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**The Contribution of the Fundamental Rights Agency to
Fundamental Rights Protection in the European Union**

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The European Union Agency for Fundamental Rights (“FRA”) can and should play an important role in the protection of fundamental rights in the EU. This decentralised agency was established in 2007 in the context of developing effective institutions for the protection and promotion of fundamental rights. Unfortunately, the agency’s functioning is significantly restricted by both legal limitations relating to its status as a decentralised agency, and political limitations due to the sensitive nature of its subject matter. The FRA’s biggest opportunity to improve fundamental rights protection is through participation in the legislative process. However, what is problematic is that the agency is much too dependent on the actors it is meant to monitor. The consequence of this is that the FRA is shut out where it is arguably needed the most. Nevertheless, there are ways in which these limitations can be overcome, which do not necessitate an amendment of the agency’s Founding Regulation. Regardless of whether formal steps are taken to better facilitate the FRA in executing its tasks, it is imperative that the agency takes a proactive and functional approach to its mandate.

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Introduction

In order to find evidence of the European Union's ("EU") commitment to fundamental rights one does not need to look very far. Article 2 of the Treaty on European Union ("TEU")¹ proclaims that the Union is founded on the respect for human rights,² while Article 6 TEU enshrines fundamental rights as general principles of Union law, commits the Union to accede to the European Convention on Human Rights ("ECHR")³ and gives the Charter of Fundamental Rights of the European Union ("the Charter")⁴ the status of primary law. In addition, the case law of the Court of Justice of the European Union ("CJEU") as well as secondary legislation adopted by the Union legislator have played a role in the shaping of the Union's fundamental rights policy. In line with the Union's increased focus on fundamental rights, the European Union Agency for Fundamental Rights ("FRA") was created in 2007.⁵

The creation of a decentralised agency to provide the EU's institutions and Member States with information, assistance, and expertise relating to fundamental rights⁶ fits within the agencification⁷ of EU executive governance that has led to over thirty agencies being created since 2000.⁸ The literature on agencies is abundant, yet one issue that has not yet received a lot of attention is the relation between agencies and fundamental rights. An agency can play a role in fundamental rights protection in several ways. Firstly, an agency can use its specific expertise and network of stakeholders and national authorities to advise the institutions on the development of new policy. Secondly, where the Union legislator has adopted a piece of legislation that needs to be implemented by the Member States, agencies can provide more administrative capacity and facilitate and strengthen cooperation between national authorities. Thirdly, an agency, which is seen as a more independent, neutral actor than the European Commission, can depoliticise certain issues.⁹

The FRA was created in the context of developing effective institutions for the protection and promotion of fundamental rights.¹⁰ However, the agency's functioning appears hampered by both legal limitations relating to its status as a decentralised agency, and political

¹ Treaty on European Union *OJ* C115/13.

² While there are certain nuances between both terms, for the purposes of this research, the terms fundamental rights and human rights will be used interchangeably.

³ Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴ Charter of Fundamental Rights of the European Union *OJ* C 326/391.

⁵ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights *OJ* 2007 L53/1.

⁶ Recital 7 and Article 2 of Council Regulation 168/2007.

⁷ Agencification refers to the process whereby the EU agencies take up an increasingly important role in the EU administration, both in a quantitative as well as a qualitative sense, Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 45.

⁸ Ellen Vos, 'EU Agencies on the Move: Challenges Ahead' (2018) Swedish Institute for European Policy Studies 15.

⁹ *ibid* 17.

¹⁰ See, for example, recital 4 of Regulation 168/2007.

limitations due to the sensitive nature of its subject matter. In light thereof, this thesis will look to answer the following research question “How can the FRA contribute to fundamental rights protection in the EU?” This research is relevant because, as the Union claims the respect for fundamental rights as an essential aspect of its foundation, it is important to continuously assess whether it backs up these assertions in practice. Here, the agency, whose task it is to monitor fundamental rights standards in the Union, can play an important role. However, in times of Euroscepticism, it seems as if in particular the Member States are anxious about the EU increasing its competence in any way, even when it would be pragmatic to do so. An analysis of the FRA’s institutional framework and practice will be valuable to shed light on the question whether its current mandate is sufficient for the agency to fulfil its tasks, or whether it should be given more competences.¹¹

For this study, research will be carried out in the form of traditional legal doctrinal research. This thesis is divided into four chapters. In order to answer the research question, it is first necessary to examine the Union’s fundamental rights policy, which will be the subject of Chapter 1. Subsequently, Chapter 2 will provide insight into the topic of EU agencies on account of the FRA’s position as one of the Union’s decentralised agencies. As such, this chapter will review the rationale for agencies and describe the different types, before discussing their legal framework and the issue of delegation of powers. Chapter 3 will then turn to an assessment of the FRA’s institutional aspects by discussing the agency’s origin, organisational set-up, activities and limits. Furthermore, this chapter will examine the FRA’s relationship with actors that are essential to its functioning, such as the EU legislator and the Council of Europe and look into the possibility of strengthening the FRA through the merger of the FRA and another agency. Chapter 4 will evaluate the FRA’s functioning in practice. For this reason, the FRA’s role in the legislative process will be considered by looking at the follow-up by the EU legislator to one of the agency’s opinions and by analysing a field in which the agency is not currently involved, namely impact assessments. Moreover, the FRA’s response to the fundamental rights actions of EU actors in times of crisis will be scrutinised. This thesis will conclude by presenting its findings and answering the research question.

¹¹ The author is aware of the PhD Thesis published by Maria Giungi entitled ‘Strengthening Fundamental Rights Protection at EU Level: The Role of the Fundamental Rights Agency of the European Union’. The topic of this PhD overlaps with this thesis to the extent that both discuss the mandate and functioning of the FRA. However, where the former focusses on the establishment of the agency and gives a detailed analysis of its Founding Regulation, before looking into its functioning by using the concepts of implementation and subsidiarity, this thesis takes into account the specifics of the FRA being a decentralised agency, and the influence this has on its functioning. Furthermore, it makes additional suggestions to improve the functioning of the FRA, such as giving it a role in impact assessments, or merging the FRA with the EIGE.

Chapter 1: The EU's Fundamental Rights Policy

In order to analyse the FRA's contribution to fundamental rights protection in the EU, the fundamental rights policy will first have to be considered. First and foremost, it cannot be said that the Union has one single fundamental rights policy.¹² One reason for this lack of coherence is the absence of a general legal basis in the Treaties.¹³ The Lisbon Treaty made an attempt to constitutionalise fundamental rights in the EU with the introduction of Article 6 TEU, as well as several provisions mentioning the respect for fundamental rights as an objective of Union policy.¹⁴ However, it did not include a legal basis conferring upon the legislator a general competence to adopt legislation in the field of fundamental rights. Consequently, the Union's fundamental rights policy is fragmented, scattered throughout primary law, secondary law, and the case law of the Court. These three sources will be discussed briefly in the following sections, starting with the Court's case law, which first acknowledged fundamental rights as part of European law, then turning to the fundamental rights implications of secondary legislation, and ending with the Charter, which has obtained the status of primary law since the Lisbon Treaty.

1.1. Fundamental Rights in the CJEU's Case Law

Fundamental rights were introduced into the European legal order when the Court confirmed in the *Stauder* case from 1969 that "fundamental human rights are enshrined in the general principles of Community law and protected by the Court".¹⁵ The Court's motivation might have been to assuage concerns from Member States that the recently decided supremacy of European law over national law,¹⁶ would not entail national levels of fundamental rights protection being overtaken by a European legal system without any fundamental rights standards.¹⁷ Nevertheless, the Court concluded, citing the common constitutional principles of the Member States and international human rights agreements, that the European Community would protect fundamental rights. Yet, at that point it was unclear what the content of fundamental rights should be in the Community. In order to compensate for this lack of

¹² See, for example, Lorenza Violini and Antonia Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* (Edgar Elgar 2018) 1. See also in this book, Selja Imamovic, 'The Role of the Court of Justice in the Fragmented European Fundamental Rights Landscape'; Tamara Lewis, 'Coherence of Human Rights Policymaking in the EU Institutions and other EU Agencies and Bodies' FRAME Report 2013-2017 available at <http://www.fp7-frame.eu/wp-content/uploads/2016/08/06-Deliverable-8.1.pdf>, last accessed 28 August 2019.

¹³ Mark Dawson, 'Critiquing and Theorising the Governance of EU Fundamental Rights' in Mark Dawson, *The Governance of EU Fundamental Rights* (CUP 2017) 19.

¹⁴ See, amongst others, Articles 2, 3, 6 and 7 of the TEU.

¹⁵ Case 29/69 *Stauder* ECLI:EU:C:1969:57.

¹⁶ Case 6/64 *Costa ENEL* ECLI:EU:C:1964:66.

¹⁷ Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (6th edition OUP 2015) 383.

experience and expertise, the Court often turned to the ECHR and its court for guidance.¹⁸ The ECHR is not formally binding on the EU, as it is not a party to it,¹⁹ but as a result of the Charter providing that the meaning of Charter rights corresponding to rights in the ECHR should be the same, it has been and continues to be an important source of inspiration.²⁰ A second prominent way in which fundamental rights feature in the Court's case law is through challenges to the legality of EU legislation and acts based on fundamental rights,²¹ which have increased since the Charter has become binding.²² An example of this is the annulment of the Data Retention Directive for violating Article 7 and 8 of the Charter.²³

In spite of the Court's essential role in the development of the fundamental rights policy, it has been criticised for prioritising the functioning of the internal market²⁴ and the supremacy of EU law²⁵ over fundamental rights.²⁶ In addition, the Court has struggled to balance the specific features of EU law with fundamental rights protection, as evidenced by the EU's failed accession to the ECHR, an obligation under primary law.²⁷ The Court found in Opinion 2/13 that the Draft Accession Agreement concluded between the Council of Europe and the EU was incompatible with Union law, because, amongst other reasons, accession would give the Strasbourg court jurisdiction it did not have itself, and would violate the autonomy of EU law.²⁸ This Opinion came to the surprise of many and led to questioning of the Court's commitment to fundamental rights by seemingly refusing to open up the Union to outside scrutiny in fear of losing its exclusive jurisdiction.²⁹ In light of this, although the Court

¹⁸ See, for example Case C-260/89 *ERT* ECLI:EU:C:1991:254; Cases C-404/15 and C-659/15 PPU *Aranyosi and Caldaru* ECLI:EU:C:2016:198.

