council of the EU seems to be distrustful of the Rule of Law Framework as it has been proposed. In a legal opinion it adopted at the request of the Council on 27 May 2014, the Council Legal Service has taken the view that "there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU" (Council doc. 10296/14). This is barely plausible as an argument. Since the Commission has powers to trigger the procedure under Article 7 TEU, it obviously may decide that it address various warnings, under whatever form it sees fit, to the Member State concerned, prior to exercising such powers. This is also the view of L. Besselink, "The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives", in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (Oxford Univ. Press, 2017), pp. 128-144, at p. 139 (arguing that the institutions which can initiate Article 7(1) TEU proceedings by submitting a "reasoned proposal" to that effect necessarily should be recognized monitoring powers, since "Without possessing monitoring powers, a proposal could hardly be reasoned. The adjective 'reasoned' is used only in the context of the initiative for triggering the preventive mechanism, and is a decisive argument to conclude that there must be powers of monitoring included in the right to initiative"); or D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540, at p. 529.

Framework to strengthen the Rule of Law, COM(2014) 158 final of 11.3.2014.



What is most striking however, is that the three institutions or groups of actors that could trigger the procedure for failure to comply with the values of Article 2 TEU each have their own mechanisms and sources of information to guide the exercise of the powers they are attributed under Article 7 TEU. As already noted, the preventive components of the procedure may be launched by a reasoned proposal by one third of the Member States, by a two-thirds majority within the European Parliament, or by the European Commission. The approach taken by the Commission has just been described. The Member States, within the Council of the EU, and the Parliament, also have developed certain tools in order to exercise their powers under Article 7 TEU.

c) The initiatives taken by the Council of the EU

Within the Council, a new "dialogue on the rule of law in the Union" was launched in 2014, on an annual basis. In establishing this new practice, the Council expressed its intention "to encourage the culture of "respect for rule of law" through a constructive dialogue among the Member States ... by promoting the political dialogue within the Council in respect of the principles of objectivity, non discrimination, equal treatment, on a non-partisan and evidence-based approach"; such dialogue, in addition, is conceived as having to be "developed in a synergic way, taking into account existing instruments and expertise in this

field".⁶⁷ Partly in reaction to the approach developed by the Commission in its Rule of Law Framework, which it appears to find excessively judgmental, the Council thus appears to have opted for a peer review process, focused on the exchange of good practices rather than on a punitive approach.⁶⁸

d) The tools developed by the European Parliament

The approach adopted by the European Parliament has a history that is both longer and more convoluted. As recalled above, after the Treaty of Amsterdam introduced in the Treaty on the European Union a provision introducing a form of political monitoring of compliance with the values on which the Union is founded, the European Parliament gradually decided to take on explicitly a monitoring role.⁶⁹ Its practice since has not been entirely consistent, however. It adopted annual reports on the situation of fundamental rights in the European Union between 2000 and 2004, but then abandoned this practice until 2009. The main reason for suspending this practice deserves to be recounted.⁷⁰ When the Commission suggested, in a communication published on 15 October 2003 in which it set out its intentions about the implementation of Article 7 TEU,⁷¹ that a permanent monitoring of compliance with the values on which the Union is founded could be established (the Commission's model was that of the EU Network of Independent Experts on Fundamental Rights which has been established in 2002 at the request of the European Parliament⁷²), the Parliament realized it may have opened a Pandora's Box. Invoking its powers under Article 7 TEU, the Parliament had gradually developed a practice of assessing systematically the situation of fundamental rights in the EU Member States, and it had indeed requested from the Commission the establishment of a network of experts to support its role in this regard. It now appeared however that it had apparently opened the way for the Commission to establish a system of permanent monitoring -- but in a form which, by the end of 2003, the Parliament had grown suspicious about. While deploring, in other respects, the timidity of the reading proposed by the European Commission of Article 7 TEU, the Parliament insisted in a resolution of 20 April 2004 that the use of Article 7 TEU should be based on four principles, including the principle of confidence, which it explained thus:

The Union looks to its Member States to take active steps to safeguard the Union's shared values and states, on this basis, that as a matter of principle it has confidence in:

- the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles,
- the authority of the European Court of Justice and of the European Court of Human Rights.

Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and *may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union*. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.⁷³

⁶⁷ Council doc. 15206/14, para. 16.

⁶⁸ The second "rule of law dialogue" was organized on 24 May 2016 by the Dutch Presidency of the EU as part of the EU's General Affairs Council. The dialogue was dedicated to migrant integration and EU fundamental values.

⁶⁹ See above, text corresponding to notes 15-17.

⁷⁰ The other reason why the Parliament suspended its practice of adopting annual reports on the situation of fundamental rights in the European Union is because of the deeply politicized debate that followed the presentation of the report prepared by A. Boumediene-Thiery, on the situation as regards fundamental rights in the European Union in 2003 (see above, note 16). No majority could be found in the European Parliament to adopt the resolution based on the report. It thus appeared that the monitoring of fundamental rights by the Parliament has become a political exercise, making it difficult for the Parliament to profile itself as a guardian of fundamental rights in the EU, as would be fitting in the role provided for it by Article 7 TEU.

⁷¹ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

⁷² See below, text corresponding to notes 109-111.

⁷³ European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12 (emphasis added).

In effect, the insistence of the European Parliament on the "principle of confidence" excluded the establishment of a mechanism for the permanent monitoring of fundamental rights within the EU Member States, which by its very nature might instead be interpreted as a sign of distrust. The vote of 20 April 2004, however, is to be replaced in its historical context: adopted at the eve of the enlargement of the Union to ten new Member States, including eight former communist countries, the Parliament understandably may have wished to avoid creating the impression that new conditions would henceforth be imposed on the new Members, through a mechanism that could be interpreted as signalling suspicion.

Only at the very end of the 2004-2009 legislature did the Parliament revert to its practice of adopting regular reports on the situation of fundamental rights in the Union.⁷⁴ In the resolution it adopted on 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, the Parliament noted that "as the directly elected representative of the citizens of the Union and guarantor of their rights, [it] believes that it has a clear responsibility to uphold [the principles listed in Article 6 of the EU Treaty, which states that the European Union is based on a community of values and on respect for fundamental rights], in particular as the Treaties in their current form greatly restrict the individual's right to bring actions before the Community courts and the European Ombudsman".⁷⁵ The Parliament also "deplore[d] the fact that the Member States continue to refuse EU scrutiny of their own human rights policies and practices and endeavour to keep protection of those rights on a purely national basis, thereby undermining the active role played by the European Union in the world as a defender of human rights and damaging the credibility of the EU's external policy in the area of the protection of fundamental rights". Noting that Article 7 of the EU Treaty "provides for an EU procedure to make sure that systematic and serious violations of human rights and of fundamental freedoms do not take place in the EU, but that such a procedure has never been used notwithstanding the fact that violations do take place in the Member States, as proven by the judgments of the [European Court of Human Rights]", the Parliament requested the EU institutions to "establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty".⁷⁶

This is the background of the proposals that are currently being tabled to improved respect for democracy, the rule of law and fundamental rights in the European Union. It is to these proposals that the next section turns.

5. Strengthening compliance with the values of democracy, the rule of law, and fundamental rights: the proposal of the European Parliament

Various proposals have been made to improve the architecture for the protection of fundamental rights and the values of democracy and the rule of law. Some of these proposals suggest amending the European Treaties in order to strengthen the ability of the EU institutions to protect democracy, the rule of law and fundamental rights. They include, for instance: allowing for the expulsion from the Union of a Member State found to have systematically breached the values on which the Union is founded (a possibility that exists within the Council of Europe); the deletion of Article 51(1) of the Charter of Fundamental Rights, in order to allow the Union to supervise compliance with the rights and freedoms of the Charter not only in the field of application of Union law, but under the jurisdiction of the EU member States in whatever field they intervene -- thus transforming the EU into a human rights organisation; or the establishment of a new body, called a "Copenhagen Commission" (by reference to the "Copenhagen criteria" set out in 1993 as conditions that candidate countries should fulfil in order to

⁷⁴ See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, of 5.12.2008) ; and the Resolution of the European Parliament of 14 January 2009 on the situation of fundamental rights in the Union 2004-2008 (2007/2145(INI)).

