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"THE EU FUNDAMENTAL RIGHTS AGENCY WITHIN THE EUROPEAN AND INTERNATIONAL HUMAN RIGHTS ARCHITECTURE:

THE LEGAL FRAMEWORK AND SOME UNSETTLED ISSUES IN A NEW FIELD OF ADMINISTRATIVE LAW"

by

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A. Introduction

Establishing the European Union Agency for Fundamental Rights (hereinafter the "Agency"), which commenced its work on 1 March 2007,[1] was another step in the expansion of an EU policy on fundamental rights.[2] Pursuant to the – not accidentally contorted – language of Art. 2 of the Regulation establishing the Agency (hereinafter the "Regulation") its objective is "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 basic institutional structure chosen for the Agency is that of an administrative agency established under EU law, even though the Agency has a number of peculiarities due to its assigned area of responsibility.

However, it would be shortsighted to view the establishment of the Agency solely as a phenomenon of EU law. As the Regulation makes clear, it was also designed in light of a model of specialized independent institutions promoting human rights. This model, developed by the UN, has led to national human rights institutions in a growing number of countries. More than 40 such specialized administrative institutions for the promotion of human rights have been introduced worldwide with diverse institutional designs, above all in the form of national commissions and institutes.[3] The idea behind such institutions is that the constitutional commitment to fundamental rights and their application by courts is not sufficient for their full implementation. The UN General Assembly's "Paris Principles" call for independent and pluralistically composed human rights institutions which should promote the effectiveness of human rights by working in cooperation with, but also as a counterpart to domestic authorities.[4] The reference to the Paris Principles in the Regulation suggests that it should also be analyzed in light of these UN recommendations.[5]

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

[2] For details on this policy field see Toggenburg, "Menschenrechtspolitik" in Weidenfeld and Wessels (Eds.), *Jahrbuch der Europäischen Integration* (Baden-Baden, 2006), 167-172, and "The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?", 3 EL Rev. (2008), 385. On the protection of minorities as a fundamental rights issue see 10th Recital of the Regulation establishing the Agency; Art. 1 of the Framework Convention for the Protection of National Minorities of 1 Feb. 1995, O. J. II 1997, 1408.

[3] Aichele, *Nationale Menschenrechtsinstitutionen* (Frankfurt/Main, 2003). Since 2003, the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*), in France „La Commission nationale consultative des droits de l'homme", in Denmark the „Danish Centre for Human Rights" and in Australia the „Human Rights and Equal Opportunity Commission".

[4] Resolution 48/134 of the UN General Assembly of 20 Dec. 1993, U.N. Doc. A/RES/48/134, the Annex to the Resolution sets forth the principles.

[5] 20th Recital; Nowak, "The Agency and National Institutions for the Promotion and Protection of Human Rights" in Alston and De Schutter (Eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford, 2005), 91-107 addressing this question before the Agency had been established.

Yet, it is significant that the Agency is not denominated as a "*Human* Rights" Agency,[6] but as a "*Fundamental* Rights" Agency. The term *human* rights stands, at least in Europe, mostly for international guarantees, whereas the term *fundamental* rights usually denominates domestic constitutional guarantees of an individual polity. The Member States had initiated the agency-project under the term "*Human* Rights" Agency (see recital 5 of the Regulation), but the European Parliament and the Commission succeeded in changing its denomination to "*Fundamental* Rights" Agency. Accordingly, the Agency appears more set to develop the EU as an autonomous polity and EU law as a municipal legal order[7] and less as an element of the multilevel human rights architecture. In fact, there can be a tension between the project to better implement regional and universal human rights and the project to develop the municipal and constitutional fundamental rights of a specific polity. Accordingly, the terminological distinction between fundamental rights and human rights is significant, notwithstanding their intertwining in some norms, such as in Art. 6 (2) EU.

The increasing influence of specific human or fundamental rights institutions in numerous States is calling into question an understanding of fundamental rights protection that is mainly focused on judicial review. Under the approach taken here, *administrative rights promotion* is conceived of as a significant instrument supplementing legal protection by the courts and therefore an important field of administrative activity: European *administrative* law scholarship should, so goes our thesis, move accordingly into this field. In a way, an important development might come full circle: The development of the European administration by the Commission and the Council in the seventies and eighties entailed a process of constitutionalization of the European Communities, in particular through fundamental rights protection,[8] whereas now the developed constitutional law of the Union might usher a new field of administrative law if the Agency's potential gets realized.

To contribute to this end, the relevant developments in the Union will be initially recapitulated first (B.) in order to then present the Agency's activities and tasks as a specialized agency for the promotion of fundamental rights where numerous unsettled issues lurk (C.). The following part analyses the Agency's possible impact on the constitution of Europe (D.), while the last part will recall the main findings and discuss the prospect of human and fundamental rights promotion as a new area of administrative law (E.).

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[6] Most national institutions refer to „human rights" in their name, see the examples referred to in note 3.

[7] On the role of fundamental rights for the EU as a legal order see joined cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat* v. *Council and Commission*, and the Opinion of Advocate General Poiares Maduro, delivered on 23 January 2008, paras. 17 et seq.

[8] On this development Weiler, *The Constitution of Europe – "Do the new clothes have an emperor?" and other essays on European integration* (Cambridge, 1999).

B. The Context of the Agency's Establishment

I. From a Purely Reactive to a More Pro-active Fundamental Rights Policy

Fundamental rights policies, which are not mentioned in the original Treaties, have steadily gained importance in the European integration process since the late 1960s, in particular in the jurisprudence of the ECJ.[9] As is well known, they were first developed by the ECJ as a reaction to demands of the national courts. Within the project of a political Union, political activities also increased, including the drafting and proclamation of the Charter of Fundamental Rights of the European Union in 2000.[10] The Charter, which is intended to be elevated to the level of primary European law by the Treaty of Lisbon,[11] as well as the ECJ's now extensive references to the ECtHR's case-law are part of an evolution which has significantly developed the European legal system by strengthening its fundamental rights dimension. The Agency has now been added and may itself become a potentially significant administrative component. As such, it needs to be situated in the overall EU-context. Accordingly, a closer inspection of some aspects of the history of human rights protection in the Union is useful.

The European legal order at first served an economic association: it was created with the objective of integrating the European peoples and states by merging their national markets.[12] European law was thus an instrument of far-reaching political and social change. Its principal aim was not the protection of the individual's fundamental rights, but rather the construction of an internal market in order to create a common European future. Fundamental rights were only gradually taken into consideration and then only to limit the discretion of the supranational institutions. They did not determine the Union's objectives and activities.

While the freedoms of the EC Treaty have been crucial for the constitutionalization of the EU,[13] these hardly qualified as *fundamental rights*.[14] Fundamental rights developed as general principles (*principes généraux*), which, given their unwritten nature, are rather malleable.[15] Only since 1993 primary law sets out that fundamental rights shall be respected (Art. F (2) EU Treaty, now Art. 6 (2) EU Treaty).[16] Despite this prominent position, the principle of protecting

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[9] Pernice, *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht* (Baden-Baden, 1979); Clapham, *Human Rights and the European Community – Vol. I, A Critical Overview* (Baden-Baden, 1991), 29 et seq.

[10] For details on earlier proposals see Bieber, de Gucht, Lenaerts and Weiler (Eds.), *Au nom des peuples européens – In the name of the peoples of Europe* (Baden-Baden, 1996), 365 et seq.

[11] Even if not fully justiciable in the UK and Poland.

[12] Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, 1972), 110.

[13] The principle of direct applicability is the basis for individual rights; in more detail Beljin, "Dogmatik und Ermittlung der Unionsrechte", 46 *Der Staat* (2007), 489-514.

[14] The freedom of movement of workers is the exception to this, the ECJ has qualified it rather early as a fundamental right, O'Leary, "Free Movement of Persons and Services" in Craig and de Búrca (Eds.), *The Evolution of EU Law* (Oxford, 1999), 377, 378 et seq. For the legal difference between market freedoms and fundamental freedoms in EU law von Bogdandy, "The European Union as a Human Rights Organization?", 37 CML Rev. (2000), 1307, 1326 et seq.

[15] On general principles in detail Pescatore, "Les droits de l'homme et l'intégration européenne", 4 *Cahiers de droit européen* (1968), 629-655; on human rights as an "integral part" of the general principles of community law, Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[16] The fundamental freedoms of Art. 6 (2) EU are not the internal market freedoms under the EC Treaty but are derived from fundamental rights traditions of the Member States and from international conventions; on the status of the Charter of Fundamental Rights in this context Kingreen in Calliess/Ruffert (Eds.), *EUV/EGV,* 3rd Ed.

fundamental rights has so far nonetheless not enjoyed outright importance. Art. F was formulated from a limiting perspective underlying Art. 6 (2) EU until today: Art. 6 (2) EU commits the Union to general principles of law which have a *restrictive* function as opposed to a constitutive one.[17] Certainly, fundamental rights have thus far not been the most important individual guarantees under Union law.[18] They are less central than in many constitutional orders, not just in comparison to the basic rights under the German Basic Law (*Grundgesetz*), whose importance might seem unique, perhaps idiosyncratic when compared to the rest of the world. Although the ECJ has over time become more rights sensitive, this aspect has not decisively shaped its jurisprudence.[19]

On the policy side, fundamental rights promotion – at least until the Treaty of Amsterdam – only played a limited role within the EU, although the quest for an active policy is an old demand. In particular the former DG V of the European Commission (Employment, Social Affairs and Equal Opportunities) and the European Parliament lobbied for affording fundamental rights policies a higher priority back in the early 1990s.[20] This demand was raised in programmatic form by Philip Alston and Joseph Weiler in a trail-blazing work commissioned by the European Parliament, which was searching for a human rights policy.[21] Alston and Weiler challenged legal scholars and politicians to expand their frame of reference and to more intensively study possibilities of enforcing human rights beyond legal review. This marked the first time that the call for an agency monitoring the respect for human rights by EU institutions, Member States and private persons[22] prominently arose in the literature. They also demanded significant organizational and procedural changes, such as an independent ombudsman, and a directorate general for fundamental rights.[23]

The process which eventually led to the Agency follows the general path of supplementing negative integration with positive integration. These concepts were developed within the context of the internal market program. Negative integration means above all market integration by means of the deregulating effect of the four freedoms, which are enforced by the courts, whereas positive integration refers to regulatory intervention by the Union's political and administrative institutions.[24] For proponents of an active fundamental rights policy, the

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(Munich, 2007), Art. 6 EUV paras. 38-39.