¹⁹ Allan Rosas, 'Is the EU a Human Rights Organisation?' (2011) CLEER Working Papers Series 2011/1 available at <https://www.asser.nl/media/1624/cleer-wp-2011-1-rosas.pdf>, last accessed 28 August 2019, 6.

²⁰ Article 52(3) of the Charter. For an example, see Case C-168/13 PPU *Jeremy F* ECLI:EU:C:2013:358.

²¹ See, for example, Cases C-402/15 and C-415/05 *Kadi v Council and Commission* ECLI:EU:C:2008:461.

²² Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law*, 168, 176.

²³ Case C-293/12 *Digital Rights Ireland* ECLI:EU:C:2014:238.

²⁴ Case C-438/05 *Viking* ECLI:EU:C:2007:772; Case C-341/05, *Laval* ECLI:EU:C:2007:809. In the *Viking* and *Laval* cases, the Court found that the right to collective action was outweighed by the employers' right to post workers under the free movement provisions in the Treaty. For criticism, see Anne Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37(2) *Industrial Law Journal*, 126, 147.

²⁵ Case C-399/11 *Melloni* ECLI:EU:C:2013:107 [56]; Aida Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10(2) *European Constitutional Law Review*, 308, 317.

²⁶ Imamovic, 'The Role of the Court of Justice in the Fragmented European Fundamental Rights Landscape' 74.

²⁷ Article 6(2) TEU.

²⁸ Opinion 2/13 ECLI:EU:C:2014:2454 [254] and [183].

²⁹ See, for example, Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16(1) *German Law Journal*, 213, 221 and Bruno de Witte and Sejla Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 5 *European Law Review*, 683, 704.

was the one to start the development of a fundamental rights policy in the EU with the *Stauder* case,³⁰ it has not always ruled in a manner³⁰ that would give maximum fundamental rights protection.

1.2. Fundamental Rights in Secondary Law

Despite the lack of a general competence in the field of fundamental rights, the EU legislator has been able to set fundamental rights standards through secondary legislation in several ways. Muir distinguishes three types of EU legislation having fundamental rights implications.³¹ Firstly, EU legislation designed to give expression to a fundamental right, such as the Directive on equal treatment in the workplace, which is based on Article 19 of the Treaty on the Functioning of the European Union (“TFEU”)³² concerning non-discrimination.³³ Secondly, legislation based on a non-fundamental rights competence that has a fundamental rights dimension. For example, where the European Arrest Warrant facilitated Member States in surrendering requested persons to each other, the rights of the requested person needed to be ensured. In this way, European legislation is incidentally setting fundamental rights standards because of a functional need.³⁴ Thirdly, there is legislation that does not provide fundamental rights protection itself, but rather defines the scope of EU law, and thus the margin for fundamental rights protection by the CJEU.³⁵ An example of this is that Member States are only bound to the Charter when they are implementing EU law.³⁶ Subsequently when a Directive lays down an obligation to be implemented by the Member States, it is indeed brought within that scope, and thus within the jurisdiction of the Court. Consequently, the EU legislator has created a patchwork of fundamental rights protection in secondary law, varying in intensity and volume depending on the relevant policy area.³⁷

³⁰ Oreste Pollicino, ‘Comon Constitutional Traditions in the Age of the European Bill(s) of Rights: Chronicle of a (somewhat prematurely) Death Foretold’ in Violini and Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* 45.

³¹ Elise Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ (2014) 51 *Common Market Law Review*, 219, 223.

³² Treaty on the Functioning of the European Union *OJ C* 326/47.

³³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *OJ L*303/16.

³⁴ Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ 223.
³⁵ *ibid* 228.

³⁶ Article 51(1) of the Charter.

³⁷ For example, while the EU’s equality policy consists of an extensive legal framework, there are only four Directives adopted in the field of defence rights. For an overview see, respectively, Craig and de Búrca, *EU Law: Texts, Cases and Materials* 892-961. See also, Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (OUP 2018), and European Commission, ‘Presumption of Innocence and Right of Defence’ available at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/justice/presumption-innocence-and-right-defence_en, last accessed 28 August 2019.

1.3. Fundamental Rights in Primary Law

The fragmentation of the fundamental rights policy led to a limited visibility for fundamental rights in the EU. Therefore, an attempt to bring more clarity and awareness to fundamental rights in the Union culminated in the Charter, a single document meant to bring together various sources of fundamental rights, such as the CJEU's case law, the general principles and the ECHR.³⁸ The purpose of creating the Charter was also to introduce a fundamental rights culture in the EU.³⁹ The Charter was solemnly proclaimed by the Presidents of the EU institutions in 2000 and gained legal force with the Lisbon Treaty in 2011.⁴⁰ Notably, since the Charter became binding, the Court has started to refer less to the ECHR in favour of the Charter.⁴¹

The Charter's scope of application is regulated by Article 51(1), which provides that it is binding on the Union's institutions, bodies, offices and agencies whenever they act, and on the Member States whenever they are implementing EU law. It follows from the Explanations to the Charter and the case law of the Court that this means whenever they act within the scope of EU law.⁴² Upon the Charter becoming legally binding, Member States were concerned that this would increase the competences of the Union. In this respect, it is worth noting that the Charter did not introduce any new remedies, which entails that the procedure for a breach of fundamental rights will be the same as the procedure for other violations of EU law.⁴³ This, combined with the fact that the Charter was largely a codification of existing standards set by the CJEU, leads to the conclusion that the Member States' fear was unfounded, as the Charter did not extend the competences of the Union in the field of fundamental rights.⁴⁴

³⁸ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review*, 375.

³⁹ Olivier de Schutter, 'A New Direction for the Fundamental Rights Policy of the EU' (2010) *Revgov Working Paper Series* 33, 4, available at [https://sites.uclouvain.be/cpdr-refgov/publications/Working%20Papers/Fundamental%20Rights%20-%20FR_\(30.11.2010_09h11\)_WP-FR-33.pdf](https://sites.uclouvain.be/cpdr-refgov/publications/Working%20Papers/Fundamental%20Rights%20-%20FR_(30.11.2010_09h11)_WP-FR-33.pdf), last accessed 28 August 2019.

⁴⁰ See the Press Release of the European Commission, 'Charter of Fundamental Rights: the Presidents of the Commission, European Parliament and Council sign and solemnly proclaim the Charter in Strasbourg' available at http://europa.eu/rapid/press-release_IP-07-1916_en.htm, last accessed 28 August 2019.

⁴¹ De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law*, 168, 176.

⁴² Case C-617/10 *Akerberg Fransson* ECLI:EU:C:2013:105 [20-23].

⁴³ Angela Ward, 'Remedies under the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Edward Elgar 2016) 162.

⁴⁴ *ibid* 185; Sybe de Vries also notes that even if the Union's competences in the area of fundamental rights have increased, this cannot be attributed simply to the Charter becoming binding. See Sybe de Vries, 'The Charter of Fundamental Rights and the EU's 'Creeping' Competences: Does the Charter Have a Centrifugal Effect for Fundamental Rights in the EU?' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* 97.

1.4. Conclusion

This chapter has demonstrated that fundamental rights norms in the EU have a variety of sources and exist on all levels of the legal system. Both the Court and the EU legislator play a significant role in the continued development of the fundamental rights policy. As the Union's competences were expanded to policy fields such as migration and police cooperation, both parties are increasingly faced with fundamental rights questions. On the one hand, this means that the legislator, with the Charter as part of EU primary law, must ensure that all of its legislation is in compliance with fundamental rights standards. On the other, it entails that the Court must strike the delicate balance between fundamental rights and other objectives of Union policy, while also protecting the unique institutional features of the Union.

Finally, the fundamental rights policy of the EU must be put into context. The European integration project has always been first and foremost an economic project, as evidenced by the fact that fundamental rights were not explicitly a part of European law until *Stauder*.⁴⁵ Similarly, unlike the European Court of Human Rights, the CJEU was not set up with the purpose of protecting fundamental rights.⁴⁶ Therefore, the fact that the EU's fundamental rights policy is fragmented is not surprising. Even so, the European Union claims to be an organisation built upon the respect for human rights, and therefore needs to prove its commitment to fundamental rights in practice.

Chapter 2: Legal Issues of EU Agencies

In order to analyse the FRA in detail, it is necessary to first establish the context and framework in which it operates as an EU agency. The creation of the first two agencies in 1975 marked the beginning of a process that led to the establishment of over thirty decentralised agencies.⁴⁷ Yet, these agencies are not all the same in terms of powers, mandate and resources. While some are competent to adopt binding decisions, others have the collection of information as their main task. The agencification phenomenon has raised some interesting legal issues.⁴⁸ In particular, questions concern the possibility of delegating powers to agencies, and the nature of agency acts. This chapter will start by explaining the rationales for establishing an agency

⁴⁵ Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' 147.

⁴⁶ De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' 169-170.

⁴⁷ For an overview see https://europa.eu/european-union/about-eu/agencies/decentralised-agencies_en, last accessed 28 August 2019.

⁴⁸ See, amongst many others, Michelle Everson, 'European Agencies: Barely Legal?' in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014); Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) and Stefan Griller and Andreas Orator, 'Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' (2010) 35(1) *European Law Review*, 3.

and describing the different types of agencies. Subsequently, the legal framework in which the agencies function, and the issue of the delegation of powers will be discussed.

2.1. The Rationale for Agencies

The increasing number of agencies can be explained in several ways.⁴⁹ Firstly, agencies are able to execute technical and administrative tasks. This takes some workload off the Commission, allowing it to focus on its other tasks and policy priorities.⁵⁰ Secondly, agencies can provide expertise the Commission simply does not have on very complex, technical matters such as medicine safety and bank regulation.⁵¹ Thirdly, agencies can be seen as a political compromise in situations where more regulation at the EU level is desirable, but where Member States are unwilling to transfer the required powers directly to the Commission. Since agencies are viewed as less political, their creation is seen as a safer choice.⁵² The variety in motivations for the creation of agencies is further evidenced by the fact that they were often set up in response to a crisis.⁵³ Consequently, it is clear that the Union legislator has not always had long-term objectives for these agencies.