⁷⁵ Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145 (INI)), Preamble, para. B.

⁷⁶ *Id.*, operational paragraphs 3 and 5.

accede to the EU⁷⁷), in charge of ensuring compliance with Article 2 TEU. The most widely discussed of these proposals, however, would not require an amendment of the treaties; but it would certainly require that a political battle be fought. It would consist in the establishment of a new mechanism to monitor compliance with the values of Article 2 EU, built through an interinstitutional agreement between the European Parliament, the Commission and the Council of the EU.

a) The proposal of the European Parliament for a EU Pact on democracy, the rule of law and fundamental rights

On 10 June 2015, the European Parliament adopted a resolution deploring the weakness of the reactions following events in Hungary (including the statement by the Hungarian Prime Minister, Viktor Orbán, concerning the need for public debate on the death penalty, and the organisation of a public consultation on migration suggesting a link between migration and security threats). The resolution also called on the Commission to present a proposal

for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States, relying on common and objective indicators, and to carry 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.⁷⁸

This was not a new idea: we have seen already that it appeared in a resolution adopted by the European Parliament already in 2009. Nor was it an idea of the European Parliament alone. Instead, it seems to be favored by at least a significant group of EU Member States. Indeed, already at an informal meeting of Justice and Home Affairs (JHA) Ministers held in January 2013, it was agreed that "the idea of setting up a mechanism to better support protection of fundamental rights and the rule of law in the Member States could be considered further. Such a mechanism would provide a holistic framework for effective responses to these issues. It could cover sharing of best practices, benchmarking, evaluating outcomes in an objective and non-discriminatory way and formulating appropriate recommendations and guidelines for action".⁷⁹

A detailed proposal for such a mechanism is contained in the resolution adopted by the European Parliament on 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.⁸⁰ The resolution requested the Commission to submit – by September 2017 – a proposal for the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights ("DRF"). According to the resolution, this proposal should take the form of an inter-institutional agreement adopted on the basis of Article 295 TFEU, which allows the European Parliament, the Council and the Commission, "by common agreement", to "make arrangements for their cooperation", to which end "they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature".

⁷⁷ The European Council that met in Copenhagen in 1993 listed political and economic criteria for accession of new Member States, as well as conditions related to administrative and institutional capacity. The political criteria are "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".

⁷⁸ European Parliament resolution of 10 June 2015 on the situation in Hungary ([2015/2700\(RSP\)](#))

⁷⁹ Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Note from the COREPER to the Council, Council of the EU doc. 10168/13 (Brussels, 29 May 2013), para. 4.

⁸⁰ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV (2016) 0409. The resolution was adopted on the basis of a report from MEP Sophie in't Veld, who was closely involved in the work of the EU Network of Independent Experts on Fundamental Rights between 2002 and 2007. That experience may have influenced some of the proposals adopted by the European Parliament.

Such a "EU Pact for DRF", according to the Parliament, should result in a monitoring mechanism that should "be evidence based ... objective and not subject to outside influence, in particular political influence, non-discriminatory and assessing on an equal footing"; it should respect "the principle of subsidiarity, necessity and proportionality"; it should address "both Member States and institutions of the Union"; and it should be "based on a graduated approach, including both a preventative and corrective arm".⁸¹ The "primary objective" of the EU Pact for DRF, the annex to the resolution states, "should be to prevent violations and non-compliance with democracy, rule of law and fundamental rights, while at the same time providing the tools needed to render both the preventative and corrective arms of Article 7 TEU, as well as the other instruments provided for in the Treaties, operational in practice".⁸² In other terms, rather than to establish a new mechanism separate from the existing procedures, the Pact is intended to improve the effectiveness of the existing tools, particularly of Article 7 TEU (but also, in particular, the use of infringement proceedings filed by the Commission in accordance with Article 258 TFEU where a Member States fails to comply with its obligations). It is also intended to bring about greater coherence across the existing mechanisms, since (in the proposals of the Parliament) it should "incorporate the Commission's Rule of Law Framework and the Council's Rule of Law Dialogue into a single Union instrument".⁸³

The resolution of the Parliament includes an Annex that sets out in detail what could be the content of the Inter-institutional Agreement establishing the EU Pact for DRF. The Draft EU Pact for DRF is premised on the idea that "the Union's democratic and legal governance does not have as solid a legislative basis as its economic governance, as the Union does not display the same intransigence and firmness in demanding respect for its core values as it does when making sure its economic and fiscal rules are implemented properly".⁸⁴ This explains why the Pact includes certain ideas (such as regular cycles of control and the adoption of country specific recommendations) that are directly imported from the new tools for socio-economic governance of the EU, particularly the European Semester. More precisely, the proposals of the European Parliament include the following elements:

(i) The Commission shall prepare, on an annual basis, of a report on democracy, the rule of law and fundamental rights (European DRF Report), including both a general part and "country-specific recommendations".⁸⁵

(ii) This annual report shall draw on reporting done by the Fundamental Rights Agency and the Council of Europe, but also on other sources, including "contributions from the Member States authorities", information provided by the European Data Protection Supervisor (EDPS), the European Institute for Gender Equality (EIGE), the European Foundation for the Improvement of Living and Working Conditions (Eurofound), and Eurostat, input from civil society and academic experts, "all resolutions or other relevant contributions by the European Parliament, including its annual report on the human rights situation in the Union", and "the case-law of the Court of Justice and of the European Court of Human Rights and of other international courts, tribunals and treaty bodies".⁸⁶

(iii) In preparing the annual European DRF Report, the Commission should work "in consultation with"⁸⁷ a panel of independent experts (DRF Expert Panel) composed of 38 independent experts (37 following the leave of the United Kingdom): the panel would be composed of one independent expert designated by the national parliament of each Member State, who is "a qualified constitutional court or supreme court judge not currently in active service"; ten further experts would be "appointed by the

⁸¹ Preamble, para. AJ.

⁸² Annex to the resolution, Detailed recommendations for a draft Inter-institutional Agreement on arrangements concerning monitoring and follow up procedures on the situation of Democracy, the Rule of Law and Fundamental Rights in the Member States and EU institutions, op. para. 2.

⁸³ Draft EU Pact for DRF, Art. 3.

⁸⁴ Preamble, para. Q.

⁸⁵ Draft EU Pact for DRF, Art. 2.

⁸⁶ Draft EU Pact for DRF, Art. 6.

⁸⁷ Draft EU Pact for DRF, Art. 4.

European Parliament, with a two-thirds majority", chosen from a list of experts nominated by various international organisations or bodies.⁸⁸

It is not entirely clear whether, in the intention of the Parliament, the panel of experts shall adopt a report providing an assessment of the situation of fundamental rights in the European Union (including an assessment of the situation in each Member State),⁸⁹ or whether such assessment should be proposed by the Commission on the basis of the panel of experts' contribution, but with the Commission taking full responsibility for the content of the report. On the one hand, the Draft EU Pact on DRF provides that the Commission, which is responsible from preparing the annual report, is to do so "in consultation with" the expert panel, which suggests that the Commission shall have the final say and may be selective as to the information it decides to include as well as as regards the precise content of the CSRs⁹⁰; on the other hand, the draft Pact suggests that "assessment of the state of democracy, rule of law and fundamental rights in the Member States, as well as the development of country-specific draft recommendations, shall be carried out by [the DFR Expert Panel] on the basis of a quantitative and qualitative review of the data and information available", as if the expert panel would be trusted in making these choices.⁹¹

The general spirit of the proposal is clear enough, however: the report shall provide an objective and impartial assessment of the situation of democracy, the rule of law and fundamental rights in the EU Member States, and independent experts should be involved in order to ensure the integrity of the process as well as the soundness of the methodology adopted.

(iv) The annual report shall lead to "a multi-annual structured dialogue between the European Parliament, the Council, the Commission and national parliaments and it shall also involve civil society, the FRA and the Council of Europe". Specifically, this multi-annual structured dialogue shall include an interparliamentary debate convened by the European Parliament and involving national parliaments on the basis of the European DRF Report, leading to the adoption of a resolution setting benchmarks and goals to be attained from one year to another, allowing effective monitoring of annual changes. An annual debate should be held within the Council, building upon its Rule of Law Dialogue, on the basis of the European DRF Report and shall adopt Council conclusions, inviting national parliaments to provide a response to the European DRF Report, proposals or reforms. Finally, again on the basis of the European DRF Report, the Commission may decide to launch a "systemic infringement" action under Article 2 TEU and Article 258 TFEU, bundling several infringement cases together⁹²; it may also, after consulting the European Parliament and the Council, decide to submit a proposal for an evaluation of

⁸⁸ Draft EU Pact for DRF, Art. 8.