[17] Molinier (Ed.), *Les principes fondateurs de l'Union européenne* (Paris, 2005), 29.

[18] For an analysis of the relevant case law see below, D.

[19] Recent decisions show a clearer fundamental rights oriented profile, see Case C-540/03, *Parliament* v. *Council* [2006] ECR I-5769, paras. 35 et seq.; Case C-305/05, *Ordre des barreaux francophones et germanophone and Others* v. *Council* [2007] ECR I-5305, paras. 28 et seq.; in appreciation of these recent developments in the ECJ's decisions see Kühling, "Fundamental Rights" in von Bogdandy/Bast (Eds.), *Principles of European Constitutional Law,* 2nd Ed. (Oxford, 2009, forthcoming), chapter 13.

[20] See the documents referred to in Alston (Ed.), *The EU and Human Rights* (Oxford, 1999), 939-940.

[21] Alston and Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy" in Alston, op. cit. *supra* note 20, 3-66. Their approach decisively influenced the Comité des Sages and its "Human Rights Agenda For the European Union for the Year 2000. Leading by Example", in Alston, ibid., Annex (after 917). For a critique see von Bogdandy, op. cit. *supra* note 14, 1307 et seq., which I modify in light of the following considerations.

[22] Alston and Weiler, op. cit. *supra* note 21, 55-59. The European Parliament is already involved in fundamental rights issues, irrespective of whether an infringement is caused by the Union, a Member State or a private person. It therefore lays claim to a general competence of becoming engaged in the area of fundamental rights, see EP-Doc. A5-60/2000, A5-50/2000.

[23] Alston and Weiler, op. cit. *supra* note 21, 40-42, 45-52.

[24] Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, 1999), 43 et seq.; Maduro, *We the Court* (Oxford, 1998), 109 et seq.

traditional approach corresponds to negative integration which needs to be supplemented by the active political and administrative promotion of fundamental rights as part of positive integration. Alston and Weiler referred to phenomena of racism and xenophobia, insufficient compliance with the laws on equal treatment and anti-discrimination, the inadequate protection of economic, social and cultural rights for underprivileged groups and minorities and the unsatisfactory legal status of refugees and asylum seekers in Europe.[25] Furthermore, inspired by US practice, they called for non-discrimination legislation, such as legislation against sexual harassment and other forms of discrimination at the work place.[26] Policies on minorities, migration and general non-discrimination policies should be joined under such an active human rights policy, which would be implemented not so much by the courts as by a specialized independent agency, involving non-governmental organizations.[27] Art. 13 EC, introduced by the Treaty of Amsterdam, shows that such demands resonate in the political realm, and important legislation has been enacted in the last decade.[28] The same Treaty, by laying down Art. 6 and Art. 7 EU, also highlights the increasing political importance of human rights in the EU.

Two further important developments in the 1990s prepared the groundwork for an active human rights policy: the Union's human rights- and minority policies vis-à-vis East European states in the accession process (II.) and the activities of the European Monitoring Centre on Racism and Xenophobia, established in 1997 (III.).

II. Protection of Minorities in the Accession States

The Union became actively involved in the field of human rights protection after the fall of the Berlin Wall. The basic features are well-known: the collapse of the socialist dictatorships permitted ethnic conflicts in Central and Eastern Europe to re-ignite; some of which turned into important security issues for the West, such as the wars in the former Yugoslavia, the Baltic States' treatment of their Russian-speaking populations, and the tensions associated with Hungarian minorities.

As the embedding of the Agency in the regional and universal human rights architecture is a major topic, it seems important to note that the European Union entered this policy field not on its own accord, but in cooperation with a number of international institutions. In 1993, the Western European political actors reached an understanding on a common policy for the treatment of minorities, which consolidated the legal, organizational and legitimatory resources of diverse European organizations into one overarching policy for the protection of such groups in the associated countries. This was evidenced, first, in conclusions of the meeting of the European Council in Copenhagen from 21-22 June 1993 relating to the opening of perspectives for accession for these countries under the so-called Copenhagen criteria, which included the effective protection of minorities,[29] and, second, in the Declaration of the Heads of State or

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[25] Alston and Weiler, op. cit. *supra* note 21, 14 et seq.

[26] Alston and Weiler, op. cit. *supra* note 21, 16, 60.

[27] See the EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: The Protection of Minorities in the European Union, 25/04/2005, CRF-CDF.ThemComm2005.en, http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf (last visited 17 Dec. 2008), in particular 20, 92 et seq., prepared by Olivier De Schutter.

[28] E.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 80/22; Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 302/16; focussing on the discrimination against third-country nationals Council Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification, O.J. 2003, L 251/12; Council Directive 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents, O.J. 2004, L 16/44.

[29] Conclusion of the Presidency of 21-22 June 1993 (SN 190/1/93), 13.

Government of the Member States of the Council of Europe (Vienna, 9 October 1993), which charged the Committee of Ministers with elaborating an independent legal regime for the protection of minorities.[30] It was on this basis that a policy of human rights protection was developed, the institutional pillars being the European Union, the Council of Europe and the OSCE. Notwithstanding a number of jurisdictional issues and tensions between the organizations, their work can be understood as a cooperative effort helping to formulate and implement human rights sensitive treatment of minorities in the transformation states.[31]

The legal bases for this new political field were the criteria for accession to the European Union pursuant to Art. 49 EU in conjunction with the criteria set forth later in Art. 6 (1) EU.[32] However, the standards were mostly those of the Council of Europe, among those the Framework Convention for the Protection of National Minorities, which was elaborated during the period from 1993 to 1995 by the Council of Europe.[33] Its ratification and implementation in most cases[34] was considered to be a crucial prerequisite for fulfilling the Copenhagen criteria and Art. 49 EU.[35] Further legislative concretization was effected by soft law instruments of various actors.[36]

Additionally the task of implementing the European human rights policy for the protection of minorities has been dispersed across a number of organizations. The European Union is at the centre; the opportunity to accede is the principal mechanism in the sense of a positive incentive.[37] However, this incentive depends on effective external monitoring of the implementation of the imposed standards in the accession states. A number of institutions have assumed this task. For example, the EU Commission regularly prepares progress reports based on its own information, on information provided by the other international institutions as well as on information from civil society. In addition, the Council of Europe remains engaged in the process, in particular *via* the advisory committee on the Framework Convention for the Protection of National Minorities.[38]

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[30] Second dash of the Vienna Declaration of 9 Oct. 1993, http://www.coe.am/en/docs/summits/vienna_summit.pdf (last visited 4 Dec. 2008).

[31] On the interaction of the organizations Toggenburg, "The Union's Role vis-à-vis Minorities. After the Enlargement Decade", *EUI Working Papers, Law No. 2006/15*, 24. For a more complete analysis von Bogdandy, "The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity", 19 EJIL (2008), 241-275.

[32] The criteria were set forth in the Conference on Security and Cooperation in Europe document of 29 June 1990, Document of the Conference on the Human Dimension of the CSCE (Copenhagen, 29 June 1990), item 1. In more detail Toggenburg, "Der Menschenrechts- und Minderheitenschutz in der Europäischen Union" in Weidenfeld (Ed.), *Die Europäische Union*, 5th Ed. (Bonn, 2008), 294, 309.

[33] Dated 1 Feb. 1995, entered into force on 1 Feb. 1998; for details of the negotiations see Hofmann, *Minderheitenschutz in Europa. Völker- und staatsrechtliche Lage im Überblick* (Berlin, 1995), 200 et seq.

[34] Latvia for instance had not fulfilled this prerequisite.

[35] Sasse, "Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?" in Toggenburg (Ed.), *Minority Protection and the Enlarged EU* (Budapest, 2004), 61, 68, 72.

[36] In detail von Bogdandy, op. cit. *supra* note 31, 241, 260 et seq.

[37] Smith, "Western Actors and the Promotion of Democracy" in Zielonka and Pravda (Eds.), *Democratic Consolidation in Eastern Europe, Vol. II International and Transnational Factors* (Oxford, 2001), 31-57; Zielonka in Zielonka and Pravda, ibid., "Conclusions. Foreign Made Democracy", 511-556.

[38] Art. 26 of the Framework Convention; for details see Hofmann, "Das Überwachungssystem der Rahmenkonvention des Europarates zum Schutz nationaler Minderheiten", 2 *Zeitschrift für Europarechtliche Studien* (1999), 379-392.

Overall, the European Union developed a human rights policy in the accession procedures during the 1990s with respect to the associated countries. This policy's justification and effectiveness were a direct result of the East European states desire to accede. However, this policy has not been a complete success everywhere, which raises the question of how to react to deficits in implementing human rights after accession. The Agency's forerunner organization – the European Monitoring Centre on Racism and Xenophobia – offered one approach.