2.2. The Types of EU Agencies

Classifying the different types of agencies is not an easy task, as no official definition of what constitutes an agency exists.⁵⁴ In 2008, the Commission recognised two categories of agencies.⁵⁵ Firstly, executive agencies, all set up under the same legal basis, having as their sole function the management of EU programmes, and completely dependent on the Commission.⁵⁶ Secondly, decentralised agencies, bodies with various specified tasks, each having their own legal basis and institutionally independent from the Commission.⁵⁷ This

⁴⁹ See amongst many others, Madalina Busuioc, *The Accountability of EU Agencies: Legal Provisions and Ongoing Practices* (Eburon 2010) 15-24; Michelle Everson, Cosimo Monda and Ellen Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 15-17.

⁵⁰ Everson, Monda and Vos (eds), *European Agencies in between Institutions and Member States* 15.

⁵¹ *ibid.*

⁵² Daniel Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies' (2002) 25(4) *West European Politics* (2002) 93, 95.

⁵³ Morten Egeberg and Jarle Trondal, 'Agencification of the European Union Administration: Connecting the dots' (2016) TARN Working paper series 1/2016, 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754716, last accessed 28 August 2019.

⁵⁴ Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* 5.

⁵⁵ European Commission, 'European Agencies: The Way Forward' COM(2008) 135 final, 2.

⁵⁶ Council Regulation No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes OJ L 11/1.

⁵⁷ Commission, 'European Agencies: The Way Forward' 4.

distinction was not found to be useful,⁵⁸ and several authors have made their own taxonomies which are based on a temporal, structural, functional, or instrumental dimension.⁵⁹ For this research, a functional approach, which classifies agencies based on the function they have been given will be used.⁶⁰

As such, Busuioc identifies five types of agencies. Firstly, information providing agencies, which are focussed on the collection and dissemination of information on a specific policy area. Secondly, management agencies tasked with supplying specific services. Thirdly, operational-cooperation agencies, which provide assistance to Member States and facilitate cooperation between them during operations. Fourthly, decision-making agencies, which are empowered to adopt legally binding individual decisions. And finally, (quasi-)regulatory agencies, which draft highly detailed technical rules for general application, which are *de facto* considered binding.⁶¹ Still, categorisation remains difficult, as agencies are increasingly given more than one task.⁶²

2.3. A Lacking Legal Framework

Before 2011, the Founding Treaties of the European Community did not include any references to agencies.⁶³ With the entry into force of the Lisbon Treaty, the agencies were recognised as part of the Union's institutions in the broad sense of the word, through their inclusion in Articles 263 and 267 TFEU. This entails that the CJEU is competent to rule on the validity and interpretation of agency acts, and that it has jurisdiction to review the legality of agency acts that are binding for third parties. In addition, mention of agencies can be found in provisions where the Treaty refers to the Union's "institutions, bodies, offices and agencies".⁶⁴ Nevertheless, despite this formalisation of the agencies' existence, their so-called 'constitutional neglect' continues to persist.⁶⁵

⁵⁸ Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* 19 and Damien Geradin and Nicolas Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' (2004) 23 *Yearbook of European Law* 137, 181.

⁵⁹ See, for example, Geradin and Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' 177-180; Ronald van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance' in Deirdre Curtin and Ramses Wessel (eds) *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia 2005) 139-144; Edoardo Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37(2) *Common Market Law Review* 309, 315-317.

⁶⁰ Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* 20.

⁶¹ Busuioc, *The Accountability of EU Agencies: Legal Provisions and Ongoing Practices* 26-29. For example, Busuioc categorises the European Aviation Safety Agency as operational co-ordination, decision-making, and quasi-regulatory.

⁶² *ibid.*

⁶³ Treaty establishing the European Community OJ C 325/1.

⁶⁴ See, for example, Articles 15, 16, 71, 123, 124, and 130 TFEU.

⁶⁵ Vos, 'EU agencies on the move: challenges ahead' 22.

Amongst the agencies' main tasks are providing assistance and expertise to the Commission.⁶⁶ Therefore, it would make sense to find the agencies mentioned in Articles 290 and 291 of the TFEU, which are dedicated to the delegation of powers.⁶⁷ Their absence in these provisions fails to acknowledge that the agencies form an integral part of the Union's executive, and that their actions can have far-reaching consequences for individuals. Moreover, as the CJEU pointed out in the *ESMA* case, the Union legislator has, in fact, delegated powers to agencies such as the European Chemicals Agency and the European Medicines Agency to adopt binding measures.⁶⁸ Therefore, it is unfortunate that this practice does not correspond to the legal reality. The *ESMA* judgment was highly anticipated, as it gave the Court the opportunity to clarify the possibility and conditions of delegating powers to agencies.

2.4. Delegation of Powers to EU Agencies

Precisely this question whether, and if so which, powers can be delegated from the EU institutions to other bodies has been a topic for debate for many years. The well-known *Meroni*-doctrine, named after the Court cases from 1958 entailed that "only clearly defined executive powers" could be delegated.⁶⁹ Subsequently, agencies would not be allowed to exercise any discretion in their actions, as this would infringe upon the "balance of powers" between the institutions.⁷⁰ In the *Romano* ruling from 1981, the Court found that delegation to a body that is not based on the Treaties, but rather on secondary legislation is possible, but that this kind of body cannot adopt "acts having the force of law", as individuals would not have access to legal remedies against these bodies.⁷¹

These two cases seem to drastically limit the possibility of delegating powers to agencies. However, the objections they pose might have been largely accommodated by subsequent Treaty amendments and a changed context. As Chamon points out, both the *Meroni* and *Romano* judgments concerned a different context than the one decentralised agencies operate in today.⁷² Where *Meroni* concerned delegation to two bodies created under

⁶⁶ Morten Egeberg, Jarle Trondal and Nina Vestlund, 'The Quest for Order: Unravelling the Relationship between the European Commission and European Union Agencies' (2015) 22(5) *Journal of European Public Policy* 609, 610 and 624.

⁶⁷ *ibid*, 23.

⁶⁸ Case C-270/12 *United Kingdom v Council and European Parliament* ECLI:EU:C:2014:18 [81].

⁶⁹ Case 9/56 and 10/56 *Meroni v High Authority* ECLI:EU:C:1958:7.

⁷⁰ See Michelle Everson and Ellen Vos, 'European Agencies: What About the Institutional Balance?' in Adam Lazowski and Steven Blockmans (eds) *Research Handbook EU institutional law* (Edward Elgar 2016) and Miroslava Scholten and Marloes van Rijsbergen, 'The Limits of Agencification in the European Union' (2014) 15(7) *German Law Journal*, 1223, 1238.

⁷¹ Case 98/80 *Romano v Institut national d'assurance maladie-invalidité* ECLI:EU:C:1981:104 [20].

⁷² Merijn Chamon, 'EU Agencies between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) 48 *Common Market Law Review* 1055, 1072.

Belgian private law, the decentralised agencies are created under Union law, having their legal bases in the TFEU. In addition, the Court's "balance of powers" argument appears to refer more to the lack of judicial review that would occur in the case of delegation to a non-Treaty body, than to the principle of the institutional balance as we find it in Article 13(2) of the TEU.⁷³ Similarly, the Court in *Romano* also focussed on the availability of legal review for individuals.⁷⁴ In light of the fact that today agencies are part of the Union's institutional framework, and their acts are subject to judicial review by the Court, the biggest objections to delegation might have been overcome. Nevertheless, the *Meroni*-doctrine stayed largely unchallenged until the *ESMA* case.

This case concerned the intervention powers of the European Securities and Markets Authority ("ESMA"), which allowed the agency to directly address decisions to national authorities and financial market participants in exceptional circumstances.⁷⁵ The United Kingdom's action for annulment claimed that this power was in breach of the *Meroni* doctrine, as it gave ESMA a wide discretionary power, that it violated *Romano*, as it allowed ESMA to adopt quasi-legislative acts, that it violated the system of delegation as laid down in Articles 290 and 291 TFEU and lastly that it violated Article 114 TFEU.⁷⁶ The Court did not agree, finding firstly that ESMA's discretionary powers were limited by various conditions and criteria in the Regulation and thus in line with *Meroni*.⁷⁷ Secondly, the Court decided that the fact that ESMA can adopt measures of general application does not violate *Romano*, as an agency is expressly permitted to adopt acts of general application under Article 263 and 277 TFEU.⁷⁸ Thirdly, the Court sidestepped the issue of constitutional neglect,⁷⁹ by finding that ESMA's situation simply fell outside the scope of Articles 290 and 291 TFEU.⁸⁰ And finally, the Court dismissed the argument that Article 114 TFEU had been breached by concluding that the purpose of ESMA's powers is to improve the internal market in the financial field.⁸¹

With this ruling, the Court has cleared up several issues. Firstly, discretionary powers may be delegated to EU agencies, when they are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority.⁸² Secondly, Articles 290 and 291 TFEU do not provide one single closed framework for the delegation of executive

⁷³ *ibid* 1059 - 1060.

⁷⁴ Everson and Vos, 'European Agencies: What About the Institutional Balance?' 151.

⁷⁵ Article 28 of Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps *OJ L* 86/1.

⁷⁶ C-270/12 UK v Council and EP [28].

⁷⁷ *ibid* [45].

⁷⁸ *ibid* [65].

⁷⁹ Everson and Vos, 'European Agencies: What About the Institutional Balance?' 152.

⁸⁰ C-270/12 UK v Council and EP [83].

⁸¹ *ibid* [116].