⁸⁹ Art. 9 of the Draft EU Pact for DRF provides that the DRF Expert Panel "shall assess each of the Member States with regard to the aspects listed in Article 7 and shall identify possible risks and breaches. That assessment shall be carried out on an anonymous and independent basis by each of the panellists in order to safeguard the independence of the DRF Expert Panel and the objectivity of the European DRF Report". The proposal for such a role of the expert panel is detailed in particular in a research paper commissioned in 2016 by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services ('Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights' (by Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov, with a thematic contribution by Wim Marneffe).

⁹⁰ Draft EU Pact on DRF, Art. 4.

⁹¹ Draft EU Pact on DRF, Art. 8.

⁹² It has been suggested that, in the future, the Commission could file infringement proceedings against a Member State for failure to comply with EU law (Article 258 TFEU) to address situations of "systemic infringement", based on Article 2 TFEU: see K.L. Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures", in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge Univ. Press, 2016). Doubts have been expressed, however, as to whether such a proposal would be legally viable. Article 2 TEU is subject to the political monitoring provided for in Article 7 TEU, and it is likely that the setting up of such a procedure, deliberately designed to avoid the Court of Justice being involved in assessing compliance with the values listed in Article 2 TEU, would be seen as precluding judicial control in the context of infringement proceedings (see D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540, at p. 520). In addition, it is unclear whether notions such as "democracy" and "the rule of law" are now sufficiently well defined to be justiciable (L. Gormley, "Infringement Proceedings", in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford Univ. Press, 2017), pp. 65-78, at p. 78).

the implementation by Member States of Union policies in the area of freedom, security and justice under Article 70 TFEU: this article provides that, acting on the basis of such a proposal of the Commission, "the Council may ... adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition".

(v) The European DRF Report, finally, may trigger the procedures provided for under Article 7 TEU. The European Parliament resolution anticipates in this regard that, "if a Member State falls short on one or more of the aspects listed in Article 7, the Commission shall start a dialogue with that Member State without delay, taking into account the country-specific recommendations". Where the country-specific recommendation on a Member State include an assessment by the DRF Expert Panel that there is a clear risk of a serious breach of the values referred to in Article 2 TEU and that there are sufficient grounds for invoking Article 7(1) TEU, "the European Parliament, the Council and the Commission, shall each discuss the matter without delay and take a reasoned decision, which shall be made public"; if the country-specific recommendations on a Member State include the assessment by the Panel that there is a serious and persistent breach (which the European Parliament resolution describes as a breach "increasing or remaining unchanged over a period of at least two years, of the values referred to in Article 2 TEU") and that there are sufficient grounds for invoking Article 7(2) TEU, "the European Parliament, the Council and the Commission shall each discuss the matter without delay and each institution shall take a reasoned decision which shall be made public".

b) The advantages of the proposal for a EU Pact on democracy, the rule of law and fundamental rights

The most interesting contribution made by the proposals that are now under discussion to strengthen the monitoring of compliance with democracy, the rule of law and fundamental rights, is that they clearly acknowledge the need for such a monitoring to be more objective and systematic -- rather than ad hoc and thus potentially discriminatory, if only some Member States are subject to scrutiny --. The proposal of the European Parliament for an interinstitutional agreement establishing the EU Pact for democracy, the rule of law and fundamental rights also presents the advantage that the three key institutions involved in the procedures defined in Article 7 TEU -- the European Parliament, but also the Council and the Commission -- shall be taking the same report as the basis for their monitoring, which should ensure greater coherence and reduce the risk of politicization of the process. This is particularly important where different political majorities exist in the European Parliament and across the Member States' governments, or where the political sensitivities within those institutions diverge from those of the College of Commissioners. In such a constellation, initiatives taken by one institutional actor may be obstructed by other actors, whether this obstruction is built into the procedure of Article 7 TEU or whether it is of a political nature (though the national governments within the Council of the EU or the European Council appear to have the final word in the scheme of Article 7 TEU). This may undermine the credibility of the actor (or group of actors, in the case of a group of States) taking the initiative of triggering this provision, and thus have a chilling effect on its use, even in the situations where the threat to Article 2 TEU values is clearest.

Ensuring that the institutional actors involved in Article 7 TEU procedures take as a departure point a single, common document, also offers a second advantage, of a strictly legal nature. The preventive component of Article 7 TEU (in its paragraph 1) refers to a "reasoned proposal" from a third of the Member States, the European Parliament, or the Commission, for the mechanism to be launched. It cannot be excluded that, if a decision to trigger Article 7 TEU is challenged by the Member State concerned (to which a recommendation is addressed, or which is found to present a "clear risk of a serious breach" of the values of Article 2 TEU), the Court of Justice of the European Union shall have to assess whether the proposal is, indeed, sufficiently "reasoned", in other terms, backed by sufficient evidence rather than based on considerations of a primarily (or exclusively) political nature.

Of course, the Court of Justice in principle plays no role in the decision to address recommendations to a Member State or to conclude that there exists a "clear risk of a serious breach" of the values on which the Union is founded. Yet, should the Council of the EU decide to take such measures, they could be challenged before the Court by the Member State concerned, in the form of an action for annulment as provided for in Article 263 TFEU.⁹³ The role of the Court is strictly limited: Article 269 TFEU provides that "The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and *in respect solely of the procedural stipulations contained in that Article*" (emphasis added).⁹⁴ As noted by the European Commission, "despite the repeated suggestions made by the Commission in the run-up to the Amsterdam and Nice Treaties, the Union Treaty does not give the European Court of Justice the power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach".⁹⁵ However, it cannot be excluded that, consistent with the role of the Court of Justice in this context (which is essentially to protect the rights of defence of the Member State concerned), the Court shall consider that it has the competence to examine whether the proposal from one third of the Member States, the European Parliament or the Commission is sufficiently well documented to qualify as a "*reasoned* proposal".

The approach recommended by the European Parliament in putting forward the idea of a EU Pact for SRF would be more principled, better informed, and more consistent across time and across Member States, than the current arrangements allow. The potential of such a new approach to the strengthening of the "Rule of Law Dialogue" held annually within the Council is particularly important to underline. This is a third advantage of the proposal: in the same way that the Universal Periodic Review process within the Human Rights Council is informed by three reports (one submitted by the State under consideration, and two reports compiled by the Office of the High Commissioner for Human Rights, respectively on the basis of findings of UN mechanisms, and on the basis of contributions from external sources, in particular reports from non-governmental organisations), a "Rule of Law Dialogue" informed by a report compiled by the European Commission on the basis of findings made authoritatively by human rights mechanisms could force the governments, within the General Affairs Council, to address certain more sensitive issues, and to do so on the basis of information that shall not be easily dismissed as unreliable or selective.

Indeed, beyond the Council "Rule of Law Dialogue", a fourth advantage is the insistence on taking into account the monitoring performed by Council of Europe and United Nations bodies and mechanisms. This should not only further reduce the risks of politicization. It also shall lead to greater coherence in the overall protection of fundamental rights and the interpretation of applicable human rights instruments.

A fifth advantage, finally, is to involve national parliaments, through the annual interparliamentary dialogue, in the debate on the reforms that should be implemented at country level in order to ensure that the values of Article 2 TEU are upheld.

⁹³ Such an action must be filed within one month following the adoption of the measure challenged.

⁹⁴ This corresponds to the former Article 46(e) of the TEU (prior to the entry into force of the Lisbon Treaty).