III. The European Monitoring Centre on Racism and Xenophobia

The European Monitoring Centre on Racism and Xenophobia (hereinafter the "Centre") was established in 1997 by virtue of an EC Regulation.[39] Pursuant to the founding document, the prime objectives and tasks were to provide "objective, reliable and comparable data" on the phenomena of racism, xenophobia and anti-Semitism at the European level.[40] The growing power of xenophobic parties in a number of European states as well as continuing structural problems in the treatment of minorities, such as the Sinti and Roma in the 1990s, initiated and drove the process for establishing the Centre. The Regulation mandated the Centre with studying the extent and analyzing the development of these phenomena and their manifestations, their causes, consequences and effects as well as identifying examples of successful counterstrategies.

The Centre's role concerned, above all, the collection of objective and comparable data. The thematically narrow formulated remit stood in contrast to a broad focus regarding the relevant policies in this field: the Centre could make an issue of any relevant political, social and legal event in the Member States. Any act in connection with xenophobic phenomena could become a target for action by the Centre; there was no restriction as to the scope of application of Community law.[41] As part of the European reaction to the change in government in Austria in 2000, the then chairperson of the Centre's management board described the Centre in an official declaration as the EU's "eyes and ears".[42]

The Centre's endeavors were from the outset directed at the creation of a new network of governmental and non-governmental actors as well as cooperation with existing networks for combating racism, xenophobia and anti-Semitism. It was apparent to the actors from the beginning that the Centre could accomplish its tasks only as a part of such a broader association of relevant actors in the field. With the help of this network, first, a type of "early warning system" had to be established and, second, positive developments in the Member States had to be identified. In particular, as foreseen in the Regulation establishing the Centre, the Centre created a European Information Network on Racism and Xenophobia (RAXEN).[43] This included the creation of contact points at universities or in civil society for the purpose of collecting data. The information gathered was assessed and evaluated by a global network of experts, namely the Rapid Response and Evaluation Network (RAREN). This approach was

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[39] Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, O.J. 1997, L 151/1; for further information see Flauss, "L'action de l'Union européenne dans le domaine de la lutte contre le racisme et la xénophobie", *Revue trimestrielle des droits de l'homme* (2001), 487-515.

[40] Art. 2 (1).

[41] Art. 2.

[42] Bulletin Quotidien Europe No. 7649 of 5 Feb. 2000, 3, 5; for further information see Schorkopf, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich* (Berlin, 2001), 26.

[43] Art. 4.

intended to couple decentralized observation capacities with scientific expertise in order to use the results to jump-start broader thematic studies and specific opinions by the Centre. The Centre's principle management resource was the allocation of financial resources for conducting studies and the organization of conferences. At the same time, the Centre used these networks to establish so-called "round tables" in a number of Member States, where representatives of civil society and government representatives met to discuss national problems and "best practices" at regular intervals.[44]

IV. The Legislative History of the Agency

The Centre, after lengthy and controversial negotiations, was transformed into the European Union Agency for Fundamental Rights. With respect to the legislative history, the process was initiated, as is the case with many of the important developments within the EU, during a European Council meeting. On 13 December 2003, the Representatives of the Member States meeting within the European Council - not the European Council itself - stressed in their conclusions the importance of human rights data collection and analysis with a view to defining Union policy in the field of human rights and agreed to extend the mandate of the Centre to become a Human Rights Agency.[45] The Commission indicated its intention of submitting a proposal to that effect and launched a public consultation on the remit, rights and thematic areas, tasks and structure of the Agency. It organized a public hearing on 25 January 2005 during which the idea of establishing an Agency independent of EU institutions and the Member States was unanimously welcomed by the more than 200 registered participants. The idea of a Human Rights Agency was reiterated by the European Council on 16 and 17 December 2004, which called for further implementation of the 2003 agreement of the Member States to establish an EU Human Rights Agency.

The European Parliament on 26 June 2005 also called on the Commission to submit a legislative proposal concerning the Agency in its Resolution on the promotion of fundamental rights, the role of national and European institutions, including the Agency of Fundamental Rights.[46] The European Parliament stated that the Agency, which it calls *Fundamental* (not Human!) Rights Agency, needs a strong mandate in order to monitor the developments linked to the implementation of the EU Charter for Fundamental Rights within the EU and its Member States and emphasized that the Agency should also deal with third countries, when human rights questions have an effect on the Union.[47] It stressed that the Agency would enjoy a higher degree of legitimacy if its management was appointed by the European Parliament, accountable to it and held to report to the relevant committees of the European Parliament.[48]
On 30 June 2005 the Commission submitted the requested proposal for a Council regulation establishing the “European Union Agency for Fundamental Rights”[49] which was supposed to become a “centre of expertise” for fundamental rights issues at the EU level, but also with the aim of making “the Charter more tangible”.[50] The proposed title of the Agency was meant to

[44] *Inter alia* in Great Britain, Ireland, Italy, Luxembourg, the Netherlands, France, Denmark, Germany, Finland and Austria, see Winkler, “Bestrebungen zur Bekämpfung von Rassismus und Fremdenfeindlichkeit in der Europäischen Union“ in Deile et al. (Eds.), *Jahrbuch Menschenrechte* (Frankfurt, 2002), 262, 268.

[45] Annex of Council document 5381/04, 27.

[46] O.J. 2006, C 117 E/242.

[47] O.J. 2006, C 117 E/242, para 27.

[48] O.J. 2006, C 117 E/242, para 28.

[49] 2005/0124 (CNS).

[50] 2005/0124 (CNS), 2.

establish a clear link between the new institution and the EU Charter of Fundamental Rights, which was seen as a decisive step towards developing a specific fundamental rights policy for the Union. Not surprisingly, the Commission did not follow the European Parliament's approach of subordinating the Agency to the Parliament. Instead, it foresaw a particularly strong role for itself in the management of the Agency.[51]

In its impact assessment report annexed to the proposal, the Commission pointed to four central problems and needs that awaited the new institution: First, the availability, comparability and quality of fundamental rights data produced by Member States was considered problematic; second, shortcomings in systematic observation of the fundamental rights situation on the ground by the Union and the Member States, when implementing Union law; third, the lack of a systematic dialogue between the EU and international organizations as well as between the EU and non governmental organizations operating in the human rights field; and fourth, the lack of public awareness among Union citizens of their rights under the Charter.[52]

As to the data-problem the Commission referred to the different traditions and systems of defining and collecting information in the human rights field and to the need for improving the comparability of data. With regard to the quality of fundamental rights data, the Commission held that official sources of information were often based on self-reporting by institutions that were at the same time responsible for ensuring rights were observed. The concern was that they might be reluctant to report on all violations that occur. Yet, NGO information alone might not have been reliable enough to have provided a complete picture either. Referring to existing shortcomings in systematic observation the Commission argued that both Union institutions and the Member States – when implementing Community law – were committed to respect fundamental rights and to promote their application but that there was no coordinated effort of assessing the impact of legislation on fundamental rights. The Commission also referred to the need for high quality data under the procedure envisaged by Art. 7 EU.

In light of these needs and problems the Commission's proposal foresaw the creation of a "Focused Observation and Assessment Agency limited to Union Law".[53] The central idea was to have an institution that could fulfill tasks related to data aggregation in the context of observing and assessing fundamental rights issues within the Union, but at the same time – through focusing the mandate of the Agency on Union law – to prevent the duplication of the work done by the Council of Europe or to interfere with Member States' fields of competence. Despite various amendments of the proposed regulation in the legislative process, this idea of a broad functional mandate that was however limited to the area of Community law was eventually realized through the regulation that established the Agency.

Annexed to the proposed Council regulation was a separate proposal for a Council decision empowering the Agency "to pursue its activities in areas referred to in Title VI of the Treaty of the European Union".[54] This proposed Council decision, which would have led to the full inclusion of fundamental rights issues arising under the so called Third Pillar into the mandate of the Agency, was not adopted by the Council. The controversy in the Council regarding this proposal ultimately resulted in the adoption of a Council declaration containing a compromise formula on this point which allows the Agency to take action in this field, but only upon request

[51] 2005/0124 (CNS), see in particular Art. 5 (1) on the multiannual framework and Art. 11 on the composition of the management board with two representatives of the Commission.

[52] 10774/05 ADD 1, 5-11.

[53] 10774/05 ADD 1, 14.

[54] 2005/0125 (CNS).

of an EU institution.[55] The question whether or not the mandate of the Agency should include Third Pillar - issues was one of the most controversial issues in the legislative process. On 15 February 2007 the Council eventually adopted Council regulation EC No 168/2007 establishing a European Union Agency for Fundamental Rights.

C. The EU Fundamental Rights Agency in Detail

Since the Agency was founded as the Centre's successor, it has been able to build on its basic organizational structures. Within the EU administrative landscape it is to be classified as an information agency. At the same time, the Agency tends toward the UN standardized model of independent national human rights institutions. According to the UN General Assembly's Paris Principles of 1993, independent and pluralistically composed administrative institutions should facilitate the national implementation of human rights.[56] In the following section the Agency will be analyzed first in terms of EU law as an information agency with respect to its structure (I.), its goals, tasks, and limits (II.) in order to then evaluate it in light of the "national human rights institutions" model for the promotion and protection of human rights propagated by the UN (III.).

I. The Organization and its Power Structures

The Agency largely corresponds to the model of a European information agency.[57] The increasingly dense European information space is administered not only by the Commission, but also increasingly by specialized agencies.[58] The development of these agencies have been occurring in an outsourcing process, in which some of the Union's administrative tasks are assumed by specialized administrative entities other than the Commission; this has been one of the most important trends in EU administrative law over the last 15 years.[59] Depending on the method of counting used, there are some twenty Union agencies.[60] *Information* agencies differ from other agencies in that their primary tasks lie in the provision of information and communication as well as network management, to be understood here as part of the endeavor to create and maintain an effective European information space. Although the Commission remains the principle European body managing information, agencies in general and information agencies in particular are increasingly assuming important roles.

