EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

MB DECISION

Decision n°:	2017/05
Subject:	Recommendations regarding changes in the Agency, its working practices and the scope of its mission

THE MANAGEMENT BOARD OF THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

HAVING REGARD to Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (hereinafter "Agency") and in particular Articles 30 and 31 thereof;

HAVING EXAMINED the second independent external evaluation of the Agency and the Agency's achievements over the last 5 years;

HAVING CONSIDERED based on the results of the external evaluation, past institutional practice and in accordance with Article 31 of the Founding Regulation "the possible need to modify the Agency's tasks, scope, areas of activity or structure",

HAS DECIDED AS FOLLOWS:

Article 1

Object

The recommendations of the Management Board following the evaluation of the second independent external evaluation of the Agency annexed hereto are adopted.

Article 2

Entry into force

This decision enters into force on the day of its adoption.

Done at Vienna, on 14 December 2017

For the European Union Agency for Fundamental Rights

Sirpa Rautio

Sirpa Rautio
Chairperson of the Management Board

Annex: Recommendations of the Management Board following the evaluation of the second independent external evaluation of the Agency

Further Increasing Clarity, Efficiency and Impact of the Agency's Work
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Recommendations of the Management Board of FRA to the EU Legislators, following up on the second independent external evaluation of the Agency

Preliminary remarks

According to Article 30 of the EU regulation establishing a European Union Agency for Fundamental Rights (hereafter: 'Founding Regulation'), the Agency had to commission an independent external evaluation of its achievements during the first five years of operations. The Founding Regulation stipulates that this evaluation shall, among others, "assess the possible need to modify the Agency's tasks, scope, areas of activity or structure" and "include an analysis of the synergy effects and the financial implications of any modification of the tasks".

A first evaluation was carried out in 2012.[1] The Agency commissioned a second independent external evaluation in 2016. Following a public call for tender, Optimity Advisors was contracted to deliver the evaluation study. The evaluation was conducted in the course of 2017, and the external evaluators' final report, delivered to the Management Board in November 2017, forms the basis for the present Management Board (hereafter 'MB') recommendations.[2] The independent external evaluation report looks at the criteria of effectiveness, efficiency, relevancy, coherence and EU added value and the Agency's alignment with the Common Approach on decentralised agencies.

According to Article 31 of the Founding Regulation, the Management Board shall "examine the conclusions of the evaluations" and "issue to the Commission such recommendations as may be necessary regarding changes in the Agency, its working practices and the scope of its mission". The European Commission shall then transmit the evaluation reports and recommendations to the European Parliament, the Council of the European Union, the European Economic and Social Committee and the Committee of the Regions and make them public. The Founding Regulation also specifies

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[1] Rambol (2012), *External evaluation of the European Union Agency for Fundamental Rights* (online here), 'Conclusions', pp. 95-98.

[2] Optimity (2017), Second independent External Evaluation of the European Union Agency for Fundamental Rights, conclusion and recommendations, pp. 141-144. The 2nd independent external evaluation report is hereinafter referred to as 'IEER2'.

that after having assessed the evaluation report and the Management Board recommendations, "the Commission may submit any proposals for amendments to [the Founding Regulation] which it considers necessary".

The Management Board has examined the findings and conclusions of the external evaluation and is hereby communicating how it intends to follow-up on these findings. Moreover, the MB recommends to the EU legislators to revise the Agency's Founding Regulation.

Part 1 clusters the main conclusions of the external evaluation. Part 2 presents the recommendations for follow-up by the Agency and Part 3 lists seven recommendations by the Management Board to the EU legislators.

The present recommendations reflect earlier recommendations by the Management Board, which built on the conclusions of the Agency's first independent external evaluation. Whereas the recommendations of 2013[3] were not followed-up by the European Commission,[4] the Management Board expresses its hope that this new set of recommendations will provide further arguments to the European Commission to submit a proposal for revising the Agency's Founding Regulation.