⁹⁵ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based (COM(2003)606 final, of 15.10.2003), p. 6). For the same reasons, the General Court (formerly the Court of First Instance) considered it had no jurisdiction to assess whether the Commission acted unlawfully in deciding to refrain from initiating the procedure under Article 7 EU against Spain following a complaint alleging breaches by this country's courts of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law: see Case T-337/03, *Bertelli Gálvez v Commission* [2004] (EU:T:2004:106) ECR II-1041, para. 15 ("The EU Treaty ... gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under Article 6(1) EU or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned")

c) The obstacles facing the proposal for a EU Pact on democracy, the rule of law and fundamental rights

The elements recalled in the previous paragraph, and the various advantages associated with each, should and can be preserved in any future mechanism as may be set up on the basis of the proposals included in the resolution adopted by the European Parliament on 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights. Whether these proposals shall be successful in their current formulation is doubtful, however. The Commission answered swiftly to the resolution of the European Parliament, probably signaling thereby the firmness of its assessment. In the response, which it released on 17 January 2017,⁹⁶ it stated in particular:

At this stage the Commission has serious doubts about 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. Some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability. Moreover, there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned.

Indeed, the proposal put forward by the European Parliament for a new mechanism on democracy, the rule of law and fundamental rights, raises a number of questions. It may be asked, first, whether the proposals of the European Parliament are compatible with the Treaties. In its initial response to the proposals of the European Parliament, the Commission questioned the compatibility with the Treaties of some of the elements contained in the Draft EU Pact for ERF. What the Commission seems to have in mind is that certain aspects of the Draft Pact might constitute a threat to the role the Treaties attribute to the Court of Justice of the European Union. It should be recalled in this regard that, according to Article 344 TFEU, Member States have undertaken not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.⁹⁷ Indeed, the EU Member States are obligated to have recourse to the procedures for settling disputes established by EU law, to the exclusion of any other method of addressing disputes. In particular, they may not derogate from the jurisdiction of the Court of Justice as established by the Treaties. This obligation is described by the Court of Justice as "a fundamental feature of the EU system" which also must be understood as "a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU".⁹⁸ It may appear in violation of this rule that a mechanism be established to assess the compatibility of measures adopted by the EU Member States and by the Union institutions with the values on which the Union is founded. In particular, the Court of Justice already ensures compliance with fundamental rights (both as listed in the Charter of Fundamental Rights and as included among the general principles of EU law) within the scope of application of Union law, and it may seem inconsistent with the jurisdiction of the Court as defined in the Treaties to establish a separate procedure to provide such an assessment.

This initial impression must be nuanced, however. A distinction should be made, in particular, between (a) assessments that might compete with those which the Court of Justice may be led to make in the exercise of its powers, and (b) assessments that do not create any risk of overlap. In particular, whereas to Court of Justice is competent, under Articles 6(1) and (3) TEU and the provisions of the Treaties that define its jurisdiction, to ensure compliance with fundamental rights in the scope of application of Union law -- whether by assessing measures taken by the institutions that are of a binding nature or whether

⁹⁶ 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, adopted by the Commission on 17 January 2017 (SP(2017)16-0).

⁹⁷ On this provision, see Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282.

⁹⁸ Opinion 2/13, paras. 201-202.

by assessing measures adopted by the EU Member States when they implement Union law --, the Court has no competence to exercise such a control in situations that fall outside Union law. Although, as the Court of Justice itself has emphasized, the legal structure of the EU "is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU", and although it is that premiss which "implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected",⁹⁹ this "fundamental premiss" is not one that, with the exception of compliance with fundamental rights in the scope of application of Union law, the Court of Justice is in a position to control.

Moreover, where an overlap may exist between the competences attributed to the Court of Justice in the Treaties and a new mechanism on democracy, the rule of law and fundamental rights, it should in principle suffice to state that any assessment issued by such a mechanism shall be without prejudice of the role of the Court of Justice, as the final authority competent to "ensure that in the interpretation and application of the Treaties the law is observed".¹⁰⁰ Indeed, when the same question arose with the establishment of the Fundamental Rights Agency, the solution was to include the following provision in the Regulation establishing the Agency:

The conclusions, opinions and reports [formulated and published by the Fundamental Rights Agency] may concern [legislative] proposals from the Commission [...] 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) [of the Regulation]. They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty [now Article 263 TFEU] 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 [now Article 258 TFEU].¹⁰¹

This "no prejudice clause" was intended to preserve the exclusive jurisdiction of the Court of Justice to ensure respect for the principle of legality within Union law and to assess the compatibility with their Treaty obligations of measures adopted by the EU Member States. A similar provision could be inserted into an inter-institutional agreement as envisaged by the European Parliament, to ensure, as required by Article 295 TFEU, that the agreement is not in violation of the Treaties.

A second question raised by the proposal for a new mechanism on democracy, the rule of law and fundamental rights, is whether "democracy" and the "rule of law" can be defined in ways that allow compliance with these requirements to be objectively monitored. One advantage of an improved coordination between the Commission, the Member States and the European Parliament, in the screening of the situation of fundamental rights in the European Union, is that they shall have to converge as to what "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", refer to, and which should be the corresponding indicators. In particular, whereas "respect for human rights" can be assessed taking into account the Charter of Fundamental Rights, the definitions of "democracy" and of "rule of law" remain to a certain extent contested. Attempts have been made in recent years, however, to overcome the ambiguities behind these requirements. The preferred approach, around which a consensus is now emerging, is to relate these notions to specific fundamental rights, allowing them to be assessed with the same tools that address fundamental rights more generally, and for such an assessment to be performed by the same human rights monitoring bodies, relying on the same attributes of human rights and indicators as for other human rights.

The requirement of "democracy", thus, can be seen as the result of compliance with fundamental rights

⁹⁹ Opinion 2/13, para. 168.

¹⁰⁰ Article 19(1) TEU.

¹⁰¹ Article 4(2) of Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1.

recognized in both international and European human rights law and in the Charter of Fundamental Rights, which contribute to a healthy democratic society. These rights include, in particular: freedom of expression and information and pluralism of the media (Article 11 of the Charter), all of which contribute to creating a public sphere in which citizens, the media and opposition political parties may flourish; freedom of assembly and association (Article 12), through which discontent with governmental policies may be expressed; the right to education and respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions (Article 14), which contributes to pluralism in a democratic society and equips citizens to take part in public deliberation; the right of access to documents held by public institutions (Article 42); and of course, the right to vote and to stand as a candidate at elections held at regular intervals. It is perhaps on this last point that the Charter of Fundamental Rights is least well equipped, however, to serve as a benchmark to assess developments within the Member States with a view to ensuring that they continue to comply with the values set forth in Article 2 TEU: like most of the other rights of Title V of the Charter,¹⁰² the right to vote and to stand as a candidate at elections is only stipulated with respect to the right of citizens of the Union, in whichever Member State they may be residing, as regards elections to the European Parliament (Article 39) and municipal elections (Article 40). With that proviso, however, the content of the value of "democracy" can be assessed, relatively uncontroversially, based on the existing catalogues of fundamental rights.

As to the "rule of law", the Luxembourg presidency of the Union proposed in 2015 to define it as

a principle of governance by which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards. Moreover, the rule of law entails adherence to a number of principles: be it supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness or procedural and legal transparency.¹⁰³

This attempt to put forward a definition of the requirement of the rule of law followed debates that took place in 2013 concerning the strengthening of the supervision of compliance with the values listed in Article 2 TEU, including by the establishment of a new mechanism to that effect, as proposed by the Foreign Affairs of Denmark, Finland, Germany and The Netherlands in the letter to the President of the Commission referred to above. One of the obstacles to the proposals considered at the time was that "there is not yet a clearly agreed common understanding of the concept of the rule of law and of the extent of its coverage within the systems of governance in Member States", although "the development of such a common understanding is a prerequisite to the development in the future of effective responses and of systems of measurement in this area".¹⁰⁴

More recently, the requirements of the rule of law have been further clarified on the basis of the benchmarks and standards put forward by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, in the "Rule of Law checklist" it adopted at its 106th plenary session of 11-12 March 2016.¹⁰⁵ The checklist, which appears to have been endorsed by the European Parliament,¹⁰⁶ includes references to six benchmarks, including five key criteria (legality, legal

¹⁰² Though the right of access to documents, already mentioned, is an exception in this regard, as it is guaranteed not only to citizens of the Union, but also to "any natural or legal person residing or having its registered office in a Member State" (Article 42 of the Charter of Fundamental Rights).

¹⁰³ Note from the Presidency, Ensuring the respect of the rule of law, Council of the EU doc. 13744/15 (Brussels, 9 November 2015).