⁸² C-270/12 UK v Council and EP [53-54].

power, as it is the prerogative of the Union legislator to choose a system for delegation.⁸³ And thirdly, Article 114 TFEU can be used as a legal basis for agencies as long as these agencies contribute to the harmonisation of the internal market. Consequently, it can be concluded that the Court has bridged a major gap created by the constitutional neglect of the Treaties, by confirming that delegation of discretionary power to EU agencies is possible as long as the Treaties provide sufficient judicial review.⁸⁴

2.5. Conclusion

It is difficult to think of an EU policy field in which agencies are not active in one way or another. As such, they play an important role in the administration of the EU.⁸⁵ However, their legal framework does not do justice to the powers the agencies have been delegated in recent years. After more than fifty years of legal uncertainty, during which the practice of giving agencies increasingly more extensive powers did not match the state of the law as decided in *Meroni*, the Court's ruling in *ESMA* brought clarity to the issue of delegation of powers. The Court chose to relax *Meroni's* strict conditions in favour of ensuring that ESMA could execute its task and supervise the financial markets.⁸⁶ The *ESMA* decision, together with treaty revisions, has partially overcome the constitutional neglect the agencies suffer from. At the same time, questions like the place of an agency act in the hierarchy of norms remain unanswered. Having set out the context and legal framework agencies function in, as well as the accompanying limits, the remainder of this thesis will zoom in on the Fundamental Rights Agency.

Chapter 3: Institutional Aspects of the FRA

This chapter will discuss several institutional aspects of the FRA, starting with its conception as the successor of the EU Monitoring Centre on Racism and Xenophobia ("EUMC") and its organisational structure. Subsequently, the activities and limits of the agency will be discussed. During these activities, the FRA cooperates extensively with the EU institutions and the Council of Europe. Therefore, in order to see how these actors affect the FRA's functioning, its relationship with them will be examined. Finally, this chapter will analyse the relationship between the FRA and the European Institute for Gender Equality ("EIGE"). In this context, it

⁸³ *ibid* [78].

⁸⁴ Heikki Marjosola, 'Bridging the Constitutional Gap in EU Executive Rule-Making: The Court of Justice Approves Legislative Conferral of Intervention Powers to European Securities Markets Authority' (2014) 10 *European Constitutional Law Review* 500, 527.

⁸⁵ Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* 47-49.

⁸⁶ Jacques Pelkmans and Marta Simoncini, 'Mellowing Meroni: How ESMA Can Help Build the Single Market' (2014) CEPS Commentary 5 available at http://aei.pitt.edu/50129/1/JP_%26_MS_Mellowing_Meroni.pdf, last accessed 28 August 2019.

will be submitted that a merger between these two agencies could better realise each of their respective objectives than if they remain two separate entities.

3.1. The FRA's Origin and Organisational Structure

3.1.1. From the EUMC to the FRA

The FRA was created on the foundation of another EU agency, the EUMC.⁸⁷ In order to combat the increasing xenophobia and discrimination of minorities in the Union, a 1994 European Council summit led to the installation of a Consultative Commission on these issues.⁸⁸ This Consultative Commission was later tasked by the Member States to study the feasibility of the EUMC, which led to its creation in 1997.⁸⁹ The Centre's objective was to provide objective, reliable and comparable data on racism, xenophobia and anti-Semitism to the Community and its Member States.⁹⁰

The suggestion of extending the remit of the EUMC to create an agency competent to consider all fundamental rights had been around since 1999,⁹¹ but for a long time the institutions had not seemed receptive. In a Communication from August 2003, the Commission stated that including other topics would distract from the Centre's work in the field of xenophobia and racism.⁹² Nevertheless, four months later, the Heads of State and Government of the Member States announced at a European Council meeting that they wanted to create a "Human Rights Agency" through the transformation of the Centre despite not giving a justification for why such a change was necessary.⁹³ The scope of this new agency would indeed include all fundamental rights.⁹⁴ After two years of negotiations, Council Regulation 168/2007 was adopted in February 2007, establishing the FRA.⁹⁵ In its mandate, a

⁸⁷ Recital 5 of Regulation 168/2007.

⁸⁸ Armin von Bogdandy and Jochen von Bernstorff, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture' (2009) 46 *Common Market Law Review*, 1035, 1043.

⁸⁹ Giungi, *Strengthening Fundamental Rights Protection at EU Level: The Role of the FRA* 20.

⁹⁰ Article 2 of Council Regulation 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia OJ L 151/1.

⁹¹ European Council, 'Conclusions of the Presidency of the Cologne European Council of 3-4 June 1999' para 46 available at http://www.europarl.europa.eu/summits/kol1_en.htm, last accessed 28 August 2019.

⁹² European Commission, 'Communication on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with the proposals to recast Council Regulation (EC) 1035/97' COM(2003) 483 final, 9.

⁹³ Olivier de Schutter, 'The EU Fundamental Rights Agency: Genesis and Potential' in Kevin Boyle, *New Institutions for Human Rights Protection* (OUP 2009) 101.

⁹⁴ Cf Article 2 of Council Regulation 168/2007.

⁹⁵ For an overview of the negotiations, and the disagreements between the institutions see, Gabriel Toggenburg, 'The Role of the New EU FRA: Debating the "Sex of Angels" or Improving Europe's Human Rights Performance?' (2008) 3 *European Law Review*, 385, 388.

special place was maintained for racism and xenophobia as a permanent thematic area of the agency's Multiannual Framework.⁹⁶

3.1.2. The FRA's Institutional Framework

The FRA's institutional structure consists of a Management Board, an Executive Board, a Scientific Committee, and a Director.⁹⁷ The Management Board is the governing board of an agency in which the Member States are represented.⁹⁸ In the FRA's case, however, while the members are appointed by the Member States, the Management Board is composed of independent persons with appropriate experience and knowledge in the field of fundamental rights. In addition, two representatives of the Commission sit on the Management Board, as well as an independent person appointed by the Council of Europe.⁹⁹ Notably, the European Parliament is not represented, even though it pushed for inclusion in the FRA's organisational structure to increase the agency's democratic legitimacy.¹⁰⁰ It does, however, play a role in the appointment of the Director, who is in charge of the agency's day to day administration.¹⁰¹ The Management Board adopts the Annual Work Programme, annual report and budget of the agency, and also appoints the Director. It is assisted in these tasks by the Executive Board.¹⁰² The Scientific Committee is composed of eleven independent persons highly qualified in the field of fundamental rights, appointed by the Management Board after a call for applications and a selection procedure, and responsible for the scientific quality of the agency's work.¹⁰³

Finally, an important institutional feature is the FRA's cooperation with civil society. The Founding Regulation, acknowledging the importance of civil society in the protection of fundamental rights,¹⁰⁴ calls for the creation of a Fundamental Rights Platform, a cooperation network open to all interested and qualified stakeholders dealing with fundamental rights such as non-governmental organisations, trade unions, religious organisations and universities.¹⁰⁵ In order to guarantee the agency's independence from its stakeholders, the Platform is not an official body of the agency.¹⁰⁶ The Platform is meant to facilitate the exchange of information

⁹⁶ Article 5(2) of Council Regulation 168/2007.

⁹⁷ Article 11 of Council Regulation 168/2007.

⁹⁸ Vos, 'European Agencies and the Composite EU Executive' in Everson, Monda and Vos (eds), *European Agencies in between Institutions and Member States* 26-28.

⁹⁹ Article 12 of Council Regulation 168/2007.

¹⁰⁰ Von Bogdandy and Von Bernstorff, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture' 1046.

¹⁰¹ Article 15 of Council Regulation 168/2007.

¹⁰² Article 13 of Council Regulation 168/2007.

¹⁰³ Article 14 of Council Regulation 168/2007.

¹⁰⁴ Recital 19 of Council Regulation 168/2007.

¹⁰⁵ Article 10 of Council Regulation 168/2007.

¹⁰⁶ Morten Kjaerum and Gabriel Toggenburg, 'The Fundamental Rights Agency and Civil Society: Reminding the Gardeners of their Plants' Roots' (2012) *European Diversity and Autonomy Papers* EDAP 02/2012, 9.

between stakeholders and the agency. It is also invited to give feedback on the Annual Work Programme and the annual report. This relationship is mutually beneficial. The agency can ensure that it uses its limited resources on relevant issues, by using the practical experience of civil society to gain insight from the field. At the same time, the Platform allows stakeholders to make use of the agency's specialised expertise on fundamental rights issues.¹⁰⁷ Consequently, this Platform is an important tool in assuring the relevance of the agency's action, and can serve as an example for the way in which other agencies shape their relationship with stakeholders.

3.2. The FRA's Activities

Article 2 of the Founding Regulation states that “the objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community, and its Member States when implementing Community law with assistance and expertise relating to fundamental rights”. The agency's tasks can be described as collecting and analysing data on fundamental rights from a wide variety of sources, advising the Union and the Member States, disseminating its findings through reports and dialogue with civil society and coordinating a network of fundamental rights information sources and experts.¹⁰⁸ Importantly, commenting on the legality of an EU act or assessing Member State compliance with fundamental rights obligations are outside the scope of the agency's competence.¹⁰⁹ As such, the legislator has neither delegated powers to take binding decisions, nor to draft regulatory rules. Using Busuioac's taxonomy, the FRA is clearly an information providing agency.¹¹⁰ While this type of agency is considered to be the weakest,¹¹¹ it is still able to indirectly influence policy when the information provided is used as the basis for policies.¹¹²

In 2018 the agency published 53 publications on its website, which included 30 reports, four handbooks, and five opinions.¹¹³ An external evaluation of the FRA found that the agency's “data collection and research activities are amongst its most important activities”, and that the quality of its output is undisputed.¹¹⁴ Stakeholders appreciated two characteristics of

¹⁰⁷ *ibid* 17.

¹⁰⁸ Article 4 and 6(1) of Council Regulation 168/2007.

¹⁰⁹ Article 4(2) of Council Regulation 168/2007.

¹¹⁰ *Cf* Section 2.2.

¹¹¹ *ibid*.

¹¹² Giandomenico Majone, ‘The New European Agencies: Regulation by Information’ (1997) 4(2) *Journal of European Public Policy* 262, 265.

¹¹³ FRA, ‘Publications overview 2018’ available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-publications-overview-2018_en.pdf, last accessed 28 August 2019.

¹¹⁴ Optimity, ‘2nd Independent External Evaluation of the European Union Agency for Fundamental Rights’ 76 available at https://fra.europa.eu/sites/default/files/fra_uploads/2nd-fra-external-evaluation-october-2017_en.pdf, last accessed 28 August 2019.

the FRA's work in particular. Firstly, that the data collected by the agency is comparable across Member States and independent. Secondly, that the FRA uses a multidisciplinary approach, which includes social and economic perspectives, rather than only a legal one. However, respondents were more divided on the agency's other activities such as its legal opinions. While one Commission official deemed them of limited value, Members of the European Parliament considered them a valuable source of information.¹¹⁵ As such, it can be said that overall, the agency's activities appear to have added value to its stakeholders. Yet, it also becomes clear that the FRA is currently mainly appreciated for its information related activities, and less for its other endeavours.