Art. 308 EC forms the legal basis for the establishment of the Fundamental Rights Agency, as it does for most of the other agencies. It possesses its own legal personality. However, the Union

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[55] Declaration by the Council of 12 Feb. 2007, Council document 6166/07, 4.

[56] Resolution 48/134 of the UN General Assembly from 1993, U.N. Doc. A/RES/48/134, Operative Paragraph 2.

[57] For details see von Bogdandy, “Informationsbeziehungen innerhalb des Europäischen Verwaltungsverbundes“ in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts,* Vol. II (Munich, 2008), 347-404; idem, “Links between National and Supra-national Institutions: A Legal View of a New Communicative Universe” in Kohler-Koch (Ed.), *Linking EU and National Governance* (Oxford, 2003), 24-52.

[58] On the role of agencies in European Administration see Vos, “Reforming the European Commission: What role to play for EU Agencies?” 37 CML Rev. (2000), 1113 and Chiti, “The Emergence of a Community Administration: The Case of European Agencies” 37 CML Rev. (2000), 309.

[59] Examples of the extensive literature include Fischer-Appelt, *Agenturen der Europäischen Gemeinschaften* (Berlin, 1999), 46 et seq.; Geradin and Petit, “The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform”, *Jean Monnet Working Paper 01/04*, 1, 36 et seq. A general classification of the agencies within the Union's institutional structure can be found in de Búrca, “Institutional Development of the EU: A Constitutional Analysis” in Craig and de Búrca (Eds.), op. cit. *supra* note 14, 75, who is critical of this tendency.

[60] Cf. the list found at http://europa.eu.int/agencies/index_de.htm (last visited 4 Dec. 2008), which differentiates according to the Union's pillars. The denomination of the agencies varies.

provides the organizational framework for the Agency, as it does for the other agencies. Thus, the Agency uses the Union's translation services, has recourse to its staff rules and regulations and is subject to the Union's budgetary authority.[61] The ECJ has jurisdiction to determine the lawfulness of the Agency's acts.[62]

The seat of the Agency is Vienna.[63] It is located in a grand building, as of 2009 has 62 employees and a budget of EUR 17 million. The Agency consists of seven departments. Three departments are dedicated to human resource requirements and internal administration (Directorate, Administration Department and Human Resources and Planning Department); two other departments are thematically dedicated (Equality and Citizens' Rights Department and Freedoms and Justice Department); and two departments are dedicated to the Agency's external political effect (Communication and Awareness Raising Department and External Relations and Networking Department).

Organizationally the Agency is composed of four bodies: a Management Board, an Executive Board, a Scientific Committee and a Director. The Management Board possesses the greatest power.[64] It is tasked with electing the members of the Executive Board, appointing the members of the Scientific Committee[65] and appointing the Director. The Director is responsible for implementing the Management Board's decisions, as well as for matters of day-to-day administration and all staff matters,[66] he is also accountable to the Board itself.[67] The Management Board thus controls the person who manages the Agency's day-to-day work. In addition, it is responsible for making the substantive decisions relating to the Agency's work, set forth in the Agency's Annual Work Program which it adopts.[68]

The Management Board is not composed of representatives of the Member States governments, but of "independent persons", who are nevertheless appointed by the Member States. The Regulation establishing the Agency speaks of persons who have "high level responsibilities in an independent national human rights institution or other public or private sector organisation".[69] Since not all Member States have such human rights institutions, it was necessary to create an opening for other independent persons.[70] The Commission appoints two representatives and the Council of Europe appoints a further independent person as a member of the Management Board. The European Parliament cannot appoint a member of its own, but shall be involved in the selection of the members of the Scientific Committee and Director.[71] The involvement of the Council of Europe in the management body is intended to coordinate

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[61] Art. 25 (3) on translation services and Art. 20 on the budget.

[62] Art. 27.

[63] Art. 23 (5).

[64] Art. 12.

[65] Art. 12 (6) (k) for the Scientific Committee, Art. 13 (1) for the Executive Board, Art. 12 (6) (c) for the Director.

[66] Art. 15.

[67] Art. 15 (5).

[68] Art. 12 (6) (a).

[69] Art. 12 (1) (a).

[70] The respective members can be found on the website fra.europa.eu.

[71] Art. 14 (1), Art. 15 (2).

the activities of the Agency with those of the Council of Europe and avoid duplication as well as friction. In the lead up to the establishment of the Agency there was a great deal of tension because some actors were fearful of competition with the Council of Europe as the principal European human rights institution.[72]

Thus, in contrast to the other information agencies, at the management level it is not about a close interlocking of the ministerial bureaucracies at the European level, but the Agency rather seeks to network administrative agencies specialised in the promotion of human rights which, to a greater or lesser extent, operate independently from the ministerial bureaucracies. Consequently, independent persons dominate the Management Board. In other information agencies the national ministries are usually represented in the management board, often at the Deputy Minister level, and are thus directly involved in shaping the program and controlling the agency. At the Fundamental Rights Agency the integration of responsible administrative units in the Member States' ministries is achieved *via* "National Liaison Officers", who serve only as the Agency's external contact points.[73] While the Commission is integrated into the Agency's structures, it is not a significant actor, let alone *primus inter pares*, as is the case for instance in an executive agency under Council Regulation (EC) No 58/2003, which is completely under the Commission's management and control.

The Commission's most important power is the preparation of the Agency's multi-annual program. At this juncture the Council also gains influence over the Agency's work. The fact that, in contrast to most of the other agencies, the multi-annual program has to be adopted by the Council attests to the sensitivity of the subject matter.[74] However, the Regulation establishing the Agency leaves open the question of how detailed this program might be, which is of importance for the UN Paris Principles.[75]

The Executive Board has only a supporting role with respect to the Management Board. The Scientific Committee, by contrast, is assigned its own task: it is "the guarantor of the scientific quality of the Agency's work, guiding the work to that effect."[76] To this end, the Scientific Committee gives opinions on projects and the output of the Agency. It is not explicitly set forth whether its pronouncements are binding for other organs of the Agency, specifically, whether the Scientific Committee may bar a project or demand a modification. The wording of Art. 14 (5) of the Regulation refers to the Committee as a “guarantor” that is “guiding” the work of the Agency indicating the authoritative nature of its decisions. The explicit establishment of formal procedures for pronouncements (Art. 14 (6) of the Regulation) confirms such interpretation according to which the pronouncements on scientific issues are binding upon other organs of the Agency. Furthermore, in terms of the object and purpose of the provision, it should be borne in mind that the Committee can only fulfill its legal role as "guarantor" if other organs of the Agency have to respect the scientific standards stipulated on a case by case basis by the Committee. In view of this task the Director must involve the Committee in the Agency's work.[77]

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[72] For a deeper analysis of this relationship see below D. III.

[73] Art. 8 (1).

[74] Art. 5 (1); the quorum required is a simple majority pursuant to Art. 205(1) EC.

[75] For further details see below C. III.

[76] Art. 14 (5).

[77] Art. 14 (5) sentence 2 explicitly states this in reference to all the Agency's products mentioned in this provision.

II. Goals, Tasks, and Limits

The Agency has no legislative or regulatory powers, no quasi-judicial competences in the sense of an ombudsman,[78] no authority to adopt legally binding decisions with effect for third parties. Pursuant to Art. 2 of the Regulation, the Agency's objective is to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States with assistance and expertise relating to fundamental rights. Although that sounds very limited, it might be the basis of considerable administrative action.

In accordance with Art. 3 (3) of the Regulation, the Agency shall only deal with fundamental rights issues in the European Union and its Member States when implementing *Community* law. In this respect the focus is significantly narrower than that of the former Monitoring Centre which could also monitor the Member States outside the remit of Community law, though only with a much narrower focus on certain forms of discrimination. The reference to Community law entails that the Regulation only allows the Agency to act with respect to those activities of the European Union which are governed by the EC Treaty or the EAEC Treaty.[79] Thus, the Regulation does not cover activities in the areas of police and judicial cooperation in criminal matters under the Union Treaty, which are particularly sensitive when it comes to the protection of fundamental rights.

Notwithstanding this limitation, the French Council Presidency as early as 2008 commissioned an opinion by the Agency on the fundamental rights conformity of a draft framework decision on the use of Passenger Name Records for law enforcement purposes (PNR),[80] which falls under Arts. 29, 30 (1), 34 (2) EU.[81] The drafting of such an opinion corresponds with the above mentioned Council Declaration regarding the consultation of the Agency within the Areas of Police and Judicial Cooperation in Criminal Matters, according to which "the Union institutions may, within the framework of the legislative process […] each benefit, as appropriate and on a voluntary basis, from such expertise also within the areas of police and judicial cooperation in criminal matters".[82] Accordingly, the Agency may draft opinions relating to Third Pillar measures under the EU Treaty upon request by other EU bodies.

This seems to be in conflict with the above mentioned Art. 3 of the Regulation. Yet, a close analysis proves that there is no violation. What is at issue is only the relationship between bodies and institutions established under the Union's legal order. Confining the Agency's activities by way of Art. 3 to the implementation of Community law is meant to exclude an active role of the Agency in the Third Pillar thereby facilitating the work of the Council by shielding it from activities initiated by the Agency itself as a possible further actor in an often most difficult political process. If, however, an EU institution itself approaches the Agency in order to obtain an opinion about the conformity of a measure with fundamental rights, this rationale does not apply; accordingly the provision does not prohibit such an activity for measures under the Third

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[78] 15th Recital, cf. Art. 4 (2).

[79] On the relationship between EU law and EC law in detail von Bogdandy, "The Legal Case for Unity", 36 CML Rev. (1999), 887.