¹⁰⁴ Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Note from the COREPER to the Council, Council of the EU doc. 10168/13 (Brussels, 29 May 2013), para. 9.

¹⁰⁵ Council of Europe doc. CDL-AD(2016)007, Study No. 711/2013 (Strasbourg, 18 March 2016).

¹⁰⁶ The Preamble to the European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, cited above, cites the checklist of the Venice Commission.

certainty, prevention of abuse of powers, equality before the law and non-discrimination, and access to justice) and specific challenges linked to corruption and data collection and surveillance. This document seeks to improve the understanding of the "Rule of Law", as referred to both in Article 2 TEU (to which reference is made) and in the Preamble of the Statute of the Council of Europe, beyond the conflicting interpretations that this notion has been given in different legal systems ("Rule of Law", "Rechtsstaat", "Etat de droit", "prééminence du droit"), a problem also highlighted in a study prepared for the European Parliament.¹⁰⁷

According to the Venice Commission, "the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".¹⁰⁸ The definition provided seeks to move beyond a purely formalistic concept of the Rule of Law, which, properly understood, cannot simply mean that authorities should act in accordance with certain procedures, but should also include a reference to certain substantive values. It is in this spirit that the Venice Commission includes among the core elements of the "Rule of Law" not only procedural requirements ((1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts), but also substantive components ((5) Respect for human rights; and (6) Non-discrimination and equality before the law).

In sum, whereas notions such as "democracy" and "rule of law" have been given competing definitions in the past, and therefore were not seen as providing an adequate basis for the establishment of an objective and impartial (i.e., non-politicized) form of monitoring, they are now more consensual, and have been provided definitions in line with the requirements of fundamental rights.

A third question emerges. The proposal of the European Parliament to establish a new mechanism on democracy, the rule of law and fundamental rights, includes setting up a body of independent experts, comprised of one expert designated by the parliament of each Member State. The proposal is obviously inspired by the former EU Network of Independent Experts on Fundamental Rights. That network was established in September 2002 at the initiative of the European Parliament.¹⁰⁹ In a resolution adopted in July 2001, the European Parliament had requested that

a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts.¹¹⁰

At the time, this group of high-level human rights experts was intended to provide the Parliament with reliable information on the situation of fundamental rights in the European Union, by the preparation of reports covering the 15 (later 25) EU Member States as well as the institutions of the Union, and using the Charter of Fundamental Rights as a grid of analysis.

¹⁰⁷ See *The triangular relationship between fundamental rights, democracy and rule of law in the EU. Towards an EU Copenhagen mechanism*, study supervised by the Policy Department Citizens' Rights and Constitutional Affairs and prepared at the request of European Parliament's Committee on Civil Liberties, Justice and Home Affairs (PE 493.03, October 2013).

¹⁰⁸ European Commission for Democracy through Law (Venice Commission), Rule of Law checklist, cited above note 64, para. 15.

¹⁰⁹ See above, note 28. This author was the coordinator of this group of experts.

¹¹⁰ Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), para. 9. The EU Network of Independent Experts on Fundamental Rights was composed initially of 16 experts (later to become 26 experts, in order to include experts from the 10 acceding EU member States), covering the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart publ., Oxford and Portland Oregon, 2005.

Indeed, in the above-cited communication it presented in October 2003 on the values on which the Union is founded, the Commission proposed that the group of experts be made into a permanent mechanism to support monitoring of compliance with the Charter of Fundamental Rights.¹¹¹ Referring to the work of the EU Network of independent experts on fundamental rights, it took the view that the information collected by the network «should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty. Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches. Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded". This language was practically borrowed from the first report of the Network, published in March 2003, which presented the situation of fundamental rights in the EU and its member States in 2002.

What the Commission was in fact suggesting, was that a permanent form of monitoring of compliance with fundamental rights by the EU Member States should be established, both in order to contribute to the mutual trust in the establishment of an area of freedom, security and justice, and in order, where necessary, to provide the institutions of the Union with the information they require in order to fulfil the tasks entrusted to them by Article 7 TEU. It saw the EU Network of independent experts on fundamental rights as the laboratory of such a mechanism.

Since then, however, the Fundamental Rights Agency was established, in part in order to fulfil some of the functions that the Network of Independent Experts on Fundamental Rights had been performing. And despite the relatively restrictive definition of its mandate under its founding Regulation, the Agency is fully equipped to provide the institutions with reports -- annual or, for instance, trimestriels -- that might allow them to exercise their powers under Article 7 TEU in a matter that is more consistent and better informed, thus ensuring the impartiality and non-discriminatory nature of the monitoring of compliance with the values on which the Union is founded. In particular, the Agency has access to a network of experts covering all the EU Member States, who are familiar with the respective legal systems; it has developed links with an impressive network of non-governmental organisations covering the full range of the rights listed in the Charter and all the Member States; and it has accumulated a strong experience in ensuring the comparability of data collected across the Member States. Indeed, the Draft EU Pact for DRF itself refers to the proposal made by the Agency in December 2013, for a 'European fundamental rights information system' (EFRIS), that would provide the institutions of the Union with a reliable tool to assess the situation of fundamental rights in the EU. The Agency presented this tool in the following terms:

The EU could also provide funds for the creation of a database that would bring together all the information needed to make an informed assessment of a given country's fundamental rights situation. Such a 'European fundamental rights information system' could form a one-stop-shop bringing together the wealth of data that already exists but remains spread over a plethora of sources. Indeed, considerable information is available on the fundamental rights performance of the 28 EU Member States; most of it is not, however, at the 'fingertips' of actors who are tasked with looking at the situation of fundamental rights in specific fields at the national and international level. The creation of a European fundamental rights information system would form a hub, bringing together, in an accessible manner, existing information from the United Nations (UN, mainly from the treaty bodies, and also from special procedures and the UN Universal Periodic Review), the Council of Europe (monitoring mechanisms and expert bodies), the Organization for Security and Co-operation in Europe, the EU (data from the European Commission, including Eurostat; FRA; Council working parties like GenVal and ScheVal; as well as possibly the European Ombudsman; and the Petitions Committee of the European

¹¹¹ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

Parliament (PETI)). Such a system would enhance transparency and objectivity and increase awareness about international standards, especially those of the Council of Europe in the EU context. Such a system could also be drawn on to 'populate' fundamental rights indicators with actual data concerning fundamental rights compliance, which would assist users in assessing the situation in Member States.¹¹²

Against this background, it may be questioned whether the establishment of a new group of independent experts truly presents an added value. Perhaps a more efficient solution, and one that could be more realistic politically, would be to request that the Fundamental Rights Agency contribute periodic reports on the situation of fundamental rights in the EU, providing the European Parliament, the Commission and the Council with the information they need in order to exercise their powers under Article 7 TEU. It is to this alternative proposal -- politically more realistic, and legally less questionable -- that the next section turns.

6. Strengthening compliance with the values of democracy, the rule of law, and fundamental rights: a new role for the Fundamental Rights Agency

a) The proposal

In order to overcome the scepticism expressed following the adoption of its resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, the European Parliament could instead consider requesting from the Fundamental Rights Agency, on an annual or on a trimestrial basis, that it submit a report on the situation of fundamental rights in the EU. In the proposal presented here, such a report would provide an overview of the situation of fundamental rights in the EU examining the full range of the rights, freedoms and principles listed in the Charter of Fundamental Rights, following a methodology that allows to assess whether in certain Member States, the threats to rights contributing to democracy and the rule of law are such that there is a risk that the values of the Union shall be breached. This final assessment should be left to the institutions or actors which, under Article 7 TEU, may launch the procedures provided for by this provision by making a "reasoned proposal" for its preventive branch to be triggered (European Parliament, Commission or nine Member States), or by making a "proposal" for a determination that a Member States is in "serious and persistent breach" of the values of the Union (Commission or nine Member States). The report, however, would support these institutions and actors exercising their functions under Article 7 TEU.

For the purposes of helping towards making such a determination, the rights contributing to democracy should be defined as the rights listed in Articles 11 (freedom of expression and information and pluralism of the media), 12 (freedom of assembly and association), 14 (right to education and respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions), 42 (right of access to document held by public institutions), 39 (right to vote and to stand as a candidate at elections for the European Parliament) and 40 (right to vote and to stand as a candidate at municipal elections) of the Charter of Fundamental Rights. In addition, reference should be made to Article 2 of the First Additional Protocol to the European Convention on Human Rights, which recognizes the right to regular and free elections, as this is a key component of democracy.