The Management Board's follow-up recommendations are clustered into three categories of action, namely:

- recommendations to increase clarity;
- recommendations to increase efficiency;
- recommendations to increase impact.

1. Conclusions of the independent external evaluation

The Management Board welcomes the positive findings of the second independent external evaluation, stating in its conclusions that:

- "there was a very broad consensus among interviewees and survey respondents that the current activities were successfully meeting the

[3] Letter of 4 June 2013 by the Chairperson of the Management Board to Viviane Reding, Vice-President of the European Commission Commissioner. These Management Board recommendations are summarised on pp. 53 and 52 of the IEER2.

[4] See Council of the European Union (2013), *Conclusions on the evaluation of the European Union Agency for Fundamental Rights*, Council doc 16622 of 21 November 2013. The conclusions end in Paragraph 18 by referring to the "next steps": "After the Commission has finalised its assessment of the evaluation report and recommendations, the Council will examine carefully and in detail any proposals for amendments, if any, which the Commission considers necessary having regard to these Council conclusions and the Paris Principles as recognised and defined in the context of the United Nations."

fundamental rights needs of the EU".[5] The overall recommendation being that the Agency "should continue doing what it does";[6]

- the Agency "is contributing importantly, and in a unique way, to the promotion and protection of fundamental rights in the EU" being the "only organisation collecting this type of data at European level" that has also the role of "a provider of relevant and unbiased data";[7]
- the Agency's outputs are "particularly useful as they reflect current needs" (particularly since FRA has shifted its efforts to the migration crisis, including by developing operational working methods).[8] "In practice, the usefulness of FRA's outputs is reflected in the fact that many duty bearers regularly use and reference FRA reports";[9]
- the Agency "has been very responsive in meeting the different needs of its duty bearers" and succeeded in increasing "its cooperation with national parliaments and collaboration with media and civil society was strengthened through various country visits";[10]
- the Agency "achieved all thematic and strategic objectives which were set out in the multi-annual programmes" and was also found successful in meeting all of its strategic priorities;[11]
- the Agency "has over the years been increasingly successful in disseminating its findings. An analysis of Facebook, Twitter and YouTube data revealed that more people followed FRA and liked relevant posts. This is also reflected in the increasing number of downloads of FRA reports over the years";[12]
- the Agency "can clearly demonstrate having an impact at EU and national level. These impacts stem principally from the FRA's core body of research and analysis, upon which additional outputs and activities can be built, such as legal opinions, country visits and missions, etc.";[13]

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[5] IEER2, p. 142. See also p. 68: "When asked, just 27% of the of external stakeholder respondents stated that there was a need for the FRA to undertake additional activities". 36 % thought it should not, and 32% did not know. Most examples given by those who indicated the need for new activities actually cover the Agency's current work or could be carried out under the current mandate even if the latter does not explicitly mention more technical forms of advice such as "transfer of knowledge" in a "more practical way", including "training" or "advocacy".

[6] IEER2, p. 144.

[7] IEER2, p. 143.

[8] IEER2, p. 142.

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

[12] IEER2, p. 143.

[13] IEER2, p. 143. The quality of the Agency's research outputs is undisputed by stakeholders (page 4) and its thematic focus was equally confirmed (p.62, 70 and 80).

- the Agency contributes "importantly, and in a unique way, to the promotion and protection of fundamental rights in the EU" with the Agency's added value being explicitly recognised in its "research activities, the conclusions and opinions, the stakeholder engagement, the independent nature of the Agency, as well as in its (so far rather indirect) monitoring role";[14]
- there is "effective coordination and coherence, particularly with other stakeholders involved in similar activities as FRA (e.g. the Council of Europe, OSCE, etc.)";[15]
- stakeholders assess the Fundamental Rights Platform and collaboration between FRA and civil society as "positive and important";[16]
- the Agency has "achieved considerable efficiency in its operations"[17] and "significant effects at a 'good value for money' for the EU Institutions and national authorities in the production of research and analysis across the EU's Member States and offers substantial value for money for the EU".[18]

The Management Board also notes that the second independent external evaluation identifies potential to increase clarity, efficiency and impact of the Agency's work.