[80] COM (2007) 654.

[81] This decision has been endorsed by various actors http://fra.europa.eu/fra/material/pub/discussion/FRA_opinion_PNR_en.pdf (last visited 20 Dec. 2008), see also European Parliament resolution of 20 Nov. 2008 on the proposal for a Council framework decision on the use of Passenger Name Records (PNR) for law enforcement purposes.

[82] Declaration by the Council of 12 Feb. 2007, Council document 6166/07, 4.

Pillar. The 13th Recital of the Regulation establishing the Agency can be interpreted in this sense: its second sentence, which contemplates the possibility of requesting an opinion on legislative proposals, does not restrict this possibility to Community law. The declaration of the Council authorizing EU bodies to request opinions from the Agency on Third Pillar issues mentioned above is therefore in line with the object and purpose of the Regulation. Also the overall limits of the EU's competences are respected. The examination of the conformity of EU acts with fundamental rights is obviously covered by EU primary law and does not impinge on Member States' competences.

According to this logic, it also appears to be possible for the Agency to become involved in a procedure under Art. 7 EU if the Council so requests. This was, as illustrated above, controversial during the legislative process.[83] However, the Council clarified in the aforementioned declaration "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."[84] The limits set out in Art. 3 (3) of the Regulation only regard the Agency's autonomous activities. When, by contrast, the Agency gives advice following the request of an EU institution, the competence and limits need determining with respect to the requesting body, not the requested. As soon as an EU institution might initiate an action under Art 7 EU, it can avail itself of the help of the Agency for its investigations.

The tasks of the Agency can be broken down into four main areas: first, to collect and analyze information and data of high scientific value as a basis for EU fundamental rights policies; second, to disseminate the aggregated information; third, to give political advice; and fourth, to network the relevant institutions and actors on the field of fundamental rights protection, to function, as the European Parliament put it, as "a network of networks".[85]

(1) Making available information and data of high scientific value as a basis for a fundamental rights policy leads to the Agency's task of *collecting* and *analyzing* data and information, which also includes information gathered by national and international research and monitoring institutions.[86] An important objective in analyzing the data is the determination of priorities for future EU policies. An important aspect of this first area of responsibility is the methodological improvement of data comparison. It is the Agency's explicit responsibility to develop common indicators and analytical standards, which allow for a greater coherence of the data and thus an improved comparability.[87] This task of the Agency is by no means merely technical in nature.

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[83] Ibid., 5; in more detail 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", 14 *Columbia Journal of European Law* (2008), 509, 524-25.

[84] Declaration by the Council of 12 Feb. 2007, Council document 6166/07, 3.

[85] Resolution of the European Parliament of 18 May 2006, para 35, O.J. C 117 E/242.

[86] Art. 6; according to its 2009 work programme, the Agency will focus on projects in the following areas: the information society and, in particular, respect for private life and protection of personal data; issues related to asylum, immigration and integration of migrants; racism, xenophobia, anti-Semitism, islamophobia, and related intolerance; discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds; the rights of the child, including the protection of children; participation of the citizens of the Union in the Union's democratic functioning; access to efficient and independent justice, see Annual Work Programme 2009 http://fra.europa.eu/fra/material/pub/WP/wp09_en.pdf (last visited 14 Jan. 2009).

[87] Art. 4 (1) (a) and (b).

The development of specific standards and methods for collecting data may contribute to further developing a common "language" for fundamental rights issues, thereby shaping and fostering common debate on these issues in the emerging European public sphere. This is particularly the case where the elaborated indicators, not least as a result of consultation activities, are subsequently used by a number of relevant public and private actors in the Member States. This is ensured by millions of Euro for commissioned research using these common indicators. The political power of the Agency is to a great extent based on the possibility to develop these standards, thereby contributing to the emergence of a common European perception of fundamental rights issues.[88] The selection of the issues, the manner in which data is collected, and how it is presented need to be conceived as administrative action to further fundamental rights within the European Union. This policy operates indirectly by sponsoring projects of numerous public and private actors.[89]

(2) Turning to the mandate to *disseminate information*, the Agency publishes thematic reports based on its analytical research and surveys.[90] In addition, the Regulation tasks the Agency with developing its own communication strategy to raise public awareness of fundamental rights issues.[91] This competence opens the opportunity for the Agency to pro-actively point out problems. It is not yet clear whether Art. 4 (1) (d) of the Regulation prevents the Agency from disseminating information on occurrences in a specific Member State, since it is only meant to formulate and publish conclusions and opinions on "specific *thematic* (rather than *national* AvB/JvB) topics".[92] This formulation seems to be too vague, however, in foreclosing this important area of activity. Moreover, in practical terms it seems impossible to prepare the envisaged thematic analyses and opinions on the situation of fundamental rights without reference to the legal and factual situation on the ground in a Member State concerned. Therefore one should conclude that a specific situation in a Member State can be examined by the Agency, and that the result can be disseminated. What is not authorized is drawing an outright conclusion of a violation of a fundamental right, Art. 4 (2) of the Regulation, but not the indication of critical situations. The annual report on fundamental rights issues, which highlights examples of good practice in protecting fundamental rights, is another possibility for the Agency to shape the public perception of fundamental rights issues in Europe.[93]

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[88] Generally on information administration Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd Ed. (Berlin, 2006), 278 et seq.

[89] On comparable management of the sciences Schmidt-Aßmann, op. cit. *supra* note 88, 133-134.

[90] Art. 4 (1) (f). The Annual Work Programme 2008 foresaw *inter alia* data collection projects on racism in sport and the examination of legal instruments and judicial data in reference to the rights of the child, http://fra.europa.eu/fra/material/pub/WP/wp08_en.pdf (last visited 23 Dec. 2008).

[91] Art. 4 (1) (h).

[92] De Schutter, op. cit. *supra* note 83, 524.

[93] Art. 4 (1) (e).

(3) Thirdly, the Agency's responsibilities include assisting the formulation and implementation of policy (*political advice*). Assistance may be provided to the political institutions where they request opinions, conclusions and reports from the Agency.[94] These Agency products can become part of the EU legislative process.[95] However, under the Regulation this is so far only possible if the respective EU institution or body has requested such an opinion. Thus, the Agency can draft reports and opinions on its own within the framework of its work program, but these will only become officially relevant for the Union's legislative procedures if the respective EU body has made a specific request. Toggenburg has argued that such an opinion triggers the obligation of the requesting institution to provide specific reasons if it opts to disregard it.[96] Although this might stretch the jurisprudence on Article 10 EC as it stands, it indicates the potential impact of the Agency's opinions. Thus, if the Agency succeeds in building a close working relationship with the EU legislative bodies, it might influence future legislation. A first case in point was the request mentioned above by the Council for an opinion on the use of Passenger Name Records. In its opinion the Agency came to the conclusion that parts of the draft framework decision violated European fundamental rights standards under the ECHR and the EU Charter of Fundamental Rights and that modifications therefore were necessary.[97]

(4) The Agency is fourthly mandated to network the relevant institutions and actors in the field of fundamental rights protection, to function, as the European Parliament put it, as "a network of networks". As a part of this mandate, national human rights institutions are foreseen as co-operation partners along with the Council of Europe, OSCE, United Nations and other international organizations.[98] A related special task of the Agency is the institutionalized consultation with civil society at the national, European and international level *via* a cooperation network by the name of the "Fundamental Rights Platform". The cooperation with the platform takes place under the authority of the Agency's Director and serves to pool knowledge and develop new Agency programs and activities as well as to further national implementation of fundamental rights.[99] Hereby EU law recognizes civil society actors as being important pillars in bringing about effective enjoyment of fundamental rights. The Agency's organizational structure is thus characterized by an extensive inclusion of relevant external actors in the Agency's bodies. This serves the organization's object and purpose: the structure facilitates a high degree of interaction both with governmental as well as non-governmental actors in the Member States and with other bodies and institutions of the EU and the Council of Europe. This type of cooperative problem tracking, analysis and knowledge production influences the perception of crucial actors across the board and can thereby impact on the implementation of fundamental rights in the Member States. The Agency as an institutionalized information network can thus exercise public authority through targeted politico-legal effects of knowledge production and dissemination.[100]

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[94] Art. 4 (1) (c) and (d).

[95] Art. 4 (2).

[96] With a broad interpretation of an obligation of loyal cooperation between EU institutions based on Art. 10 EC Toggenburg, "Exploring the fundaments of a new agent in the field of rights protection: the Fundamental Rights Agency in Vienna", 7 *European Yearbook of Minority Issues* (2009, forthcoming)

[97] On this see the annotation in footnote 81.

[98] Art. 8 (2) (a) and (b).

[99] Art. 10.

[100] On information networks under the auspices of the OECD as public authority see Goldmann, "Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht" in Boysen et al. (Eds.), *Netzwerke* (Berlin, 2007), 225-245.

III. The Agency and the Paris Principles

Art. 16 of the Regulation establishing the Agency stipulates that it shall fulfill its tasks in "complete independence." This distinguishes the Fundamental Rights Agency from other Union agencies. The 20th Recital explicitly refers to the UN principles for independent human rights institutions (Paris Principles). In line with these principles, the composition of the Management Board should "ensure" the independence of the Agency with respect to both the institutions of the Union as well as Member State governments. As early as the Regulation establishing the former Monitoring Centre there has been talk of "independent experts" and "largely independent" activities of the Centre. The Fundamental Rights Agency, however, goes one step further and explicitly refers to the "principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the Paris Principles)".[101] The independence of the Agency can therefore be justified by recourse to this international standard and can be fleshed out by it. In the following, the Agency's institutional set up will be assessed in more detail through the matrix set out by the Paris Principles for independent human rights institutions. The General Assembly Resolution of 1993 contains criteria relating to their *tasks*, their *independence* and their *operational methods*.[102]

In terms of the *tasks*, human rights institutions should be given as broad a mandate as possible to promote and protect human rights.[103] For the Agency, this is the case as the Regulation refers to Art. 6 (2) EU.[104] In the 9th Recital of the Regulation it becomes evident that a broad interpretation of Art. 6 (2) EU is implied, an interpretation which includes a number of economic and social rights.[105] However, it should be noted that the universal human rights, which form the focus of the General Assembly's Resolution, are not explicitly referred to anywhere in the Regulation; only Recital 4 alludes to them. In order to develop the Agency in light with the Paris Principles, the link to universal institutions and standards of human rights promotion should be always reflected and stressed in the Agency's work.

A problematic limitation is the restriction of the scope of the Agency to the "implementation of *Community* law" in Art. 3 (3) of the Regulation as this excludes the Third Pillar from the Agency's field of activities.[106] The fact that the Agency may nonetheless act in this area at the request of a Union institution (above C II) does not satisfy the Paris Principles. Neither does it seem in line with the idea of an independent human rights institution that the Agency is not mandated to pronounce itself ex-officio in the course of legislative procedures but can only do

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[101] 20th Recital.

[102] Resolution 48/134 of the UN General Assembly of 20 Dec. 1993, U.N. Doc. A/RES/48/134.

[103] Ibid., Annex, under the section "Competence and responsibilities", No. 2.

[104] Art. 3 (2).

[105] The 2nd Recital already cites the social charters adopted by the Council of Europe; for further details see Alston, "The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights" in Alston and De Schutter, op. cit. *supra* note 5, 159-188.

[106] As mentioned above, the Commission originally envisaged that the Agency would also be responsible for fundamental rights in the areas of police and judicial cooperation in criminal matters, but this proposal was blocked by the Council. The compromise reached removed this area from the substantive scope of the Agency's competence but stipulates that the Council would make another decision on this issue at a later date, Declaration by the Council of 12 Feb. 2007, Council document 6166/07, 4; on the legal objections against the Agency's jurisdiction in the third pillar raised by the German *Bundesrat* Toggenburg,"Die Grundrechteagentur der Europäischen Union: Perspektiven, Aufgaben, Strukturen und Umfeld einer neuen Einrichtung im Europäischen Menschenrechtsraum", *MenschenRechtsMagazin* (2007), 86, 99.

so upon request of an EU institution (Art. 4 (2) of the Regulation).[107] In view of the relevance of policies under the so-called Third Pillar and the importance of a general mandate to monitor EU legislation for its fundamental rights compatibility, we find it difficult to conclude that the Agency's mandate is sufficiently broad.

Less critical regarding the criterion of a sufficiently broad mandate we see the exclusion of Member States' activities outside the remit of EU law. If one perceives the Agency as part of a supranational polity, operating in cooperation with comparable Member State institutions, then a restriction to the scope of *Union* law can be understood as a reasonable division of labor between the supranational and national level in line with the principle of subsidiarity. In addition, due to the broad anti-discrimination directives[108] the fact that the Agency is confined to issues regarding the implementation of Community law is likely to turn out to be less of a limitation for its supervision of Member States than some of the Member States may have thought when the Agency was established.

Geographically, Art. 3 (3) of the Regulation restricts the Agency's activities to "fundamental-rights issues in the European Union and in its Member States". Nonetheless, pursuant to Art. 28 of the Regulation, candidate countries and countries with which a Stabilization and Association Agreement has been concluded may participate in the Agency. The potential geographical area in which the Agency may conduct activities is thereby expanded significantly.

According to the Paris Principles, central criteria for a human rights institution are its *independence* and a *pluralistic* internal structure.[109] The personal independence of the Agency is achieved, as shown above, by the requirement of independent persons forming the Management Board. Yet, there is little control as to whether the Member States actually do appoint independent individuals. With respect to operational independence, Art. 16 (1) of the Regulation mandates the Agency to fulfill its tasks in "complete independence." The greatest restriction on this lies in Art. 5 (1) of the Regulation, which confers upon the Council the competence to adopt a multi-annual framework for the Agency. In this procedure, the Agency only has a consultative role. In order not to overly restrict the Agency's independence within the meaning of the Paris Principles, the multi-annual framework should only lay down an abstractly formulated programme, which leaves the Agency considerable autonomy. On the whole, there is great deal of tension between the "external programming" of the Agency and the criterion of an independent human rights institution.

Establishing networks and the involvement of National Liaison Officers on the ground level help to ensure that the institution is sufficiently pluralistic in nature. In respect of the *methods of operation*, the Paris Principles foresee a close cooperation with civil society, which is institutionally provided for at the Agency on multiple levels. The institutionalized cooperation with non-governmental organizations and institutions of civil society in the "Fundamental Rights Platform" is a case in point.[110] As to the plurality of actors involved in the institution's activities, the Agency fulfils the criteria of the Paris Principles.

Thus, in summary, it can be said that the current legal mandate of the Agency does not completely satisfy the Paris Principles' model of an independent human rights institution. The

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[107] Toggenburg, 3 EL Rev. (2008), op. cit. *supra* note 2, 393 et seq.

[108] See above, note 28.

[109] Resolution 48/134 of the UN General Assembly of 20 Dec. 1993, U.N. Doc. A/RES/48/134, Annex, under the section "Composition and guarantees of independence and pluralism", Nos. 1-3.

[110] Art. 10.

main discrepancies in this regard are the exclusion of the Third Pillar from its active mandate,[111] the missing mandate to pronounce itself ex-officio in legislative procedures, as well as its dependence on the Commission and Council regarding the multi-annual work program.

D. The Agency's Possible Impact on the Constitution of Europe

Fundamental rights are a central element of any constitutional order. The establishment of a specific administrative body for their promotion is likely to have an impact on that order. This is particularly so for the constitutional order of the European Union which is only one element of the overall constitution of Europe[112]. Any development here needs to been seen in relationship with the constitutional orders of the Member States, but also the European Convention of Human Rights and its institutions given their constitutional role. The establishment and operation of the Agency touches upon four fundamental constitutional issues: *first*, the development of the EU as a guarantor of constitutional principles in the European legal area; *second*, the role of the ECJ and the future of the EU fundamental rights discourse; *third*, the relationship between Agency and the institutions of the ECHR; and *fourth*, the impact of its activities on the constitutional autonomy of the Member States.

I. The EU as a Guarantor of Constitutional Principles in the European Legal Area

The central argument advanced in the following is that an active EU fundamental rights policy, that is the raison d'être of the Agency, is in line with the constitutional decision taken with reference to Treaty of Amsterdam to develop the fundamental rights profile of the Union and cultivate it into a guarantor of constitutional principles in the European legal area. The most visible legal manifestations are the insertion of the constitutional principles in Art. 6 (1) and (2) EU and of the sanction mechanism in Art. 7 EU. By explicitly setting forth the principles of structural compatibility in Art. 6 (1) EU, the Amsterdam Treaty formulates *common* constitutional principles for *all* public authority in the European constitutional area and assigns to the Union the role of their guarantor via Art. 7 EU. It has to ensure these normative *essentialia* throughout the European constitutional area, including the Member States.[113] Important legislation in this respect has been enacted, in particular, but not exclusively, under the competence of Art. 13 EC.[114] Moreover the EU under the legal personality of the EC has become a party of an important UN human rights treaty instrument.[115]

The EU Charter of Fundamental Rights is another most important aspect of this constitutional development. The decisions to draft and to adopt the Charter were taken with the purpose of creating specific fundamental rights yardsticks for the Union and thereby further developing the Union as an autonomous polity, rather than simply referring to regional and universal human rights. As the name of the Agency suggests (Recital 9), its establishment was closely linked to the Charter project, providing an administrative component of its promotion and implementation and aiding its visibility towards EU citizens.

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[111] The Lisbon Treaty should improve the situation, see below E.

[112] Seminal Weiler, op. cit. *supra* note 8.

[113] In more detail von Bogdandy, "The European Union as a Supranational Federation", 6 *Columbia Journal of European Law* (2000), 27-54.

[114] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 80/22; Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 302/16.

[115] Council Decision of 20 March 2007, CS/2007/7404 (Signing of the UN-Convention on the Rights of Persons with Disabilities).

Some may argue that these developments were not intended to change the constitutional setup, referring to the reluctance to provide the Charter with binding legal status. Yet, many institutional actors, including the ECJ,[116] have made use of its provisions. The Commission has used the Charter since 2001 to assess the fundamental rights aspect of its legislative proposals.[117] Due to the Amsterdam Treaty and the Charter, the fundamental rights acquis of the Union has been considerably developed. For this reason, the 1996 ECJ Opinion on Accession by the Community to the ECHR does not contradict our argument. Its statement that "[n]o treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field",[118] was first focused on the accession question and has furthermore been superseded by the constitutional decisions taken by the Treaty of Amsterdam. Granted, the strengthening of the Union's fundamental rights profile has not been undisputed, and some uncertainty remains. This might explain, for example, why the decision to initiate the process leading to the Agency has been taken by the Representatives of the Member States meeting within the European Council, and not the European Council itself.