It is relevant in this regard to note that the mandate of the Fundamental Rights Agency, under its founding Regulation, is not limited to the Charter of Fundamental Rights. Indeed, when the Agency was established, the Charter still had the status of a political declaration, with no binding force; the sole reference to fundamental rights in the Treaties was in Article 6(2) of the EU Treaty, which referred to fundamental rights as recognized among the general principles of EU law, "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result

¹¹² Fundamental Rights Agency, *Fundamental rights in the future of the Union's Justice and Home Affairs* (Vienna, 31 Dec. 2013), p. 8.

from the constitutional traditions common to the Member States" (this provision is now in Article 6(3) TEU). The Preamble of the Regulation states in this regard 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 Freedoms, *and as reflected in particular in the Charter of Fundamental Rights [...]*".¹¹³ In other terms, though the Charter of Fundamental Rights provides a convenient and consensual reference for the work of the Agency, it was not the intention then, and it still is not the intention today, to discourage the Agency from taking into account other sources of fundamental rights recognized as general principles of Union law.¹¹⁴

For the purposes of assessing the situation of the rule of law, similarly, the rights listed in the Charter in Articles 21 (Non-discrimination), 47 (Right to an effective remedy and to a fair trial) and 49(1) (Principle of legality), should be taken into account. As seen above, the criteria listed by the Venice Commission of the Council of Europe in its definition of the Rule of Law also include a broader requirement of legality, understood as "a transparent, accountable and democratic process for enacting law". This criterion overlaps in part with the criteria constitutive of "democracy"; they also relate to "quality of the law" as defined by the European Court of Human Rights in its examination of the acceptability of restrictions to the rights and freedoms guaranteed under the European Convention on Human Rights. Indeed, the link between the "quality of the law" as defined by the Court and the notion of the "rule of law" is explicit in its recent judgments,¹¹⁵ and the Court of Justice of the European Union has established the same connection.¹¹⁶ This is not the place where to provide a detailed comment of such requirements. The point is merely that, relying on the definition provided by the Venice Commission, it is possible to assess the situation of the rule of law using the classic tools from fundamental rights analysis, thus

¹¹³ See the founding Regulation, Preamble, Recital 9.

¹¹⁴ Indeed, when the Treaty of Lisbon was negotiated, on the basis of the Treaty establishing a Constitution for the European Union, a deliberate choice was made to maintain a reference to fundamental rights as part of the general principles of Union law, in order to allow the Court of Justice of the European Union to develop such rights as may be necessary, thus avoiding the risk that the Charter -- which expressed a consensus, at one point in time, about the acquis of fundamental rights in the EU -- would "freeze" the development of fundamental rights in the EU legal order.

¹¹⁵ See, e.g., Eur. Ct. HR (GC), *Roman Zakharov v. Russia*, Appl. No. 47143/06, judgment of 4 December 2015, paras. 227-231 ("the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects [...]). The Court of Justice of the European Union in turn has referred to this requirement, which is particularly important where secret surveillance measures or the processing of personal data are concerned, due to the risk of arbitrariness in the absence of a sufficiently protective legal framework. See, e.g., , Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson v. Home Secretary*, judgment of 21 December 2016, para. 109 ("In order to satisfy the requirements set out in the preceding paragraph of the present judgment, that national legislation must, first, lay down clear and precise rules governing the scope and application of such a data retention measure and imposing minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. That legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary [...].")

¹¹⁶ See *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, judgment of 8 April 2014, EU:C:2014:238 (in the context of a preliminary ruling concerning the validity of Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, the Court recalls in para. 54 that: " the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data"; see also paras. 60-62, on the characteristics that legislation restricting the right to respect for private life and the protection of personal data, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights, should present); see also *Maximillian Schrems v Data Protection Commissioner and Digital Rights Ireland Ltd*, C-362/14, judgment of 6 October 2015, EU:C:2015:650, esp. paras. 91 and, on the right to judicial protection, 95: "legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. ... The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in *Les Verts v Parliament*, [294/83](#), [EU:C:1986:166](#), paragraph [23](#); *Johnston*, [222/84](#), [EU:C:1986:206](#), paragraphs [18](#) and [19](#); *Heylens and Others*, [222/86](#), [EU:C:1987:442](#), paragraph [14](#); and *UGT-Rioja and Others*, [C-428/06 to C-434/06](#), [EU:C:2008:488](#), paragraph [80](#))."

making such an assessment objective and based on well-established criteria.

The assessment provided by the Fundamental Rights Agency should systematically take into account findings made by monitoring bodies established within the United Nations and within the Council of Europe. This would contribute to the overall coherence of human rights protection in Europe, and it would strengthen the credibility of the assessment; it would also ensure that the findings and recommendations from the human rights monitoring bodies are given more 'teeth', by being provided a follow-up in this form.

As regards the Council of Europe, this would in any case follow from the Memorandum of Understanding between the Council of Europe and the EU, adopted in May 2007.¹¹⁷ The MoU specifies that, when developing its standards in the field of human rights, the EU will refer to the relevant Council of Europe norms and will take into account the decisions and conclusions of its monitoring bodies, although this should not prevent the Union from providing a higher level of protection.¹¹⁸ This follows a proposal made in the Juncker report on the future of the EU's relationship with the Council of Europe, released on 11 April 2006,¹¹⁹ and immediately endorsed by the Parliamentary Assembly of the Council of Europe.¹²⁰ In this report, Prime Minister Jean-Claude Juncker proposed that a working rule be established, according to which "the decisions, reports, conclusions, recommendations and opinions of [the Council of Europe] monitoring bodies: 1. will be systematically taken as the first Europe-wide reference source for human rights; 2. will be expressly cited as a reference in documents which they produce." As noted by the report, this

merely confirms existing practice. But it does mean taking something which today is simply a practice, and turning it into a rule for EU institutions on all levels. This explicit formula will enhance the status of the Council of Europe's human rights instruments and monitoring machinery in all its member states, both EU members and others. It will also make for more effective co-operation between the two organisations.

In addition to the findings and recommendations of UN and Council of Europe human rights monitoring bodies, the report should take into track developments at domestic level, as they may be collected by national human rights institutions, independent experts and academic institutions, and non-governmental organisations. Indeed, the findings and recommendations of international or regional monitoring bodies, though particularly authoritative, typically reflect situations that have developed over a number of years, or they relate to events which often shall have occurred months or years before. Such findings and recommendations should therefore be complemented by more recent data, collected from other reliable sources.

The report could contribute more than only providing an overview of the situation of fundamental rights in the EU. It could also identify trends that might justify the introduction of new policy or legislative initiatives to strengthen the protection of fundamental rights in the EU. As such, it should contribute to a fundamental rights policy of the Union that sees fundamental rights not only as an external constraint, restricting how the institutions of the EU may act or which measures the EU Member States may take

¹¹⁷ Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007) (hereinafter referred to a 'Memorandum of Understanding').

¹¹⁸ See Memorandum of Understanding, cited above note 90, paras. 17-19.

¹¹⁹ *Council of Europe – European Union; a sole ambition for the European continent*, report by Jean-Claude Juncker to the Heads of State and government of the Member States of the Council of Europe, 11 April 2006.

¹²⁰ See PACE, Recommendation 1743 (2006), *Memorandum of understanding between the Council of Europe and the European Union*, in which the PACE recommends to the Committee of Ministers to propose to the European Union to formally acknowledge in the memorandum of understanding between the two organizations that that 'the Council of Europe must remain the benchmark for human rights, the rule of law and democracy in Europe, in particular ensuring that the European Union bodies recognise the Council of Europe as the Europe-wide reference in terms of human rights and that they systematically act in accordance with the findings of the relevant monitoring structures'. This Recommendation was adopted on 13 April 2006, immediately following the presentation by Mr Juncker of his report before the Parliamentary Assembly of the Council of Europe. It was based on a report prepared within the Political Affairs Committee by Mr Kosachev (rapp.).

in the scope of application of Union law, but also as a guide for the exercise of the competences that have been attributed to the institutions. Indeed, although the Union does not have a general competence to promote and protect fundamental rights and though it is not, in that sense, a "human rights organisation", it has been attributed competences in a number of areas that it could use more proactively in order to improve the protection of fundamental rights in the Member States.¹²¹ Where cross-country comparisons allow to identify the emergence of diverging standards, this may represent a threat to the mutual trust on which, in the establishment of the internal market and of the area of freedom, security and justice, European integration is built. In such cases, the Commission may be encouraged to prepare proposals for policy or legislative measures that might overcome such divergences, either by harmonizing the areas concerned or by creating the conditions that might allow for mutual recognition to develop smoothly.