3.3. The FRA's Limits

The previous section has shown that the FRA is involved in a variety of activities. However, in executing these tasks, the agency's room for action has been significantly limited by the legislator. Firstly, the agency is not free to decide itself the issues it wants to tackle. The areas of its activities are circumscribed by a Multiannual Framework adopted every five years by the Council on a proposal from the Commission and with the consent of the Parliament.¹¹⁶ An exception is made when one of the institutions requests the FRA's input. While the Multiannual Framework is phrased in general terms covering topics such as victims of crime, the information society, and integration of refugees, migrants and Roma,¹¹⁷ the only influence the agency has is through the consultation of the Management Board in the adoption process. It is telling that only one of its recommendations was taken over in the final version of the second and third Framework combined.¹¹⁸

Secondly, the FRA can only act when the Member States are implementing 'Community' law.¹¹⁹ Even though this formulation copies the language of Article 51 of the

¹¹⁵ *ibid.* See also *infra* Section 4.1.2.

¹¹⁶ While Article 5(1) of Council Regulation 168/2007 only requires consultation of the Parliament, both the MAF for 2013-2017 and 2018-2022 were adopted in accordance with Article 352 TFEU, which requires the consent of the Parliament. *Cf* Council Decision 2017/2269.

¹¹⁷ Council Decision 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018-2022 OJ L326/1 identifies the following eight thematic areas: victims of crime and access to justice; equality and discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on the grounds of nationality; information society and, in particular, respect for private life and protection of personal data; judicial cooperation, except in criminal matters; migration, borders, asylum and integration of refugees and migrants; racism, xenophobia and related intolerance; rights of the child; integration and social inclusion of Roma.

¹¹⁸ Opinion of the Management Board of the EU Agency for Fundamental Rights on a new multi-annual framework (2013-2017) for the agency, and Opinion of the Management Board of the EU Agency for Fundamental Rights on a new multi-annual framework (2018-2022) for the agency available at <https://fra.europa.eu/en/about-fra/what-we-do/areas-of-work/multi-annual-framework-2018>, last accessed 28 August 2019.

¹¹⁹ Article 4(1)(d) of Council Regulation 168/2007.

Charter, the FRA's mandate is more limited, given that it refers explicitly to Community law, rather than Union law.¹²⁰ The Council maintains that the reference to Community law is a conscious choice of the legislator, and subsequently entails that the agency cannot act in the field of the former third pillar, unless it is requested to do so by one of the institutions.¹²¹ From a legal point of view, the Council's argument does not hold up, as the entry into force of the Lisbon Treaty should have led to an automatic substitution of all references to Community law to Union law.¹²² Nevertheless, the limitation remains in place, as a proposal for a Council Decision that would extend the agency's competence to include the areas of police and judicial cooperation in criminal matters was not adopted.¹²³ As such, the current Multiannual Framework explicitly states that one of the thematic areas is judicial cooperation, except in criminal matters. This exclusion is remarkable, as it concerns a field where fundamental rights scrutiny is arguably most warranted, given its sensitive nature.

Finally, the Founding Regulation restricts the FRA from taking on a role in the legislative process to cases where one of the institutions request its participation.¹²⁴ This limitation is difficult to reconcile with the agency's function as an independent fundamental rights monitor.¹²⁵ In this capacity, it should be able to comment on a legislative proposal whenever it has concerns about the fundamental rights implications thereof. Under the current framework, if hypothetically, the Commission knows its proposal does not comply with fundamental rights standards, it is unlikely to request a FRA opinion, wanting to avoid a hurdle or delay in the adoption process, and the FRA is unable to exercise its function. As such, it can be concluded that the legislator has seriously curbed the agency's ability to act on its own initiative, which hurts its independent functioning. This is unfortunate, as the FRA lacks competence where it could be most useful.

3.3. The FRA's Relationship with Other Relevant Actors

FRA action is often dependent on a request from the EU institutions, making the agency's relationship with them crucial. In addition, the Founding Regulation provides that its working method is to take account of information and activities undertaken by other actors when

¹²⁰ Maria Giungi, 'Strengthening Fundamental Rights Protection at European Union Level: The Role of the Fundamental Rights Agency of the European Union' (PhD thesis, University of Milan 2013) 92.

¹²¹ See Von Bogdandy and von Bernstoff, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture' 1047.

¹²² Jan Wouters and Michal Ovádek, 'What Political Role for the EU's Fundamental Rights Agency?' (2019) Leuven Centre for Global Governance Studies Working Paper 209, 9.

¹²³ Council of the European Union, 'Declaration by the Council on the Review of the Remit of the Agency under Title VI of the Treaty on European Union' Doc 6166/07, 4 available at <http://www.statewatch.org/news/2007/feb/eu-hra-6166-07.pdf>, last accessed 28 August 2019.

¹²⁴ Article 4(2) of Council Regulation 168/2007.

¹²⁵ Toggenburg, 'The Role of the New EU FRA: Debating the "Sex of Angels" or Improving Europe's Human Rights Performance?' 394.

pursuing its activities.¹²⁶ For example, in its data collection tasks, the FRA frequently makes use of information from the Council of Europe. The cooperation with this international organisation has even been codified in the Founding Regulation.¹²⁷ On the other side of the coin, other actors make use of the FRA's expertise and data, an example of which is the European Institute for Gender Equality ("EIGE"). Hence, its cooperation with other actors is an essential part of the agency's activities and therefore merits further attention.

3.3.1. The FRA and the EU Institutions

Despite the Commission's strong representation in the agency's structure, it has not been very enthusiastic about the FRA. Next to the Commission's reluctance to open its legislative proposals up to external scrutiny, this attitude can be explained by the fact that, having a decent amount of fundamental rights expertise in-house, the Commission is less compelled to rely on the agency.¹²⁸

The European Parliament on the other hand, has most frequently made use of the FRA's services. The Parliament has a reputation for being engaged with fundamental rights, and its fundamental rights committee pushed for the creation of first an EU Network of Independent Experts on Fundamental Rights, and later the establishment of the FRA.¹²⁹ On a more political level, the Parliament is able to employ a potentially negative opinion of the FRA as a justification for its position when it differs from that of the Council.¹³⁰

Lastly, the Council is very influential in the agency's mandate as it is empowered to adopt the Multiannual Framework, but it is wary of the agency broadening its purview. After all, it was the Council that decided not to extend the FRA's competence to the former third pillar, and it is the Council that insists that this restriction remains in place. Similarly, it was the Council that removed the role of the FRA in the Article 7 TEU procedure from the Commission's proposal.¹³¹ Consequently, it can be concluded that the institutions' decision to make use of the FRA is largely motivated by political reasons, rather than a genuine desire that its legislation is of the highest possible standard from a fundamental rights perspective.

¹²⁶ Article 6 of Council Regulation 168/2007.

¹²⁷ Article 9 of Council Regulation 168/2007.

¹²⁸ Wouters and Ovádek, 'What Political Role for the EU's Fundamental Rights Agency?' 15.

¹²⁹ De Schutter, 'The EU Fundamental Rights Agency: Genesis and Potential' 98.

¹³⁰ Mark Dawson, *The Governance of EU Fundamental Rights* 132.

¹³¹ Gabriel Toggenburg and Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the Agency for Fundamental Rights?' (2016) 54(5) *Journal of Common Market Studies*, 1093, 1094.

3.3.2. The FRA and the Council of Europe

All EU Member States as well as 21 other European countries are part of the Council of Europe, which calls itself “the continent’s leading human rights organisation”.¹³² In its response to the EU creating the FRA, it was very vocal to warn against any duplication of its work, as well as competition for its authority.¹³³

Upon a closer look at the FRA’s actual tasks, these concerns are unfounded.¹³⁴ Where the FRA’s primary objective is to advise EU institutions and Member States on fundamental rights issues,¹³⁵ the Council of Europe is primarily concerned with assessing fundamental rights compliance by its Member States.¹³⁶ Therefore, the FRA takes an *ex ante* approach, attempting to ensure that EU policies guarantee fundamental rights, whereas the Council of Europe, in particular with the ECHR, constitutes an important *ex post* compliance mechanism. In addition, the Founding Regulation has accommodated the Council of Europe’s concerns by providing that the agency shall coordinate its activities with the Council of Europe and refer to its findings.¹³⁷ Hence, it cannot be said that the FRA frustrates the Council of Europe’s work, but rather that they can work together to improve fundamental rights protection in Europe. This cooperation has also come to fruition in practice, as evidenced by the publication of several Handbooks on fundamental rights co-authored by the FRA and the Council of Europe.¹³⁸

3.3.3. The FRA and Other Agencies: The Example of the EIGE

One of the FRA’s objectives is to provide assistance to other agencies of the Union. An example of this can be found in the FRA’s relationship with the EU’s gender equality agency, the EIGE.¹³⁹ This agency was chosen for analysis due to the proximity of its subject matter to the FRA’s.¹⁴⁰ The EIGE was created in 2006, and has a similar mandate to the FRA’s, with the exception that it does not conduct research itself. Subsequently, it makes use of FRA data in

¹³² Council of Europe, ‘Who we are’ <https://www.coe.int/en/web/about-us/who-we-are>, last accessed 28 August 2019.

¹³³ Resolution 1427 (2005) of the Parliamentary Assembly of the Council of Europe, para 10 available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17309&lang=en>, last accessed 28 August 2019.

¹³⁴ For more on this issue, see De Schutter, ‘The EU Fundamental Rights Agency: Genesis and Potential’ 123.

¹³⁵ Cf Article 2 of Council Regulation 168/2007.

¹³⁶ Resolution 1427, para 4.

¹³⁷ Article 6(b) and 9 of Council Regulation 168/2007.

¹³⁸ See for example, FRA and Council of Europe, ‘Handbook on European Data Protection Law’ (2018) available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-edps-2018-handbook-data-protection_en.pdf, last accessed 28 August 2019.