II. The Agency, the ECJ and the future of the EU fundamental rights discourse

The Regulation's focus is clearly on fundamental rights protection in the implementation of Community law by political and administrative institutions. But could the Agency as an administrative entity also influence the ECJ in "thickening" its jurisprudence or even tightening its scrutiny? With regard to the judicial enforcement of fundamental rights there has been a long-standing critique that the ECJ enforces a lower standard of protection vis-à-vis EU institutions than it does against other participants in legal proceedings before the Court.[119] Yet, the Court has gradually shown a greater willingness to engage with fundamental rights arguments. This is particularly true with respect to EU administrative action. In a considerable number of staff cases and competition law proceedings, applicants have successfully challenged EU administrative acts for violation of fundamental rights. Regarding staff cases the ECJ has inter alia found violations of the right to non-discrimination,[120] freedom of expression and freedom of religion.[121] Adjudication in the field of competition and anti-dumping proceedings has brought about ECJ case law regarding fundamental rights of a procedural nature, referred to as "rights of the defense", including a right to a fair hearing.[122] As to challenges to EU legislation the Court was clearly less willing to strike down legislation on the grounds of incompatibility with fundamental rights, even if some recent decisions show a clearer fundamental rights oriented profile.[123] What can be observed in this context is rather the

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[116] See for example Case C- 540/03 *European Parliament* v. *Council* [2006] ECR I-5769, paras. 37-39 and 58.

[117] COM (2005) 172; Toner, "Impact Assessment and Fundamental Rights Protection in EU Law", 31 EL Rev. (2006), 316.

[118] Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759, paragraph 27.

[119] Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford, 2000), 340.

[120] For selected examples see Case C-404/92 P *X* v. *Commission* [1994] ECR I-4737 and Case C-191/98 P *Tzoanos* v. *Commission* [1999] ECR I-8223.

[121] Freedom of expression: Case 100/88 *Oyowe and Traore* v. *Commission* [1989] ECR 4285; freedom of religion: Case 130/75 *Prais* v. *Council* [1976] ECR 1589.

[122] On the right to access to documents: Case T-210/01 *GEC* v. *Commission* [2005] ECR II-5575; on the length of time of proceedings: Case C-185/95 P *Baustahlgewebe* v. *Commission* [1998] ECR I-8417; on fair hearing: Case C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co.* v. *Council* [1991] ECR I-3187.

[123] Case C-540/03, *Parliament* v. *Council* [2006] ECR I-5769, paras. 35 et seq.; Case C-305/05, *Ordre des*

recognition by the ECJ that secondary law has a fundamental rights dimension, in particular when it comes to economic rights affected by Community legislation.[124] Like in *Bosphorus* the ECJ in these cases tends to interpret the legislation as a proportional limitation of a particular right rather then as a violation of it.[125] In sum, the rights-related jurisprudence of the ECJ has "thickened", but remains nevertheless rather "thin" in comparison with other constitutional courts.[126]

The envisaged role of the Agency is certainly not to modify the ECJ's role regarding the protection of fundamental rights within the Union. As described above its activities are embedded in an earlier phase of the EU politico-legal process. The activities of the Agency aim at preventing fundamental rights violations through EU measures by providing advice to EU institutions during the legislative process. If EU policies have a growing fundamental rights dimension, it seems vital for EU institutions to assess potential fundamental rights implications at an early stage of the legislative process. Such an independent ex ante - scrutiny can increase the awareness of the involved actors and prevent conflicts between EU legislation and fundamental rights in the first place.[127] Fundamental rights concerns might also have more "voice" if formulated by a specific institution, rather than by the generalist legal services of the Commission, the Council or the Parliament. Moreover, in the long run, the Agency might help to "thicken" the European-wide discourse on fundamental rights which could then indirectly influence the ECJ's jurisprudence.

III. The Agency and the Institutions of the ECHR

The ECHR and its institutions, the Council of Europe and the ECtHR, are part of the Constitution of Europe.[128] So far, human rights protection and human rights promotion in the European legal area has been more a task of these institutions than of those of the EU. Accordingly, the Agency needs to be embedded carefully in this overall structure. In the course of the Agency's legislative history it was repeatedly pointed out that the Agency should not duplicate the Council of Europe's work or become an institutional competitor. These concerns have been addressed by the Agency's specific institutional design, for example through the close institutional involvement of the Council of Europe in its management.[129]

In substance, it is illuminating to recollect how the question of the relationship between the ECHR and the ECtHR on the one side and the EU system on the other was resolved in the EU Charter of Fundamental Rights. During its drafting, the question of whether or not the EU needed its own fundamental rights policy had already been discussed. As a result, Art. 52 (3) of the Charter promotes harmony between corresponding rights in the Charter and the ECHR. At the same time, the paragraph in its second sentence clearly stipulates that "[t]his provision shall

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barreaux francophones et germanophone and Others v. *Council* [2007] ECR I-5305, paras. 28 et seq.

[124] The classic so called "Nold and Hauer - Jurisprudence", see Case 4/73 *Nold* v. *Commission* [1974] ECR 491; Case 44/79 *Hauer* v. *Rheinland Pfalz* [1979] ECR 3727; see also Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[125] Case C -84/95 *Bosphorus* v. *Minister for Transport* [1996] ECR I-3953.

[126] For a detailed comparative analysis see Kraus in Grote/Marauhn (Eds.), *EMRK/GG Konkordanzkommentar* (Tübingen, 2006), Chapter 3, paras. 108 et seq.

[127] On the issue of ex-ante political scrutiny and ex-post judicial control see Kumm, "Constitutionalising Subsidiarity in Integrated Markets", 12 ELJ (2006), 503, 525-30.

[128] See the reference to the ECHR in Art. 6 (2) EU; Grabenwarter, *Europäische Menschenrechtskonvention* (München, 2008), 5-6.

[129] See above C. I.

not prevent Union law to provide more extensive protection". In this vein, many provisions of the Charter go beyond the human rights set out in the ECHR. Like the Member States, the EU is not precluded by its constitutional recognition of ECHR-standards in Art. 6 (2) EU from establishing a higher level of protection than prescribed by the Council of Europe's human rights standards.[130] Moreover, it needs to be stressed that the Union with its Agency differs fundamentally from an international organization charged with human rights protection. In an increasing number of issues, the EU itself exercises public powers and therefore, like the states, needs to formulate accompanying internal fundamental rights policies.

This did not allay concerns in the Council of Europe. To address them, on 15 July 2008 the Agency and the Council of Europe have concluded a cooperation agreement, prescribing in detail how inter-institutional linkages were supposed to be strengthened and how duplication shall be avoided.[131] The agreement stipulates as a general principle that cooperation with the Council of Europe shall cover the whole range of the Agency's activities, both present and future.[132] Both institutions shall hold regular consultations, notably regarding the Agency's annual work program, its annual report and its cooperation with civil society.[133] The agreement also contains a reciprocal obligation to exchange information and data generated in its activities[134] and foresees the possibility for the Agency to fund specific projects of the Council of Europe.[135] Both institutions are entitled to attend each other's relevant meetings as observers.[136] The detailed provisions aim at complementary institutional practices fostered through intensive cooperation including joint projects. The Agency herewith follows the path beaten by previous constitutional decisions, namely to fully recognize the important role of the ECtHR in the elaboration and enforcement of European human rights standards by intensively co-operating with Strasburg, while at the same time moving towards a specific EU fundamental rights policy that effectively ensures that EU institutions themselves respect fundamental rights standards, and which – with regard to the Member States – may even go beyond the level of protection granted by the ECHR.

But there is also another potential for a mutually supportive relationship, as the Agency might in the long run help to reduce the enormous number of cases, which currently overwhelm the ECtHR, and has led to a crisis in the Court.[137] In order to reduce the workload of the ECtHR an intensified cooperation between domestic institutions on the one side and the Council of Europe and the ECtHR on the other may be crucial. Among these domestic institutions are first and foremost the courts (including the ECJ), but also domestic bureaucracies, in particular specific institutions such as the Agency. The Agency could follow up on ECtHR-cases, in which the

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[130] For an extensive discussion of the relationship between the Agency and the Council of Europe see De Schutter, op. cit. *supra* note 83, 530 et seq.

[131] O.J. 2008, L 186/7.

[132] No. 6 in the Agreement (O.J. 2008, L 186/8).

[133] No. 13 (a)-(c) in the Agreement (O.J. 2008, L 186/9).

[134] Nos. 7-11 in the Agreement (O.J. 2008, L 186/8).

[135] No. 15 in the Agreement (O.J. 2008, L 186/9).

[136] No. 4 in the Agreement (O.J. 2008, L 186/8).

[137] For a thorough analysis and evaluation of strategies on how to cope with the problem see Wolfrum and Deutsch (Eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Heidelberg, 2009); on the "explosion" in the number of cases see the Report of the Group of Wise Persons to the Committee of Ministers, Council of Europe – Committee of Ministers Doc. CM(2006)203 of 15 Nov. 2006; as of 12 May 2009 the Council of Europe has adopted Protocol No. 14*bis* as a recent measure to address the crisis in the court.

Court has pointed at structural violations in an EU Member State in order to then propose a fine tuned use of the full panoply of EU instruments for remedying systemic problems. These diverse instruments might even prove to be more effective than those of the Council of Europe, in particular if the Agency cooperates closely with the Commission and has become the organizing heart of a broader network of human or fundamental rights institutions in Europe. Hence, the Agency might fulfill an important role in facilitating the implementation of standards and decisions that have been produced in Strasburg, hereby strengthening the constitution of Europe.

IV. The Constitutional Autonomy of Member States

This leads to a further most sensitive constitutional issue: to what degree can EU institutions in general and the Agency in particular monitor and perhaps even challenge Member State action on the grounds of alleged violations of fundamental rights. At stake is the constitutional autonomy of the Member States, protected by Art. 6 (3) EU, on the one hand and the EU guarantee of a common standard of fundamental rights protection on the other. It is one of the fundamental premises of European integration to date that the Member States remain largely autonomous from the Union in the shaping of national policies for fundamental rights protection,[138] but at the same time the EU has evolved into a guarantor of common constitutional principles.

Art. 6 and Art. 7 EU stipulate a role of the Union with respect to the fundamental rights performance of Member States.[139] Systemic fundamental rights violations cannot be excluded. Quite to the contrary a considerable number of indicators demonstrate that the fundamental rights situation in EU Member States does not always satisfy European fundamental rights standards. In particular, the treatment of some minority groups, such as the Roma, has in some Member States become so critical that even the threshold of Art. 7 (1) EU may have been reached.[140] Given Art. 7 EU, it can hardly be denied that the EU has a competence to monitor the fundamental rights situation in the Member States. Yet, Art. 7 EU does not provide a competence to the Agency. In this respect, it can only act upon a request by the Council.[141] Its autonomous field of monitoring is, however, far narrower. The Regulation states that the Agency "shall deal with fundamental-rights issues (…) in its Member States when implementing *Community* law". This is even more restrictive than Art. 51 (1) Charter which refers to *Union* law. Moreover, the focus on "implementation" instead of the broader "within the scope of Union

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[138] Weiler, "Fundamental rights and fundamental boundaries" in Weiler, op. cit. *supra* note 8, 102-129. This does not preclude that some of the Member States may model their fundamental rights autonomously on European standards, Huber, "Offene Staatlichkeit: Vergleich" in von Bogdandy, Villalón and Huber (Eds.), *Handbuch Ius Publicum Europaeum, Vol. II* (Heidelberg, 2008), § 26 paras. 98 et seq.

[139] Kühling, "Fundamental Rights" in von Bogdandy/Bast (Eds.), *Principles of European Constitutional Law* (Oxford, 2007), 501, 524 et seq.; Ruffert in Calliess/Ruffert (Eds.), *EUV/EGV*, 3rd Ed. (Munich, 2007) Art. 7, paras. 7 et seq.

[140] As an example of a violation of fundamental rights found by the ECtHR in this field see the ground-breaking judgement of the ECtHR of 13 Nov. 2007 on the discrimination against the Roma in the Czech school system: *D. H. and Others* v. *the Czech Republic*, Grand Chamber, Application No 57325/00; see also the successful complaint alleging violation of the right to housing of, and discrimination against Roma in Greece under the European Social Charter: *Roma Human Rights Centre* v. *Greece*, Decision of the European Committee on Social Rights of 8 Dec. 2004, Complaint No 15/2003; Wolfrum, "The legal status of Sinti and Roma in Europe; a case study concerning the shortcomings of the protection of minorities", 33 *Annuaire Européen* (1985), 75-91; Guglielmo, "Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU" in Toggenburg (Ed.), *Minority Protection and the Enlarged EU: The Way Forward* (Budapest, 2004), 37-58; De Schutter and Verstichel, "The Role of the Union in Integrating the Roma: Present and Possible Future", Edap 2 (2005), http://www.eurac.edu/documents/edap/2005_edap02.pdf (last visited 25 Apr. 2007).

[141] See above, C II.

law" wording seems to have been deliberate because such a broader formulation would have clearly also included cases where Member States derogated from Union law.[142] Yet, in the interpretation of the term "implementing", the more recent jurisprudence of the ECJ needs to be taken into account. The Court states, in reference to a general obligation of the Member States, the need to respect fundamental rights in the implementation of Community legislation. Rather than striking down the EU legislation for the violation of fundamental rights, it requires the Member States to protect the fundamental rights of its citizens while implementing EU law, taking recourse to the Charter and the jurisprudence of the ECtHR.[143] This has become particularly visible in the challenge brought to the EU Family Reunification Directive by the European Parliament in 2006.[144] As has been noted by critical voices in the literature, this strategy gives the Court the power to reinterpret legislation and to limit the discretion of Member States when implementing Community law on the basis of a fundamental rights-sensitive review.[145] This approach expands the concept of "implementation" and thereby also the possible scope for the Agency's monitoring of Member States.

This possible scope of monitoring should not be perceived as a potential further threat to Member States' autonomy. In contrast to the ECJ, the Agency functions as an expert network identifying relevant fundamental rights issues with a view of developing and reforming EU legislation. Through ex-ante assessments, data gathering and independent political advice on fundamental rights implications of EU policies it can even diminish the likelihood that the ECJ will have to engage in wide ranging ex-post reinterpretations of EU legislation while assessing the fundamental rights implications of the implementation measures in the Member States. In this vein, the Agency has been given the competence of providing expertise to interested Member States in the context of the implementation of EU legislation upon their request.[146]

There is a lot to say to the view that the Agency should construct up a solid database on the fundamental rights situation in the Member States and strive for a corresponding European public awareness; in addition it should consolidate the emerging network between the relevant national institutions. Eventually, a European fundamental rights system with significant added value may evolve through structured information- and data exchange with the national independent human rights institutions. Monitoring of Member States in this sense does not imperil the constitutional autonomy of Member States.

This conclusion is not meant to suggest that the Agency should primarily monitor the Member States. The Union's legislation and administration itself have increasing relevance for fundamental rights. In the Union's complex inter-institutional negotiating procedures fundamental rights issues have not always been well represented and defended. The Agency offers an opportunity to counter this deficit and to further fundamental rights promotion. The Council's request for a preliminary draft opinion on the draft framework decision on the use of Passenger Name Records for law enforcement purposes mentioned above points in the right direction.

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[142] As in the landmark ERT case, Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT)* v. *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

[143] See on this development Bast, "Legal Instruments and Judicial Protection" in von Bogdandy/Bast (Eds.), op.cit. *supra* note 19, chapter 10, section II, subsection 3; Kühling, op. cit., *supra* note 139.

[144] Case C- 540/03 *European Parliament* v. *Council* [2006] ECR I-5769; see for this tendency also Case C-305/05 *Ordre des barreaux francophones et germanophones and Others* v. *Council* [2007] ECR I-5305.

[145] On this problem Huber, „Unitarisierung durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung", 2 *Europarecht* (2008), 190; Masing, „Vorrang des Europarechts bei umsetzungsgebundenen Rechtsakten", 5 *Neue Juristische Wochenschrift* (2006), 264.

[146] Declaration by the Council of 12 Feb. 2007, Council document 6166/07, 4.

E. Conclusions and Outlook

The creation of the Agency represents an institutional acknowledgement that the EU, at the dawn of the last century, has embarked on the journey of a EU-specific fundamental rights policy. It has to be understood in the context of the development of an outright political Union, of the transition of Central and Eastern European states from autocratic rule to democracy, and of new competences in fundamental rights sensitive policy areas. Although the Court moved towards a more fundamental rights sensitive jurisprudence, no institutional mechanism was in place to independently and specifically assess possible fundamental rights implications of EU policy. Moreover, new competences in the fundamental rights field, such as Art. 13 EC, added to the need for EU institutions to have reliable data on the fundamental rights situation in the Member States. The need also grew because of new competences and legislative activities in the Third Pillar. Sometimes Member States were either not in a position or not willing to deliver the necessary data. But also different standards of data gathering made it impossible to compare and analyze the available information. A further task that could not be satisfactorily accomplished by the existing institutional set-up was the coordination of EU policy with human rights institutions in the Member States, the Council of Europe and the universal institutions in the human rights field. Throughout this contribution the Agency has been interpreted as an answer to these perceived needs.

As regards the current legal basis and institutional structure of the Agency, the most important conclusions drawn in this article are: even though the Agency is conceived as an EU information Agency, it enjoys a particular status by the references to the UN-model of an independent human rights institution in line with the Paris Principles. Unfortunately, the current Agency can only to a limited extent satisfy the prerequisites of the UN model. The main discrepancies are the exclusion of the Third Pillar from its active mandate, the missing mandate to pronounce itself ex-officio in legislative procedures, as well as its dependence on the Commission and Council regarding the multi-annual work program. Furthermore, the founding Regulation does not actively embed the Agency's activities in the universal human rights discourse.

As to the future, the entry into force of the Lisbon Treaty will have a considerable impact on the Agency. Given that the basis for the Agency's work is the Regulation and not primary law, the effect of the Lisbon Treaty on the Agency will be mediated by the Regulation. The EU Charter of Fundamental Rights becoming primary law here seems of lesser importance since the Agency already bases its activities on it, as foreseen in Recital 9 of the Regulation. Most importantly, the entry into force of the Lisbon Treaty brings police and judicial cooperation in criminal matters into its remit. The Reform Treaty moves this policy field from the EU Treaty to the Treaty on the Functioning of the European Union (Art. 82 et seq.), which is the amended EC Treaty. Article 3 of the Regulation on the scope of activities refers to the "Treaty establishing the European Community", which, after the entry of the Lisbon Treaty, includes that policy field. One could only argue in favor of a continuing exclusion of this policy field if Art. 3 were to be interpreted as a static reference to the EC Treaty as it stood in 2007. Yet, the normal form of reference within a legal order is a dynamic one, and there are no indications that this rule should not apply here. Recital 32 of the founding Regulation also reflects a dynamic understanding of the competence-issue by stating that "nothing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters."

Finally, on the more abstract level of EU scholarship, this article aims to contribute to the development of an EU administrative law of fundamental rights protection and promotion. The protection and promotion of rights by independent administrative institutions is relatively new

and only slowly being discovered by legal scholarship.[147] Experience at the national level so far has shown that such institutions – even without quasi-judicial authority – can provide an effective contribution to the implementation of fundamental rights. At the same time it is beyond question that human or fundamental rights promotion by independent administrative institutions, as foreseen by the UN Paris Principles, cannot replace judicial review. It is designed to be a supplemental administrative element. As such, it carries a potential that deserves to be further explored both in practice and theory.

[147] Gusy, "Grundrechtsmonitoring. Grundrechtsdurchsetzung außerhalb gerichtlicher Instanzen", 47 *Der Staat* (2008), 511, 522 et seq.; with a comparative law survey: Aichele, op. cit. *supra* note 3.