The Court of Justice has already noted that positive obligations could be imposed on the basis of the Charter, for instance in the preparation of directives (which should be sufficiently detailed to ensure that fundamental rights shall not be violated by the Member States in the adoption of implementation measures¹²²). The same logic has led the Court to find that the requirement to "promote the application" of the Charter¹²³ may imply a duty on the Commission to proactively take into account fundamental rights in the design of memoranda of understanding with States being provided with financial assistance.¹²⁴ Being provided with a systematic overview of the evolution of fundamental rights in the EU, as well as with a comparative analysis identifying potential diverging trends, may allow the Commission to prepare legislative proposals in fundamental rights-related areas in order to avoid a fragmentation of the internal market or to cement mutual trust in the area of freedom, security and justice. It is on this premise, for instance, that the adoption of directives relating to the advertising, sponsorship, manufacture, presentation and sale of tobacco products was justified:¹²⁵ when asked to confirm whether Article 95 EC (now Article 114 TFEU) could constitute an adequate legislative basis for the adoption of such instruments, the European Court of Justice agreed with the argument that a failure to act by the Union could result either in obstacles in the internal market, or in the absence of an adequate protection of the right to health through State regulation:

having regard to the fact that the public is increasingly conscious of the dangers to health posed by consuming tobacco products, it is likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development and intended more effectively to discourage consumption of those products by means of warnings and information appearing on their packaging or to reduce the harmful effects of tobacco products by introducing new rules governing their composition.¹²⁶

¹²¹ For developments on this idea, see Olivier De Schutter, "The New Architecture of Fundamental Rights Policy in the EU", *European Yearbook of Human Rights*, 2011, pp. 107-143. For the example of the tools that could be used in order to strengthen the protection of the rights of persons belonging to national minorities in the EU, see Olivier De Schutter, "The Framework Convention on the Protection of National Minorities and the Law of the European Union", in Kristin Henrard (ed.), *Double Standards Pertaining to Minority Protection* (Martinus Nijhoff Publ., Leiden-Boston, 2010), pp. 71-116.

¹²² See *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, judgment of 8 April 2014, EU:C:2014:238, para. 65 (where the Court concludes that "Directive 2006/24 [providing for the retention of data in electronic communications] does not lay down clear and precise rules governing the extent of the interference with the 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 strictly necessary").

¹²³ Art. 51(1) of the Charter of Fundamental Rights.

¹²⁴ *Ledra Advertising Ltd, et al.*, Joined Cases C-8/15 P to C-10/15 P, judgment of 21 September 2016, EU:C:2016:701, para. 59 and 67.

¹²⁵ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194, 18.7.2001, p. 26); Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

¹²⁶ Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, [2002] ECR I-11453, at para. 67. This position was confirmed in two judgments of 14 December 2004:

On the surface, the Tobacco Manufacture and Advertising Directives aimed at product standardisation in the internal market; in reality, their objective was to contribute to the protection of health, an objective which could not be achieved by the Member States acting individually. The need for the adoption of these directives was made clear by comparing trends across EU Member States, and the growing divergences between States that were more protective of consumers' health and States that provided a lower level of protection. As noted above, this -- the identification of such emerging divergences, that may call for initiatives to approximate legislation or to harmonize -- was already described by the Commission as one of the main contributions a permanent fundamental rights monitoring mechanism (for which the EU Network of independent experts on fundamental rights provided a model) might make in the future.¹²⁷

b) The legal argument

The most important obstacle to this scenario is not political; it is legal. The Regulation establishing the Fundamental Rights Agency states that "the Agency should act only within the scope of application of Community law [now Union law]".¹²⁸ It could be argued that this restriction prohibits any involvement of the Agency in support of the institutions' assessment of the situation of democracy, the rule of law and human rights in the context of Article 7 TEU.

Indeed, the omission of any reference to Article 7 TEU in the Regulation establishing the Fundamental Rights Agency was not the result of some oversight of poorly advised governmental representatives; it was the result of a battle fought, but lost, by the Commission. The circumstances of the discussion are worth recalling. The original proposals on the establishment of a Fundamental Rights Agency, which the Commission presented on 30 June 2005,¹²⁹ although they anticipated that the Agency would be established on the basis of the "implicit powers" provision of the EC Treaty (article 308 EC, at the time), also provided that the new Agency could be invited to provide its 'technical expertise' in the context of Article 7 TEU.¹³⁰ However, the Legal Service of the Council of the Union¹³¹ took the view that such a possibility would 'go beyond Community competence', and that, moreover, it would be incompatible with Article 7 TEU itself insofar as this provision would not allow for the adoption of implementation measures and was, in that sense, self-sufficient. The Commission answered that the draft Article 4(1)(e) it proposed 'should be seen not as an autonomous exercise of Community competence needing a proper legal basis in the EC Treaty, but rather as a largely declaratory opening clause, [providing for] a possibility that the Council would arguably have anyway, while clarifying modalities and limits'.¹³² Indeed, drawing upon the lessons from the Austrian crisis of 1999-2000,¹³³ Article 7(1) TEU itself referred at the time to the possibility of "call[ing] on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question" in order to determine whether there

Case C-434/02, *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, [2004] ECR I-11825; Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893. Comp. with Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-2247 (where the Court annulled Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1992 L 213, p. 9) since that Directive did not ensure free movement of products which are in conformity with its provisions, and therefore could not be said to contribute to the establishment of the internal market as required for Article 95 EC (then Article 100a of the EC Treaty) to be relied upon as a legal basis).

¹²⁷ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

¹²⁸ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1, Preamble, Recital 8.

¹²⁹ Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM (2005) 280 final of 30.06.05.

¹³⁰ See Article 4(1) (e) of the Draft Regulation, presented in COM (2005) 280 final of 30.06.05.

¹³¹ Doc. 13588/05JUR 425 JAI 363 COHOM 36 (26 October 2005).

¹³² Note from the Commission to the Council *Ad hoc* Working Party on Fundamental Rights and Citizenship, Council doc. 14702/05, JAI 437, CATS 75, COHOM 38 COEST 202 (18 November 2005), paras. 46-52.

¹³³ See above, text corresponding to note 13.

exists a "clear risk of a serious breach by a Member State of principles mentioned in Article 6(1) [now the values listed in Article 2 TEU]".¹³⁴ The implicit view of the Commission was that the Agency could either be an 'independent person' for the purposes of this provision, or could contribute to identifying such independent persons, in accordance with the broad flexibility that Article 7(1) EU intended to leave to the Council. In the view of the Commission, therefore, including Article 4(1)(e) in the proposed Regulation added nothing to Article 7 EU itself.¹³⁵ In particular, a mere reference to the possibility of the Agency contributing its technical expertise upon request of the Council "should be distinguished from any further reaching provision that would enable other institutions to seize the . . . Agency or even an own initiative power of the latter to analyse possible Article 7 EU situations. Any such provision might indeed exceed Community competence and conflict with the exhaustive institutional setting in Article 7 EU".

The Commission was taken at its word. Within the Council's *Ad hoc* Working Party on Fundamental Rights and Citizenship in charge of examining the Commission's proposal on the Fundamental Rights Agency, a number of delegations expressed doubts as to the need to include a reference to Article 7 EU in the text of the Regulation establishing the Agency, as such a reference would, according to the Commission's own admission, serve no useful purpose and, going beyond Community law, could moreover lack a legal basis. The compromise solution consisted therefore in appending to the Regulation establishing the Agency a Declaration of the Council confirming this possibility, without any reference being made to Article 7 TEU in the text of the Regulation itself.¹³⁶

This solution preserved the purely political character of Article 7 TEU: the mechanisms it provided allowed for a political evaluation by the Council of the EU and the European Parliament, but did not allow the European Court of Justice or any other independent body—such as the Fundamental Rights Agency—to decide whether a State is in serious and persistent breach of the values (listed at the time in Article 6(1) EU) or whether there exists a clear risk of a serious breach.