¹³⁹ Council Regulation 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality OJ L403/9.

¹⁴⁰ Cooperation with the EIGE is even mentioned in recital 16 of the FRA’s Founding Regulation.

its annual Gender Equality Index.¹⁴¹ The cooperation between the FRA and the EIGE is formalised in a cooperation agreement.¹⁴² This document sets out that they will exchange information, collaborate in projects and identify common stakeholders. Still, it is clear that there is overlap between the two agencies' mandates, as gender equality is certainly a fundamental right and would fall within the scope of the FRA's remit if not for the existence of the EIGE.¹⁴³ This raises the question whether it is necessary to have a separate agency on gender equality, or whether it would benefit both of these agencies' objectives to join forces and merge. This issue will be discussed in the following section.

3.4. The FRA and the EIGE: Arguments for a Merger

The Common Approach on decentralised agencies, a non-binding framework that was adopted in 2012 by the Commission, the European Parliament, and the Council in an attempt to streamline their governance,¹⁴⁴ raised the possibility of merging agencies in cases where their tasks are overlapping, where synergies can be contemplated or when agencies would be more efficient if inserted in a bigger structure.¹⁴⁵ Given the overlap in the tasks of the FRA and the EIGE, it should be analysed whether the FRA could improve its activities and thus its contribution to fundamental rights protection if it were to include gender equality through an incorporation of the EIGE.

During the EIGE's legislative process, the Commission decided against including gender equality within the scope of a future fundamental rights agency for two reasons. Firstly, it claimed that the existing Community *acquis* in the field of gender equality was further developed than in other fundamental rights areas. Secondly, it believed that the topic of gender equality differed from the fight against discrimination, as it also encompasses important socio-economic aspects.¹⁴⁶ However, it is not immediately obvious that the Commission's arguments from 2005 still withstand scrutiny in 2019. Since the creation of both the FRA and the EIGE, there have been significant developments in the EU's fundamental rights policy, while the

¹⁴¹ European Institute for Gender Equality, 'Intersecting inequalities: Gender Equality Index 2019' available at <https://eige.europa.eu/publications/intersecting-inequalities-gender-equality-index>, last accessed 28 August 2019.

¹⁴² Cooperation Agreement between the European Institute for Gender Equality and the European Union Agency for Fundamental Rights of 22 November 2010 available at https://fra.europa.eu/sites/default/files/fra_uploads/1257-FRA-EIGE-cooperation-agreement_EN.pdf, last accessed 28 August 2019.

¹⁴³ Cf Recital 16 of Council Regulation 168/2007. The EIGE's mandate is to contribute to and strengthen the promotion of gender equality, Article 2 of Council Regulation 1922/2006.

¹⁴⁴ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, COM (2008) 135, available at https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf, last accessed 28 August 2019.

¹⁴⁵ Common Approach, para 5.

¹⁴⁶ Proposal for a Regulation establishing the EIGE, 12.

development of the EU's gender equality policy seems to have slowed down.¹⁴⁷ Therefore, three arguments will be discussed in favour of a merger, which will include a rebuttal to the Commission's second argument.

Firstly, an external evaluation concluded that the EIGE's main obstacle was a lack of resources and visibility.¹⁴⁸ In fact, the EIGE has the lowest budget and the smallest staff of all agencies that are part of the Justice and Home Affairs network of agencies.¹⁴⁹ A merger would lead to a pooling of resources, as well as a reduced administrative burden, given that the combined budget would only have to cover one organisational structure rather than two. This would leave more resources for the combined agency to spend on its substantive work.

Secondly, the inclusion of the EIGE in the FRA could actually contribute to the EIGE's objective of gender mainstreaming, while simultaneously improving the FRA's approach to fundamental rights. The Commission defines gender mainstreaming as "the systematic consideration of the differences between the conditions, situations and needs of women and men in all Community policies and activities when defining and implementing them".¹⁵⁰ Essentially, this means that the gender perspective should be kept in mind in each of the Union's policies. If gender equality would become part of the FRA, then it would be obliged to ensure that indeed, a gender perspective is integrated in all of its work, and not merely in activities explicitly related to gender.

This also ties into the final argument for merging, an intersectional approach to fundamental rights. The EIGE itself points out the importance of intersectionality in achieving gender equality.¹⁵¹ An intersectional approach takes account of the synergetic discrimination that occurs when an individual faces discrimination on the basis of multiple and intersecting aspects of their identity.¹⁵² For example, the experience of a white, wealthy woman is completely different than the experience of a poor woman of colour. Given the FRA's expertise in discrimination on a variety of grounds, merging the two agencies could facilitate the agency

¹⁴⁷ Jill Rubery and others, 'The Ups and Downs of European Gender Equality Policy' (2004) 35 *Industrial Relations Journal*, 603, 609; Mark Smith and Paola Villa, 'The Ever-Declining Role of Gender Equality in the European Employment Strategy' (2010) 41(6) *Industrial Relations Journal*, 526, 540 and Emanuela Lombardo and Mieke Verloo, 'Institutionalizing Intersectionality in the European Union'? (2009) 11(4) *International Feminist Journal of Politics*, 478, 481.

¹⁴⁸ PPMI and Deloitte, 'External Evaluation of the European Institute for Gender Equality' 2015, 10, available at <https://eige.europa.eu/about/documents-registry/external-evaluation-european-institute-gender-equality>, last accessed 28 August 2019.

¹⁴⁹ Wouters and Ovádek, 'What Political Role for the EU's Fundamental Rights Agency?' 11.

¹⁵⁰ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality' COM(2005) 81 final, para 2.6.

¹⁵¹ EIGE, 'Intersecting Inequalities' 7.

¹⁵² *ibid*, and Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 22 *Revista Direito GV*, 480.

taking a more intersectional approach in its advice to the institutions. This would then hopefully also lead to an increased intersectionality in the EU's policies.¹⁵³

Admittedly, the EIGE was praised for its specificity in dealing exclusively with gender equality. Reminiscent of the Commission's warning with regard to the conversion of the EUMC into the FRA, there was a fear that if gender equality were included in the FRA, it would be reduced to fighting discrimination on the basis of gender.¹⁵⁴ Certainly, gender equality is more than merely the absence of discrimination on the basis of gender. However, the integration of the EIGE in the FRA would not necessarily entail this restriction, given the latter's multidisciplinary approach.¹⁵⁵ Additionally, gender equality could be added as one of the FRA's main focal points in its Founding Regulation next to the fight against racism and xenophobia, thus ensuring that it would be one of the agency's priorities. This would allow the expertise of the EIGE to be included in the FRA's structure, while benefiting from the FRA's higher visibility and broader mandate. In light of the foregoing, it is submitted that a merger would be beneficial to the FRA's contribution to fundamental rights protection due to its increased resources, as well as facilitating the agency taking an approach that includes gender mainstreaming and intersectionality.

3.5. Conclusion

This chapter has shown that the FRA is one of the cogs in the complex wheel of fundamental rights protection in Europe. The FRA has proven to be particularly strong in the areas of data collection and research. While gathering information and drawing attention to fundamental rights concerns do not appear influential tasks, they actually serve multiple functions.¹⁵⁶ They can be considered a form of 'surveillance' which evokes compliance by Member States who want to avoid the stigma of being 'bad'.¹⁵⁷ In this context, the FRA possesses a type of disciplinary power. In addition, fact-finding can have political consequences, as any findings that fundamental rights protection is lacking will make the relevant actor want to remedy this.¹⁵⁸

¹⁵³ Lombardo and Verloo, 'Institutionalizing Intersectionality in the European Union?' 486 and Mieke Verloo, 'Intersectional and Cross-Movement Politics and Policies: Reflections on Current Practices and Debates' (2013) 34(4) *Signs*, 893, 906.

¹⁵⁴ Agnès Hubert and Maria Stratigaki, 'The European Institute for Gender Equality: A Window of Opportunity for Gender Equality Policies?' (2011) 18(2) *European Journal of Women's Studies*, 169, 173.

¹⁵⁵ Cf Optimity, '2nd Independent External Evaluation of the European Union Agency for Fundamental Rights' 76.

¹⁵⁶ Veronika Valkovičová, 'The Struggle of Benchmarking and Ranking Gender Equality: The Case of the European Institute for Gender Equality' (2017) 23(77) *Croatian International Relations Review*, 9, 17-20.

¹⁵⁷ Bal Sokhi-Bulley, 'The Fundamental Rights Agency of the European Union: A New Panopticism' (2011) 11(4) *Human Rights Law Review*, 683, 685.

¹⁵⁸ De Schutter, 'The EU Fundamental Rights Agency: Genesis and Potential' 117.

As such, the FRA plays an important role in setting normative trends, in particular through horizontal monitoring of the Member States in its annual reports.¹⁵⁹

However, as the EU's fundamental rights policy evolves, so too should its fundamental rights agency. The limitations on its functioning are difficult to reconcile with its primary objective. All limitations identified come down to the same issue, namely that the Union, its institutions, and Member States should not get to decide when fundamental rights scrutiny is warranted or not. For this reason, the FRA should be able to exercise its function whenever it feels necessary and it is essential that the FRA can act in the former third pillar, scrutinise legislative proposals at its own initiative and adopt its own Multiannual Framework.¹⁶⁰

In this chapter, the benefits of a merger between the FRA and the EIGE were discussed extensively. However, it must be admitted that a merger appears politically unfeasible. The possible merger of agencies has been suggested twice by the Commission, and both times the proposal was met with fierce resistance in the Council.¹⁶¹ Furthermore, amending the FRA's and revoking the EIGE's Founding Regulation requires unanimity in the Council, and the Member State hosting the EIGE will be unwilling to give up this sign of prestige.¹⁶² However, if the institutions are committed to implementing the Common Approach,¹⁶³ the merger of the FRA and EIGE should be given serious consideration in any future review of both agencies. In the next chapter, the FRA's functioning in practice will be further assessed.

Chapter 4: The FRA in Practice

The previous chapter has analysed the FRA's institutional framework and information related activities. In order to fully examine the FRA's possible contribution to fundamental rights protection in the EU, this chapter will look further into the agency's functioning in practice. Firstly, the FRA's role in the legislative process will be considered. This will be followed by an evaluation of the FRA's response to two situations with negative fundamental rights implications in the Union.

¹⁵⁹ Nadja Milanova, 'EU Agency for Fundamental Rights: A reality check' 34 available at <http://www.hrwf.net/index.php/publications/reports/115-2011/483-eu-agency-for-fundamental-rights-fra-a-reality-check>, last accessed 28 August 2019.

¹⁶⁰ Ramboll, '2012 External Evaluation of the European Union Agency for Fundamental Rights' 96 and 97 available at https://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf, last accessed 28 August 2019 and Optimity, '2nd Independent External Evaluation of the European Union Agency for Fundamental Rights' 145.

¹⁶¹ The first proposal concerned the merger of the European Union Agency for Network and Information Security with a future European Electronic Communications Market Authority. The second proposal concerned the merger of the European Police College with Europol. See Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* 98.

¹⁶² Miroslava Scholten, 'The Newly Released 'Common Approach' on EU Agencies: Going Forward or Standing Still?' (2013) 19 *Columbia Journal of European Law Online*, 3.

¹⁶³ Joint Statement and Common Approach, 1.

¹⁶³ See paras 1-9.

4.1. The FRA's Role in the Legislative Process

This section will analyse the FRA's activities and impact in the legislative process. The agency's opinions are considered to be its primary channel of influence and constitute one of its main tasks.¹⁶⁴ Therefore, an analysis of one of these opinions and the resulting follow-up will be carried out. Secondly, impact assessments, an area in which the FRA could arguably make a considerable fundamental rights contribution¹⁶⁵ but where it is currently not active, will be discussed.

4.1.1. The FRA's Opinion on the EBCG Proposal

Up until August 2019, the FRA has published 26 opinions¹⁶⁶, of which one was written on its own initiative, 21 were requested by the Parliament, three by the Council, and one by the Commission, clearly reflecting the agency's relationship with these institutions. The main question is what the value of these non-binding opinions is in practice. The FRA itself evaluates its performance by using key performance indicators, such as stakeholder perception and the number of references to its work in policies and legislation.¹⁶⁷ It must be recalled that the external evaluation of the FRA found that stakeholders considered the agency's provision of information its main added value, rather than its opinions. Nevertheless, this report also states that the agency's opinions have a considerable impact on the specific legislative text, and further notes that a FRA opinion is particularly relevant in cases where no prior impact assessment was made.¹⁶⁸ These findings will be illustrated through the example of the FRA's opinion on the Commission's proposal for the establishment of a European Border and Coast Guard ("EBCG"), which includes the EBCG Agency, the successor of Frontex.¹⁶⁹ This opinion was requested by the European Parliament and published on 27 November 2018.¹⁷⁰

In this document, the FRA gives 25 suggestions for the legislator to amend provisions of the legislative text. These suggestions range from making the governance of the pool of forced return monitors independent, and enhancing the role of the independent Fundamental

¹⁶⁴ Wouters and Ovádek, 'What Political Role for the EU's Fundamental Rights Agency?' 13.

¹⁶⁵ Kim Fyhr, 'Making Fundamental Rights a Reality in EU Legislative Process' (PhD Thesis, University of Helsinki 2016) 63-65.

¹⁶⁶ FRA's Opinions are available at <https://fra.europa.eu/en/publications-and-resources/opinions>, last accessed 28 August 2019.

¹⁶⁷ FRA, 'FRA Programming Document 2019-2021' 114 available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-programming-document-2019-2021_en.pdf, last accessed 28 August 2019.

¹⁶⁸ Optimity Advisors, '2nd Independent External Evaluation of the European Union Agency for Fundamental Rights' 80.

¹⁶⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' COM(2018) 631 final.

¹⁷⁰ FRA, 'The Revised European Border and Coast Guard Regulation and its Fundamental Rights Implications' Opinion 5/2018, available at <https://fra.europa.eu/en/opinion/2018/eu-border-agency>, last accessed 28 August 2019.

Rights Officer, to adding a United Nations Convention in the recitals.¹⁷¹ When looking at the final version of the Regulation as agreed upon by the EU legislator,¹⁷² comparison with the FRA's Opinion shows that 14 of the 25 suggestions were (partially) taken over.¹⁷³ This example shows that in line with the evaluation's conclusions, the FRA's opinions are an important vehicle for the agency to improve fundamental rights standards in EU legislation,¹⁷⁴ as the legislator, in particular the European Parliament, will often accept the FRA's suggestions and amend the legislative text accordingly.

4.1.2. The FRA and Impact Assessments

Impact assessments can be a valuable tool for fundamental rights promotion,¹⁷⁵ one of the rationales for the FRA's creation.¹⁷⁶ They constitute an important stage of the legislative procedure as they inform decision-makers of the consequences of policy choices, and can raise awareness for issues throughout the decision-making process.¹⁷⁷ As part of its 'Better Regulation' initiative to improve the quality of legislation,¹⁷⁸ the Commission committed itself to implementing impact assessments for all its major legislative and other policy proposals.¹⁷⁹ However, in its description on how to integrate fundamental rights in impact assessments, the Commission does not consider a role for the FRA. This is strange, as the Commission's objectives such as providing expertise to the legislator about the fundamental rights implications of its amendments and disseminating information about fundamental rights to better inform the public fall squarely within the scope of the agency's tasks.¹⁸⁰ By only referring to the FRA as a source of reliable data for the Commission's annual report, rather than a source for expert advice, the agency's services remain unused in an area where it could be exceptionally useful.

¹⁷¹ FRA Opinion 5/2018 7 and 8, cf Articles 52, 107 and recital 16 of the Commission proposal and FRA opinion 3, 5, and 2 respectively.

¹⁷² Council of the European Union, 'Outcome of Proceedings on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' Doc 8354/19 available at <https://data.consilium.europa.eu/doc/document/ST-8354-2019-INIT/en/pdf>, last accessed 28 August 2019.

¹⁷³ A suggestion is considered to be partially taken over when the final text was amended to reflect the FRA's opinion, but when a substantive element is lacking. For example, FRA suggests giving the Fundamental Rights Officer ("FRO") "full administrative authority, including the possibility of unannounced visits". The final text adds that "the FRO can act autonomously" but does not include the possibility of unannounced visits.

¹⁷⁴ Giungi, *Strengthening Fundamental Rights Protection at EU Level: The Role of the FRA* 107.

¹⁷⁵ Helen Toner, 'Impact Assessments and Fundamental Rights Protection in EU Law' (2006) 3 *European Law Review*, 1, 16.

¹⁷⁶ Recital 4 of Council Regulation 168/2007.

¹⁷⁷ Toner, 'Impact Assessments and Fundamental Rights Protection in EU Law' 13.

¹⁷⁸ European Commission, 'Action Plan "Simplifying and improving the regulatory environment' COM(2002) 278 final.

¹⁷⁹ European Commission, 'Communication on Impact Assessment' COM(2002) 276 final 2.

¹⁸⁰ Commission, 'Strategy for the Effective Implementation of the Charter' 9 and 11.

4.2. The FRA's Practice in Times of Crisis

In this section, the FRA's actions in the two biggest crises in the Union's recent history with major fundamental rights implications, the influx of migrants and the financial crisis in the eurozone, will be touched upon. While the "refugee crisis" only started in the summer of 2015, the influx of migrants had been putting the EU's external borders under pressure since 2010. In this context, the European Court of Human Rights found in 2011 that returning an asylum seeker to Greece under the Dublin system amounted to a violation of the prohibition of torture and inhuman and degrading treatment due to the detention conditions in Greece.¹⁸¹ Similarly, the FRA published a damning report on the inhumane conditions in Greek detention camps, calling it a 'fundamental rights emergency'.¹⁸² However, in this report the FRA did not consider Frontex' possible role in the fundamental rights violations, arguing that the reception of persons was outside Frontex' mandate.¹⁸³ This is highly questionable, as Frontex' prominent role and involvement has been convincingly argued.¹⁸⁴

Consequently, the question arises whether the FRA would have been able to discuss Frontex' involvement. Article 4(2) of its Founding Regulation makes clear that the agency is not competent to assess the legality of binding agency acts. Assumedly by analogy, this limitation would also extend to agencies' non-binding acts. However, as an information providing agency, one of its main tasks is to collect and disseminate information on the situation of fundamental rights. As Von Bogdandy and Von Bernstorff note, it is impossible to do so without reference to the legal and factual situation.¹⁸⁵ As such, the FRA should not have been satisfied with a formalistic assessment of Frontex' mandate, since it could have described the factual situation and Frontex' involvement therein without having to address the legality of those actions. Therefore, it is a shame that the FRA did not fully make use of its competences

¹⁸¹ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) [360].

¹⁸² FRA, 'Coping with a Fundamental Rights Emergency: The Situation of Persons Crossing the Greek Land Border in an Irregular Manner' (2011) 5 available at https://fra.europa.eu/sites/default/files/fra_uploads/1500-Greek-border-situation-report2011_EN.pdf, last accessed 28 August 2019.

¹⁸³ *ibid* 9.

¹⁸⁴ See, amongst many others, Luisa Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border' (2011) 7(4) *Journal of Contemporary European Research*, 468, 482; Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 233-236; Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (2011) available at https://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf, last accessed 28 August 2019; Migreurop, 'Frontex Agency: Which Guarantees for Human Rights?' (2011), available at <https://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>, last accessed 28 August 2019.

¹⁸⁵ Von Bogdandy and Von Bernstorff, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law' 1054

in this case.¹⁸⁶ In 2013, the FRA missed another chance to speak out on this topic. In a report on Frontex' fundamental rights challenges, it concluded that while Frontex has taken "significant steps to enhance fundamental rights compliance, there are still aspects that remain to be addressed".¹⁸⁷ Unfortunately, however, this report did not look into Frontex' involvement in these fundamental rights challenges either. Finally, it is interesting to note that under the new EBCG Regulation, the EBCG Agency's role in return operations has expanded significantly as the agency will be competent to organise, coordinate and monitor returns itself.¹⁸⁸ It has been argued that this increased mandate will also lead to increased fundamental rights accountability.¹⁸⁹

Turning then to the eurocrisis, the EU was criticised heavily for the severe austerity measures it imposed on Member States in exchange for financial assistance.¹⁹⁰ These austerity measures had significant fundamental rights implications, particularly in the field of social rights. Yet, the EU's fundamental rights agency remained silent. Two reasons can be given for the FRA's absence. Firstly, the agency's hands appeared tied by its Multiannual Framework, which did not include socio-economic rights, and thus precluded the FRA from undertaking action on its own initiative. Secondly, the institutions did not request the FRA's advice, which would have allowed it to act regardless of its Framework.¹⁹¹ This is regrettable, as the agency could have played a role in the monitoring of fundamental rights standards in the Member States implementing austerity measures and could have provided advice on the legislator's response to the crisis.¹⁹²

Both of the examples analysed in this section painfully expose the limits of the FRA. The agency's relevance is dealt a considerable blow when it is side-lined during two of the most significant fundamental rights related events in the EU. The fact that the Union actors, whether it be Frontex or the legislator combatting the financial crisis, do not make use of the

¹⁸⁶ Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' 26.

¹⁸⁷ FRA, 'EU Solidarity and Frontex: Fundamental Rights Challenges' (2013) 16, available at <https://fra.europa.eu/sites/default/files/tk3113808enc.pdf>, last accessed 28 August 2019.

¹⁸⁸ Article 51 of the final version of the Regulation, available at http://www.europarl.europa.eu/doceo/document/TA-8-2019-0415_EN.pdf, last accessed 28 August 2019.

¹⁸⁹ See also, Mariana Gkliati, 'The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?' EU Law Analysis, 17 April 2019, <http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>, last accessed 28 August 2019.

¹⁹⁰ See Colm O'Connell, 'Austerity and the Faded Dream of "Social Europe"' in Aoife Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) and Claire Kilpatrick and Bruno de Witte (eds), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI Working Paper 2014/05.

¹⁹¹ Alicia Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis' (2016) 22(1) European Law Journal, 61, 66-69.

¹⁹² *ibid* 68.

agency's expertise shows that the EU has not yet achieved its 'fundamental rights reflex'.¹⁹³ Finally, it must be noted that when the FRA is involved, as was the case in the migration crisis, it does not make use of the full extent of its mandate. By not looking into Frontex' actions in fundamental rights violations during its operations at sea, it failed in monitoring the fundamental rights standards in the Union.

4.3. Conclusion

The example of the follow-up to the FRA's Opinion on the ECBG proposal has further demonstrated that the FRA, when it is allowed to exercise its tasks, functions well. This also illustrates that the agency's biggest opportunity for influence arguably lies in the period when Union policies are being developed. During this process, it can offer valuable insights that can improve the Union's fundamental rights standards. Therefore, it is frustrating that the Union institutions do not sufficiently make use of the FRA's services. Notwithstanding its excellent relationship with the Parliament, deferring to the agency for fundamental rights advice seems to be the exception rather than the rule. As such, it is noteworthy that Frontex did not request fundamental rights expertise from the FRA in spite of the cooperation agreement between the two agencies allowing it to do so,¹⁹⁴ and that the Commission did not think to involve the fundamental rights agency in its strategy for fundamental rights impact assessments.

In light of this, the question arises what the agency could do itself in order to be as effective as possible. Although the FRA cannot go beyond the limits of its mandate, it can work around some of them. In particular, "framing" an issue is important. For example, the Multiannual Framework's broad language makes it difficult to distinguish between (former) first and third pillar issues, and, while socio-economic rights are not included in the Framework, social origin is explicitly mentioned as a ground of discrimination.¹⁹⁵ This gives the agency some leeway into territory it appears to be shut out of at first sight. Therefore, it is essential that it takes a proactive, functional approach to its mandate. In doing so, it will be able to contribute to fundamental rights protection in the Union most effectively.

Conclusion

This thesis set out to examine how the EU's fundamental rights agency could contribute to fundamental rights protection in the EU. This protection is realised through primary law,

¹⁹³ COM(2010) 573 final 4.

¹⁹⁴ FRA and Frontex, 'Cooperation agreement between The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights' available at <https://fra.europa.eu/en/press-release/2010/fra-frontex-signs-cooperation-arrangement-fundamental-rights-agency>, last accessed 28 August 2019.

¹⁹⁵ Tannelie Blom and Valentina Carraro, 'An Information-processing Approach to Public Organisations: The Case of the FRA' (2014) 18 European Integration Online Papers 25.

secondary law and the case law of the Court. Together, these sources result in high fundamental rights standards and a fragmented fundamental rights policy. In terms of taxonomy, the FRA's main task, conducting interdisciplinary research and collecting objective and comparable data classifies it as an information providing agency to which the legislator has not delegated any decision-making or regulatory powers. However, the fact that the FRA does not have far-reaching powers does not make it weak or unable to influence policy, as it possesses the ability to induce fundamental rights compliance through horizontal monitoring. In addition, the agency's output has a high quality and is appreciated by its stakeholders. As such, this aspect of the FRA functions particularly well. One way in which the FRA might be strengthened in this context is through the incorporation of the EIGE. This would not only increase the FRA's resources, which have been lagging behind compared to other agencies from the Justice and Home Affairs network,¹⁹⁶ but also ensure that the FRA takes an approach that includes gender mainstreaming and intersectionality in its research activities.

Still, only seeing the FRA's added value in information collection and research does not do justice to its mandate, nor to an important rationale for setting up an agency, namely its expert advice. In particular, by giving *ex ante* advice in order to ensure that EU policies have the highest fundamental rights standards, the agency can have a complementary function to the CJEU, which rules on *ex post* compliance.¹⁹⁷ As such, the FRA's biggest opportunity to directly improve fundamental rights protection is through participation in the legislative process. Yet, this conclusion also makes clear the agency's biggest hindrance, namely the limitations that the legislator has put on its room for action. Currently, the agency is much too dependent on the actors it is meant to monitor. The consequence of this is that in practice, the FRA is shut out where it is arguably needed the most, which was evident in the analysis of the FRA's role in the migration and eurozone crisis.

The fact that the FRA can neither act in the former third pillar, nor participate in the legislative process on its own initiative is the most pressing limitation to its functioning. There are two ways in which these issues can be overcome. Ideally, they would be resolved through amendment of the FRA's Founding Regulation, but this does not seem politically feasible. Instead, one of the institutions, or all three together, could conclude an interinstitutional agreement or a cooperation agreement with the FRA in which they commit themselves to requesting the agency's participation whenever the FRA makes this wish known. In particular

¹⁹⁶ For example, where in 2007 Eurojust and the FRA had a similar budget of 18 million and 14.4 million, respectively, in 2017 Eurojust's budget had grown to 47.9 million while the FRA's had only increased to 22.7 million, Wouters and Ovádek, 'What Political Role for the EU's Fundamental Rights Agency?' 11.

¹⁹⁷ See also Maria Giungi, 'Counterbalancing the European Court of Justice's Dominion of Fundamental Rights' (2016) <https://think.iafor.org/counterbalancing-european-court-justice-dominion-fundamental-rights/>, last accessed 28 August 2019.

the European Parliament, the agency's biggest supporter, should be open to such a solution. For the third pillar exclusion, another possibility would be for the institutions to agree to modelling the FRA's Multiannual Framework after the Charter. In practice, the agency already makes ample use of the Charter throughout its work, by referencing it in its opinions, and structuring its reports accordingly. It has even been suggested that the Multiannual Framework could be done away with completely if the Charter was included in the FRA's mandate, which would, however, again require formal amendment.¹⁹⁸ With regard to legislative involvement, another solution would be for the Commission to systematically include the FRA in its impact assessments, which would render a separate FRA opinion superfluous.

Implementing these suggestions would also not interfere with the limitations the FRA faces as a decentralised agency. Whereas the FRA deciding itself when it can act could be considered a discretionary power, this would still fall within the scope of the CJEU's *ESMA* judgment, since none of the FRA's output is legally binding, and it would still have to act in accordance with its Multiannual Framework, the adoption of which includes the delegating authority. Therefore, there is no issue of the FRA encroaching on these limits.

What remains concerning is that the call for changes to the FRA's limitations is not new. For example, the FRA has asked for the explicit inclusion of reference to the Charter in its Multiannual Framework,¹⁹⁹ and both of the FRA's independent external evaluations recommended that the agency should adopt its own Multiannual Framework.²⁰⁰ However, these calls have fallen on deaf ears time and time again.

Finally, whether the institutions are willing to implement these recommendations or not, in order for the FRA to contribute to fundamental rights protection in the EU, it is imperative that the agency takes a proactive and functional approach to its mandate. It can do so by making use of every opportunity it sees to execute its tasks. An example of this is that it should not shy away from drawing attention to a fundamental rights concern by describing the factual situation and the EU actors' involvement therein. Even if the FRA is not competent to outright condemn their acts as fundamental rights violations, gathering and disseminating information can create political pressure and incentivise the actors involved to remedy their actions.

Where the EU's failed accession to the ECHR raised criticism of the Union's fear of external scrutiny, the FRA's case shows that this anxiety is also present when it comes to

¹⁹⁸ Gabriel Toggenburg, 'Fundamental Rights and the European Union: How does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?' (2013) EUI Working Paper 2013/13, 13.

¹⁹⁹ FRA, 'Opinion of the Management Board of the EU Agency for Fundamental Rights on a new Multiannual Framework (2018-2022) for the agency' 3.

²⁰⁰ Ramboll, 'External Evaluation of the European Union Agency for Fundamental Rights' 96-97 and Optimity, '2nd Independent External Evaluation of the European Union Agency for Fundamental Rights' 144.

internal scrutiny by its own agency. In order to enable the FRA to contribute to fundamental rights protection in the EU, it is not necessary that it is given additional powers. However, what is crucial is that it is actually allowed to execute its mandate. As such, by only rarely making use of its advisory expertise, the legislator appears set on limiting the agency's activities to the collection of data and conducting research. This is unfortunate, as its expert advice is one of the means through which the FRA can contribute most to improving fundamental rights standards in the EU. Therefore, if the EU wants to have the highest possible level of fundamental rights protection it needs to do a better job in facilitating its fundamental rights agency.

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