Clarity

In this regard, the independent external evaluation concludes that:

- some stakeholders have argued that FRA should be engaging more with 'multipliers' to further increase its visibility;[19]
- the Agency "should be permitted to initiate research in the area of police and judicial cooperation in criminal matters, and social rights, in order to meet the needs of stakeholders at the national and EU level";[20]
- among stakeholders, "there is not always a common understanding of what the objectives of the Agency are";[21] "this lack of common understanding can lead to situations where some stakeholders have

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[14] IEER2, p. 143.
[15] *Ibid.*
[16] *Ibid.*
[17] IEER2, p. 144.
[18] *Ibid.*
[19] IEER2, p. 143.
[20] IEER2, p. 145.
[21] IEER2, p. 141.

a more negative view of the Agency's impact given that they expect its objectives to be much wider than they actually are"[22];

- the Agency should clearly "delineate and communicate the roles and responsibilities of staff".[23]

Efficiency

In this regard, the independent external evaluation concludes that:

- the Agency should "continue to set clear and realistic targets on both thematic and strategic levels. There could be "a discussion on whether the scope of the thematic areas shall be limited (e.g. by combining one or more thematic areas in one) in order to limit the scope of FRA's activities in light of resource limitations";[24]
- the European Commission "could look into the relevance, appropriateness and need of the MAF that currently defines the thematic areas for a period of five years and through a decision adopted not by the Agency but the Council of the European Union";[25]
- among stakeholders and interviewees, there seems to be an "acknowledgement that the Agency is at the limit of the human resources necessary to achieve its objectives, with respect to areas such as field deployments and accompanying research, and communication and dissemination. Additionally, while a lot has already been achieved, findings indicate that the Agency could further improve the way it prioritises human resources and the dissemination of the methodology for prioritisation across the Agency";[26]
- "sufficient resources should be provided for research activities corresponding to new requests received annually by EU institutions for more research evidence on fundamental rights issues";[27]
- the Agency should "create the title of Deputy Director with the task of day-to-day management of the Agency, in order to prioritise the Director's activities towards leadership, outreach and cooperation";[28]
- a substantial cross-section of the Agency's stakeholders call for a clarification of the Agency's mandate "to meet an existing fundamental rights need in the EU around police and judicial

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[22] IEER2, p. 141, compare also p. 74.
[23] IEER2, p. 146
[24] *Ibid.*
[25] IEER2, p. 145.
[26] IEER2, p. 144.
[27] IEER2, p. 146
[28] IEER2, p. 146, discussed already in IEER1, p. 48.

cooperation in criminal matters"[29] and that for the Agency "to be fully aligned with the Common Approach and to be as efficient as possible while ensuring its independence, a change in the Founding Regulation would be necessary".[30]

Impact

In this regard, the independent external evaluation concludes that:

- "a substantial cross-section of the Agency's stakeholders believe that the FRA's mandate should be changed in order for the Agency to meet an existing fundamental rights need in the EU around police and judicial cooperation in criminal matters";[31]
- the Agency "should focus on gaining more visibility at the national level. One way is to engage more closely with those NGOs and NHRIs that could build a link to authorities."[32] Moreover, the Agency "should focus on increasing its impact at the national level by building country-specific knowledge and expertise on Member States, in particular those that warrant specific attention at any point in time";[33]
- the Agency "should continue to capitalise on the wealth of research and analysis it has accumulated by 're-packaging' it in publications and other activities that could have a wider impact, especially at the national level"; [34]
- the Agency "should continue to be responsive to requests (particularly on current emergencies like the migration crisis) while not neglecting on-going research projects".[35]

2. Recommendations for follow-up by the Agency

The Management Board is committed to take all necessary steps, lying within its area of competence, to ensure a stringent follow-up by the Agency on the findings and conclusions of this second independent external evaluation.

Building on the positive findings of the Agency's performance in the period from 2012 to 2017 and, while maintaining the Agency's overall strategic

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[29] IEER2, p. 141.
[30] IEER2, p. 144.
[31] IEER2, p. 141.
[32] IEER2, p. 145.
[33] *Ibid.*
[34] IEER2, p. 142.
[35] IEER2, p. 145.

direction, the Management Board will pursue the following four categories of action to address the potential for improvements:

(1) Increasing clarity
(2) Increasing efficiency
(3) Increasing impact
(4) Delivering through a five-year strategy

Increasing clarity

- The Management Board is committed to increase in its area of competence the Agency's visibility. It further recommends that the Agency enhances its communication with key target audiences to foster a common understanding of its overall mandate, main objectives and core tasks among its stakeholder communities.
- Internally, the Management Board recommends that the Director takes the necessary actions to clarify and fine-tune the alignment of roles and responsibilities of staff and departments.

Increasing efficiency

- The Management Board is committed to undertake relevant steps to further increase the efficiency of the Agency, by prioritising the Agency's work and resources.
- While recognising the importance of prioritising, the Management Board underlines that "the Agency should be given an increase in its human and financial resources, in order to enable it to reach its critical mass in terms of impact, which will allow the Agency to respond effectively to the increased demands placed on it".[36]
- The Management Board also expresses its conviction that the multiannual planning tools developed within the Agency are better placed to prioritise the Agency's work than the tool of the Multiannual Framework (see Recommendation 4). In this context, the Management Board recalls the positive assessment of the Agency's planning tools in the external evaluation.[37]

Increasing impact

- The Management Board acknowledges the importance of enhanced outreach and visibility at national level as a way to enhance its overall impact on fundamental rights. It fully supports the Agency's

[36] IEER2, p. 143.
[37] IEER2, p. 51 and 52.

commitment to furher increase its existing cooperation with civil society and other relevant human rights actors.

- The Board recommends that the Agency improves its communication efforts by capitalising on the wealth of research and analysis it has accumulated, and by working with and through multipliers and stakeholders at national level.
- Whereas the external evaluation did not address the financial implications of its respective recommendations, the Management Board will take these duly into account before engaging in new activities or working methods.
- The Management Board acknowledges that impact is dependent on quality and timeliness of delivery to feed the policy process. These should remain at the top the Agency's concerns.

Delivering through a five-year strategy

The Management Board will ensure follow-up to the external evaluation by locking above commitments into the delivery of the Agency’s multiannual Strategy for 2018-2022. The strategy aims to build on the Agency’s core competences, which were positively assessed by the external evaluation, while guaranteeing a focused approach on areas of potential improvement. To this end, the Management Board has established the following five strategic priorities for the period 2018-2022 (across the Agency’s thematic areas):

1. Identifying trends through the collection and analysis of comparable data and evidence
2. Contributing to better law making and implementation by providing independent advice
3. Supporting rights-compliant policy responses by providing real-time assistance and expertise
4. Effectively promoting rights, values and freedoms (through awareness raising, creating a space for dialogue with key actors and innovative communication of FRA outputs)
5. Strengthening cooperation with national and local fundamental rights actors by working with communities of support, and further strengthening the capacity of national and local actors

3. Seven recommendations to the European Commission (and the co-legislators) for changes in the Founding Regulation that allow to further increase clarity, efficiency and impact

Increasing legal clarity

1. ***The Founding Regulation should clarify that the Agency carries out its task within the competences of the European Union as laid down in the Treaty on the Functioning of the European Union (TFEU).***

Article 3 of the Founding Regulation states that the Agency shall carry out its task "within the competences of the Communities as laid down in the Treaty establishing the European Community".[38] The Treaty of Lisbon put an end to the former 'pillar structure' and revised the former Treaty establishing the European Community. The Lisbon Treaty stipulates that the terms 'Community' and 'European Community' shall be replaced by 'Union' and 'European Communities' by 'European Union'.[39] Against this background, the evaluation report concludes that the Agency's Founding Regulation "should be modified in order to bring the wording in line with the Post-Lisbon reality and thus increase legal clarity", including by making "explicit"[40] that the regulation covers police cooperation and judicial cooperation in criminal matters.

2. **The Founding Regulation should make very clear that the Agency, in carrying out its tasks, shall refer to all of the fundamental rights and principles as they result from the legally binding Charter of Fundamental Rights of the European Union (the Charter).**

Since the entry into force of the Lisbon Treaty, the Charter has "the same legal value as the Treaties".[41] The Charter is the EU's core standard in the area of fundamental rights – this should be prominently reflected in the Agency's mandate. Whereas the ninth consideration of the current regulation states that the "*close connection to the Charter should be reflected in the name of the Agency",* and that the Agency should in its work refer to fundamental rights "*as reflected in particular in the Charter of Fundamental Rights",* this close connection is not reflected in the

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[38] Art. 3(1) of the Founding Regulation.

[39] Art. 2(2) lit. (a) of the Treaty of Lisbon amending the Treaty on European Union and the treaty establishing the European Community, in OJ 2007/C 306/01 of 17.12.2017.

[40] IEE2, p. 141.

[41] Art. 6 (1) of the TEU.

operational and legally binding part of the regulation.[42] Against this background, the external evaluation calls for a recognition of the Post-Lisbon reality and calls for a revised wording of the regulation to "stress the importance of the Charter as a now legally binding standard". [43]

3. ***The Founding Regulation should reflect the Agency's institutional practice when providing "assistance and expertise" to the EU and its Member States. It should make explicit that the overall statutory mission of the Agency also implies the operational task to "provide technical assistance, training and capacity-building on fundamental rights issues" to EU institutions, bodies and agencies, as well as to Member States when they are implementing EU law.***

The overall statutory objective of the Agency is to provide "relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".[44] To efficiently provide such assistance and expertise, the Agency has carried out this overall mandate not only through the provision of data, surveys and reports but also increasingly through hands-on practical approaches, such as the development of good practice guidance ('do's and don'ts'); facilitation of ad-hoc working groups with Member State experts (e.g. on hate crime data, Roma integration indicators); fundamental rights inputs to training initiatives led by EU agencies (e.g. for border guards deployed to Frontex operations); the participation in Schengen evaluations and fact finding missions, as well as a mid-term presence on the ground with a field operation in the hotspots (Greece and Italy). There has been growing demand for such services by FRA, in particular in areas where the EU is providing operational support to the Member States (migration, asylum, border management). It is important that the Agency's foundational document does reflect also these operational aspects to guarantee transparency and clarity and to avoid misperceptions of the institution.

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[42] Art. 6(1) of the TEU. The relationship is analysed in Toggenburg, G.N. (2014), 'The EU Fundamental Rights Agency and the EU Fundamental Rights Charter: How fundamental is the link between them?, in Peers, S. *et al* (eds.) (2014), *The EU Charter of Fundamental Rights*, Oxford, pp. 1613-1626.

[43] IEE2, p. 141.

[44] Art. 2 of the Founding Regulation.

Increasing efficiency

4. ***The Multiannual Framework (MAF), as established in the Founding Regulation, should be removed. Constituting an anomaly compared to other EU agencies, the provision to adopt every five years a Council decision on the basis of Article 352 of the TFEU (unanimity in Council, consent by the European Parliament) to define general "thematic areas" has proven to be inefficient, institutionally cumbersome and redundant with the introduction of the 'Common Approach on EU decentralised agencies'. The procedures proposed by the Common Approach are far more efficient and allow for a true prioritisation taking due account of the Member States' views, and the orientations and priorities of the EU institutions.***

Whereas the instrument of a Multiannual Framework (MAF) is not used in founding regulations of other agencies, it was introduced in the Founding Regulation of FRA. The Common Approach on EU decentralised agencies, as agreed in July 2012 by the European Parliament, the Council of the European Union and the European Commission, aims to put in place a more coherent and efficient framework for the functioning of all agencies. Against this background, harmonised approaches and procedures across the over 40 decentralised agencies in the EU are preferable, unless the specific nature of a given agency points to an alternative solution. In the case of the MAF, it is difficult to identify a reason why this instrument should be upheld because it appears to undermine efficiency gains. The preparation, negotiation and adoption of the instrument bind considerable resources in all three EU institutions. Moreover, institutional experience shows that there is a risk that the adoption is delayed thereby putting the ordinary functioning of the Agency at risk.

Experience also shows that the very purpose of the MAF – the prioritisation of the Agency's work – was never guaranteed by this framework but by the Agency's annual work programmes. A comparison between the first, second and third MAF, as carried out by the external evaluation, reveals that the thematic areas in the MAF remained very general in nature and hardly changed in substance over the years.[45] Despite their general nature, the MAF decision has raised the expectation that FRA will deliver to the same degree in all of the many thematic areas identified by the respective Council decisions. The prioritisation of the Agency's work is far more efficiently guaranteed through the regular programming process, which involves the Agency's key stakeholders.

[45] IEER2, p. 32-33, p. 56.

In line with the Common Approach and the Commission delegated Regulation (EU) No. 1271/2013 of 30 September 2013, the Management Board adopts now multiannual strategic guidelines and annual programmes, as foreseen by the mentioned regulation. The Member States are closely consulted in this process through the National Liaison Officers. The National Liaison Officers submit opinions on the draft programme prior of it being submitted to the Management Board[46] and in accordance with regulation 1271/2013 the draft programme is also sent to the Council[47]. The European Commission also delivers an opinion on the programming document. This approach guarantees EU Member States input and further underlines that the MAF is not needed but rather an inefficient and cumbersome tool, which, in addition, is sometimes perceived as a tool limiting the Agency's independence.[48] Against this background, the evaluation report concludes that the European Commission "could look into the relevance, appropriateness and need of the MAF that currently defines thematic areas for a period of 5 years and through a decision adopted not by the Agency but the Council of the European Union".[49]

5. ***Apart from replacing the MAF with the ordinary 'multi-annual strategic programmes' the Management Board adopts, a revised Founding Regulation should also bring other aspects of the regulation in line with the Common Approach. These adaptations should, among others, include:***
    - ***a clarification of the term of Management Board members (start; non-consecutive terms);***[50;]
    - ***a change of membership in the Management Board so that the European Parliament designates at least one Board member;***[51]
    - ***a simplification of the voting procedures within the Management Board;***[52]

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[46] Art. 8 (1) of the Founding Regulation.

[47] Art. 33 (5) of the delegated Regulation No. 1271/2013.

[48] See e.g. Dutheil de la Rochere, J. (2011), 'Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty', in *Fordham International Law Journal*, 6 (2011), pp. 1776-1799; von Bogdandy, A. and von Bernstorff, J. (2010), 'Die Europäische Agentur für Grundrechte in der europäischen Menschenrechtsarchitektur und ihre Fortentwicklung durch den Vertrag von Lissabon', in *Europarecht*, 2 (2010), pp. 141-164.

[49] IEE2, p. 142

[50] IEER2 p. 138.

[51] Common Approach on EU decentralised agencies, Point 10.

[52] European Parliament, Council of the EU, European Commission, Joint Statement on decentralised agencies, 19 July 2012 (Common Approach), Point 13; IEER2, p. 54.

- ***a simplification of the appointment procedure of the Director;***[53]
- ***a change of the Director's term from 5 plus 3 years to 5 plus 5 years;***[54]
- ***the introduction of a provision on the handling of EU classified information and on fraud prevention.***[55]

As mentioned, alignment with the Common Approach can generate efficiency gains. The independent external evaluation acknowledges that the Agency "is clearly one of the most advanced agencies in the adoption of the roadmap", as adopted in 2012 by the three EU institutions to foster a harmonised approach across all EU agencies.[56] The Roadmap of the Common Approach comprised 89 actions to be delivered by EU agencies and institutions, 59 of these are to be addressed by the agencies themselves. The Agency's external evaluation reports that, to date, the Agency has completed 50 actions, with a further six in progress and three that are not applicable to FRA. However, for actions that the Agency cannot adopt itself, the report stresses: "In order for the Agency to be fully aligned with the Common Approach and to be as efficient as possible while ensuring its independence, a change in the Founding Regulation would be necessary".[57] There is a need for an assessment, whether all of the elements laid down in the Common Approach apply to the Agency given its very specific nature and the fact that it needs to act in "complete independence"[58] from both EU institutions and Member States, which its Founding Regulation stresses in various provisions.[59]

Increasing impact

6. ***The revised Founding Regulation should allow for more impact by providing the Council of the European Union the opportunity to open the participation in the Agency's work beyond the current possibilities enshrined in Article 28 of the Founding Regulation so that also countries outside the Western Balkans can participate in and profit from the Agency's services. This would be important to allow additional non-EU Member States such as members of the European Economic Area (EEA) to become part of FRA's work.***

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[53] IEER2 p. 138.

[54] *Ibid.*

[55] IEER2 p. 124-125.

[56] IEE2, p. 50.

[57] IEE2, p. 141.

[58] Art. 16 of the Founding Regulation. For an interpretation of this term in the context of data protection authorities, see e.g. CJEU, C-518/07, *Commission v. Germany*, Judgement of 9.3.2010, paras. 18 and 19.

[59] IEER2, p. 126.

Different from the majority of other EU agencies, FRA is not mandated to deal with third countries, such as countries under the EU's European Neighbourhood Policy. This approach is justified given that these countries are covered by the Council of Europe or other human rights organisations and do not have immediate links to the EU *acquis*. Such links do however exist for other countries – not just for candidate states or countries that hold a Stabilisation and Association Agreement (SAA) with the EU. For instance, the Agency participates and provides fundamental rights inputs to Schengen evaluations carried out by the European Commission. But it cannot do so for the four associated members of the Schengen area despite the undisputed usefulness of such an Agency involvement. Countries like Norway and other EEA states might also want to assist and cooperate with the Agency. This would underpin the already existing cooperation with the EEA states in their role as donors for the EEA and Norway Grants, with which the Agency has concluded a very fruitful administrative arrangement for cooperation.

7. ***Where the EU legislator deals with legislative files that raise fundamental rights questions, the Agency should be able to provide its assistance and expertise where and when it is needed and not only when it is formally requested. Therefore, in order to make full use of the Agency's expertise in the legislative process, the Founding Regulation should allow the Agency to deliver non-binding opinions on draft EU legislation on its own initiative.***

The Agency may not deal with the legality of acts (as is done in actions for annulment before the Court of Justice of the European Union)[60] and cannot engage with the question of whether a Member State has failed to fulfil an obligation under the Treaty (in the sense of an infringement procedure before the Court of Justice of the European Union).[61] The Agency can, however, "formulate opinions […] without interference with the legislative and judicial procedures established in the Treaty".[62] Currently, the Agency is not entitled to issue opinions on its own initiative on the institutions' legislative proposals or positions taken in the course of legislative procedure. Such opinions[63] can only be formulated "where a request by the respective institution has been made".[64]

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[60] See Art. 263 of the TFEU (formerly Art. 230 of the TEC as referred to in Art. 4 (2) of the Founding Regulation).

[61] See Art. 258 of the TFEU (formerly Art. 226 of the TEC as referred to in Art. 4 (2) of the Founding Regulation).

[62] Art. 4 (2) of the Founding Regulation.

[63] Note that such opinions can also deal with the "compatibility with fundamental rights". See recital 13 of the Founding Regulation.

[64] Art. 4 (2) of the Founding Regulation. See in contrast the Paris Principles relating to the Status of National Human Rights Institutions (NHRIs), as adopted by General Assembly

The Agency's overall advisory function to provide the EU legislator with "assistance and expertise relating to fundamental rights in order to support them when they […] formulate courses of action [so that they] fully respect fundamental rights"[65] could be carried out more efficiently and with more impact if the Agency would not require an explicit request for delivering such expert opinions on EU legislative drafts. Such formal requests require cumbersome procedures in the EU institutions (a COREPER decision in the Council;[66] a formal letter by the President of European Parliament[67]). Allowing for own-initiative opinions by FRA on EU legislative drafts would also do away with another anomaly: the unjustified differentiation between data protection (Article 8 of the Charter of Fundamental Rights) and all the other fundamental rights as enshrined in the Charter. So far, only for data protection an independent fundamental rights body, the European Data Protection Supervisor (EDPS), is mandated to deliver own initiative opinions on EU legislative drafts that raise questions in regard to data protection.

Against this background, the external evaluation concluded that "in order for the Agency to improve the extent to which it meets the fundamental rights needs of the EU through undertaking new activities, an extension of the Agency's mandate is required".[68] Already the first external evaluation issued in 2013 postulated, "it should be clarified to which extent the FRA should be mandated to issue on its own initiative opinions in the legislative process".[69] It pointed to the respective positions by relevant stakeholders in this regard when stating that "It is considered that the FRA could have a clearer position in the legislative process, for example through contributions to impact assessments and providing opinions on legislative proposals (views expressed mainly at level of EP, CSO and to some extent Member

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Resolution 48/134 of 20 December 1993 which states in Point 3. (a) that NHRIs shall have the responsibility to submit on an advisory basis "either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral" opinions on "bills and proposals" and shall make "recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights". Whereas the Agency is not an NHRI, it is a Human Rights Institution that is under a statutory obligation to "fulfil its tasks in complete independence" (Art. 16 (1) of the Founding Regulation). The Founding Regulation makes the link to the Paris Principles explicit by referring to them in the context of the independence of Management Board members (consideration No. 20 of the Founding Regulation). The Paris Principles guide not only current institutional practice but are also relevant when revising the Agency's mandate. Indeed, the Council of the European Union has acknowledged that any review of the Founding Regulation will need to give due "regard to […] the Paris Principles as recognised and defined in the context of the United Nations."(see Footnote 4).

[65] Art. 2 of the Founding Regulation.

[66] Art. 19 (7) point (h) of the rules of procedure of the Council of the European Union.

[67] Rule 139 of the Rules of Procedure of the European Parliament.

[68] IEE2, p. 139.

[69] IEE1, p. VII.

States (MS)".[70] The report also stated that there were "several opinions regarding the independence" of the Agency, which is seen as limited due to its "restricted mandate in terms of issuing at its own initiative FRA opinions regarding legislation (views expressed mainly at level of EP, civil society organisations and to some extent Member States)".[71] It goes without saying that for a fundamental rights body any doubt as to its independence is – even if not justified – a challenge to the impact of its work and to the overall credibility of the Union's openness to independent fundamental rights scrutiny. In the context of better law making, the added value of having also at EU level an independent expert body issuing expert opinion on draft legislation as exists at national level is important to stress and was also analysed in academic studies.[72]

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[70] IEE1, p. VII.

[71] IEE1, p. VII

[72] See, for example, Fyhr, K. (2016), Making Fundamental Rights a Reality in EU Legislative Process: Ex ante Review of Proposals for EU Legislative Measures for their Compatibility with the Charter of Fundamental Rights of the European Union, Helsinki, University of Helsinki.