It does not necessarily follow that the terms of the founding Regulation forms an insuperable obstacle to the Fundamental Rights Agency playing a certain role (if not that of making a final assessment) under the procedures provided for in Article 7 TEU. First, the restriction to the mandate of the Fundamental Rights Agency, as it appears in the founding Regulation, pre-dates the entry into force of the Treaty of Lisbon. This Treaty however has abolished the distinction between Community law and Union law, as it substituted a single legal entity (the European Union) to the pre-existing Communities and Union. Whereas the legal basis on which the Fundamental Rights Agency was established (then Article 308 EC) made it legally impossible to extend its mandate beyond Community law, this mandate has now been in effect expanded to cover all areas of Union law. This could be seen as including Article 7 TEU. Indeed, if it were to support the institutions of the EU involved in Article 7 TEU proceedings, the Agency would not be monitoring the EU Member States for purposes other than those prescribed in the Treaties: its role would still be very different, for instance, from the role performed by United Nations or Council of Europe monitoring bodies.

Secondly, in human rights monitoring, maintaining a watertight distinction between situations that fall under the scope of application of Union law and situations that fall outside that scope of application is highly artificial, in part because any violation of fundamental rights, under certain circumstances, might

¹³⁴ The Treaty of Lisbon removed any explicit reference, in Article 7 TEU, to the possibility of calling on independent persons to provide a report on the situation of fundamental rights in a country subject to an Article 7(1) TEU, in order to assess whether there is a "clear risk of a serious breach" of the values on which the Union is founded. This removal may be seen as a further confirmation of the desire to preserve the purely political dimension of the mechanism established in Article 7 TEU.

¹³⁵ Already in a Communication where it clarified its understanding of Article 7 EU, the Commission has mentioned the possibility that the Council draw up a list of independent personalities which could be called upon to assist the Council in exercising its functions under Article 7(1) EU (see COM(2003) 606 final, of 15.10.2003, at para. 1.3.).

¹³⁶ This Declaration states: "The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met".

be relevant to the application of Union law -- for instance, because the victim is a citizen of the EU exercising a free movement right. Of course, the Charter of Fundamental Rights -- and fundamental rights as general principles of Union law -- applies only to the actions or omissions of the institutions, agencies and bodies of the Union, and to situations in which the EU Member States act within the scope of application of Union law (Article 51 of the Charter). This refers to situations where the Member States implement Union law (by transposing a directive, applying a regulation or executing a decision); where they take part in a decision-making process within the EU; or where they restrict an economic freedom recognized under EU law.¹³⁷ Although the range of situations that are relevant for the purposes of Article 7 TEU is broader, the boundary that separates situations that fall within the scope of application of Union law (in the meaning of Article 51 of the Charter) and situations that fall outside that scope of application has been notoriously difficult to define, and it is shifting: any initiative by the Union that leads it to exercise new competences (that is to say, to exercise competences it shares with the Member States, provided the conditions of subsidiarity and proportionality are complied with), by definition, extends the range of situations that present a link to EU law that is sufficiently close to justify the Court of Justice of the European Union ensuring compliance with fundamental rights. In other terms, in may be impractical to restrict the role of the Agency only to situations in which the EU Member States clearly act within the scope of application of EU law: defininig with precision what such situations are, and define on that basis the mandate of the Agency, appears increasingly artificial.

Thirdly, although the Regulation establishing the Fundamental Rights Agency does not explicitly mention a role for the Agency in the implementation of Article 7 TEU, and although the reference in the Preamble to the requirement that the Agency act "only within the scope of application of Community law [now Union law]", would seem to exclude any future role for the Agency under Article 7 TEU, this clearly was not the intention of the Commission and the Member States acting within the Council of the EU: indeed, the declaration appended to the Regulation explicitly provides for the possibility of the Council of the EU requesting the assistance of the Agency in performing its functions under Article 7 TEU. The same possibility is not provided for the other institutions involved in Article 7 TEU proceedings. However, although the Council of the EU is sole competent to determine the existence of a "clear risk of a serious breach" of the values on which the Union is founded, under the preventive branch of Article 7 TEU, the other institutions (the European Parliament and the Commission), as well as Member States acting individually, may decide present a "reasoned proposal" to trigger this provision; there is no reason why they should not be allowed to seek the assistance of the Fundamental Rights Agency in exercising this function.

Finally, seeking from the Fundamental Rights Agency an analysis of the situation of democracy, the rule of law and fundamental rights in the Member States does not lead to derogate from the exclusively political nature of the monitoring procedure established under Article 7 TEU. If it were to be asked to provide a report on the situation of fundamental rights in the EU in order to guide the assessment by the institutions involved in Article 7 TEU proceedings, the Agency nevertheless would not be making a decision as to whether or not a "reasoned proposal" should be presented to trigger this procedure, as this would have to be decided by the institutions (or the Member States) under their sole responsibility; nor of course, would it be to the Agency to determine whether there exists a "clear risk of a serious breach" to the values of the Union: this is not a task the Council of the EU could delegate to the Agency.

7. Conclusion

This paper suggests that, ten years after it was established, the Fundamental Rights Agency could be given a new role, allowing it to contribute more effectively to stem the rise of "illiberal democracies" in the European Union. The mechanism would be simple enough: it would consist in the Agency presenting a report on an annual or trimestrial basis on the situation of fundamental rights in the EU, for the institutions and the Member States to rely on in the exercise of their powers under Article 7 TEU. This would ensure that the procedures provided for by this clause shall be used in an objective and impartial

¹³⁷ See, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24) ; Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (para. 81).

manner, avoiding accusations of politicization, while leaving it to the institutions (and, in the final instance, the to Council of the EU and the European Council) to make the final determinations as to whether action should be taken to safeguard the values on which the Union is founded. Such a report would also equip national parliaments, national human rights institutions and civil society organisations, operating at domestic level, with a tool that could allow them to hold the national governments accountable, in particular by presenting them with "good practices" successfully implemented in other Member States, thus increasing the pressure on governments to refrain from taking measures that might diminish respect for democracy or threaten the rule of law, and to act in accordance with fundamental rights.

But such a report would also serve other, complementary objectives. It could help the institutions converge on the means and methodologies for assessing compliance with democracy, the rule of law and fundamental rights, improving coherence between them. It could facilitate the involvement of human rights non-governmental organisations in the identification of the most significant threats to democracy, the rule of law and fundamental rights, while at the same time strengthening the ability for the EU institutions to take into account the findings and recommendations of UN and Council of Europe monitoring bodies. It could also encourage the Commission to make a more systematic use of its powers, under Article 258 TFEU, to file infringement proceedings against Member States who are failing to comply with EU law, in all situations where fundamental rights are at stake.¹³⁸ It could encourage the Commission, finally, to put forward legislative or policy proposals that might improve the protection of fundamental rights in the EU, where diverging trends appear across the Member States that might limit the ability of each State to protect rights at the appropriate level, or threaten mutual trust between States. Indeed, on the basis of the report on the situation of fundamental rights in the EU, and the comparative analysis contained therein, the European Parliament could request that the Commission take certain initiatives, including the presentation of legislative proposals for which the Commission has a monopoly.¹³⁹ Perhaps the time has come.

¹³⁸ In the Strategy it announced in October 2010 for the effective implementation of the Charter of Fundamental Rights, the Commission stated its determination to "use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law", and "whenever necessary [to] start infringement procedures against Member States for non-compliance with the Charter in implementing Union law", giving priority to situations "which raise issues of principle or which have particularly far-reaching negative impact for citizens" (Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final of 19.10.2010, p. 10). However, in the absence of a systematic monitoring of fundamental rights in the EU, whether or not the Commission delivers on this pledge, and whether it uses its discretionary powers to file infringement proceedings in a way that is sufficiently principled and non-arbitrary, remains difficult to assess.

¹³⁹ Article 255 TFEU allows the European Parliament to request from the Commission that it submits certain legislative proposals: "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons".