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The Curious Case of the Fundamental Rights Agency's Mandate: Legal Shrouding and Democratic Politics

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1 INTRODUCTION

On 7 December 2017 a fairly innocuous legal act was published in the Official Journal of the European Union (EU). The act is entitled ‘Council Decision (EU) 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022’ and it lays down the thematic areas within which the EU Agency for Fundamental Rights (FRA) carries out its tasks. The adoption of the Multiannual Framework (MAF) marked the end of another period of fruitless lobbying to bring the mandate of FRA in line with the Treaty of Lisbon by, in particular, including police and judicial cooperation within the Agency’s remit. The saga surrounding the MAF is almost as old as the FRA itself but it continues to frustrate the European fundamental rights community.

The present article tells the story of the FRA’s mandate, focusing in particular on the legal controversy arising from the pre-Lisbon drafting of the acts which make up the mandate and the role of the opinions rendered by the Council Legal Service (CLS) in this regard. The detailed account of the dispute concerning FRA’s MAF will serve as a resource for showing how the opinions of the CLS can offer legal pretext behind which the Member States can hide their politically motivated positions in a practice which might be described as ‘legal shrouding’. On this basis, a generalized argument about the detrimental effects of legal shrouding

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on the Union's democratic aspirations will be posited. On the one hand, the article therefore traces the rocky path to the creation and modification of FRA's mandate, a research objective in itself given the evidence it presents about institutional attitudes towards the role of EU governance in the European fundamental rights landscape, and, on the other, it extrapolates from this process a potentially more general (and alarming) phenomenon.

2 ORIGINS OF THE FRA AND ITS MANDATE

The origins of the FRA are well-documented in the literature.¹ The Agency arose from a complex political process spanning the better part of a decade, the proposals evolving simultaneously as the EU grappled with a multitude of challenges and historic changes, from the Haider affair in 2000 and debates on the internal protection of EU values (Article 7 TEU), the proclamation of the EU Charter of Fundamental Rights (CFR), the 'big-bang' enlargement of 2004, the failure of the Constitutional Treaty a year later, as well as the proliferation of EU agencies ('agencification') and rise of regulatory networks in this period. Uniquely among EU agencies, the 'constitutive politics'² surrounding the establishment of the FRA were also influenced by an existing international template developed at the United Nations, the National Human Rights Institution (NHRI).³ Moreover, the FRA was not created entirely from scratch, as the European Monitoring Centre on Racism and Xenophobia (EUMC) had been set up in Vienna in 1997; it was also entering an environment already partially occupied by the Council of Europe (and to a lesser extent, the Organization for Security and Co-operation in Europe (OSCE)) which was wary of further contestation to its waning importance.

One of the first publicly expressed proposals to establish a specialized EU human rights agency came from Philip Alston and Joseph Weiler who argued that the protection of human rights could not rest solely on the European Court of Justice (ECJ).⁴ Instead, human rights mandated a supervisory function with 'pro-active

¹ See among others, O. De Schutter, *The EU Fundamental Rights Agency: Genesis and Potential*, in *New Institutions for Human Rights Protection* 93 (K. Boyle ed., Oxford University Press 2009); W. Hummer, *The European Fundamental Rights Agency*, in *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* 117 (A. Reinisch & U. Kriebaum eds, Eleven International Publishing 2007); T. Blom & V. Carraro, *An Information Processing Approach to Public Organisations: The Case of the European Union Fundamental Rights Agency*, 18 Eur. Integration online Papers 1 (2014).

² Blom & Carraro, *supra* n. 1.

³ Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly resolution 48/134 of 20 Dec. 1993.

⁴ P. Alston & J. H. H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy*, 9 Eur. J. Int'l L. 658, 677 (1998). The analysis was adapted from *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000: Agenda of the Comité Des Sages and Final Project Report* (EUI and Academy of European Law 1998), a project at the EUI funded by the Commission to mark the fiftieth

monitoring designed to detect areas of human rights concerns'.⁵ To this end, Alston and Weiler suggested the creation of a new agency or 'a substantial expansion in the scope and power of the existing [EUMC]', so that the body would have monitoring jurisdiction in relation to 'all human rights in the field of application of Community Law'.⁶ The EUMC's mandate did in the end constitute the template for the Council Regulation establishing the FRA (hereinafter the 'Founding Regulation'),⁷ but not exactly in the way envisaged by Alston and Weiler.⁸

Although the European Council took note of the idea to set up a human rights agency in 1999,⁹ the initial views in both the Commission and the Council were negative.¹⁰ This changed in late 2003 when the European Council endorsed the idea of extending the mandate of the EUMC to make it a 'Human Rights Agency'.¹¹ The relevant Council conclusions mentioned the acquiescence of the Commission, in apparent disregard of the fact that the Commission tabled a proposal explicitly arguing *against* extending the scope of the EUMC just four months prior.¹² When the Commission launched a public consultation regarding the design of the 'Fundamental Rights Agency' a year later, it was still concerned – as it was with the EUMC which was struggling to deliver on its tasks – by the potential breadth of the thematic and geographical remit of the future FRA.¹³

anniversary of the Universal Declaration of Human Rights. The journal article was reprinted in *The EU and Human Rights* (P. Alston ed., Oxford University Press 1999).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Council Regulation (EC) No 168/2007 of 15 Feb. 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

⁸ In the view of De Schutter, the FRA Founding Regulation 'largely corresponds to the idea initially expressed by Alston and Weiler'. See De Schutter, *supra* n. 1, at 95. The different interpretation put forward here is, among others, down to the fact that the FRA has not in fact been vested with the task of monitoring fundamental rights in the EU as suggested by Alston and Weiler.

⁹ Para. 46 of the Cologne European Council Conclusions of June 1999 reads: 'The European Council takes note of the Presidency's interim report on human rights. It suggests that the question of the advisability of setting up a Union agency for human rights and democracy should be considered'. 'A full EU Agency on Human Rights' was also endorsed in the Wise Men Report on the Austrian Haider crisis. See M. Ahtisaari, J. Frowein & M. Oreja, *Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of FPÖ*, 40 Int'l Legal Materials 102, 121 (2001).

¹⁰ In so far as external relations were concerned, the Commission remarked that it 'considers that the European Union does not lack for sources of advice and information'. See European Commission, 'Communication from the Commission to the Council and the European Parliament – the European Union's Role in Promoting Human Rights and Democratisation in Third Countries', COM(2001) 252 final, 20. The follow up Council conclusions shared this position. See 'Conclusions of the 2362nd Council General Affairs meeting', 25 June 2001. In 2003, when discussing proposed amendments to the EUMC, the Commission was of the opinion that extending the scope of the Monitoring Centre was 'neither necessary nor appropriate' and potentially 'an unwelcome distraction'.

¹¹ European Council, Presidency Conclusions, Brussels, 12–13 Dec. 2003, at 27.

¹² See *supra* n. 10. The original proposal to recast the EUMC Regulation was withdrawn in Aug. 2004.

¹³ European Commission, 'Communication from the Commission – The Fundamental Rights Agency: Public Consultation', COM(2004) 693 final, at 8.

Even though it was a foregone conclusion that the core business of the Agency would be in data collection, it was unclear whether it would have a role in monitoring compliance with Article 7 TEU; whether its remit would cover only Community law (first pillar) or also Union competences enshrined in the TEU, notably police and judicial cooperation; and whether its geographical scope would include third countries.

As a consequence, it should come as no surprise that the content of the proposal for a Founding Regulation put forward by the Commission in 2005 and the ensuing legislative process proved highly contentious.¹⁴ The proposal envisaged that the objective of the Agency would be to provide assistance and expertise on fundamental rights to EU institutions and the Member States when implementing EU law.¹⁵ The proposed modalities were the following: the fundamental rights reference framework was to be what is today Article 6(3) TEU (ex Article 6(2) TEU) *and* the yet non-binding CFR; the Agency would collect, record, analyse, improve and disseminate data, conduct surveys, publish reports, formulate opinions and conclusions (but not on the legality of legislative proposals and positions), coordinate information networks, enhance cooperation with civil society and raise awareness of its work; upon request, the FRA would be able to provide technical expertise to the Council in relation to the procedure set out in Article 7 TEU concerning Member States' violations of EU values; a five-year framework determining the thematic areas of the Agency's activity (the MAF) would be adopted by the Commission; the Agency would be empowered by a separate Council Decision to work on police and judicial cooperation (former third pillar issues); and the FRA's work could involve, upon request of the Commission, fundamental rights aspects of EU relations with third countries, in addition to candidate countries being able to participate in the FRA as observers.

The adopted Founding Regulation exhibits not only the eroding influence of some Member States and of the Council of Europe which pined for a more circumscribed role for the FRA, but also some pushback against the Commission's attempts to guard its prerogatives.¹⁶ Although the objective of the FRA remained unchanged (word for word), a number of compromises were necessary on the modalities of the Agency's functioning in order to reach a unanimous agreement in the Council, as required by Article 352 Treaty on the

¹⁴ Blom & Carraro, *supra* n. 1, at 18.

¹⁵ Art. 2 of European Commission, 'Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union', COM(2005) 280 final.

¹⁶ For a detailed account of the reservations of the Council of Europe, see De Schutter, *supra* n. 1.

Functioning of the European Union (TFEU) (then Article 308 TEC), the legal basis for adopting the Founding Regulation.¹⁷ Incidentally, and as is fairly common in the case of important and contested files,¹⁸ the legal basis of the Founding Regulation was also disputed. This is when the CLS became involved for the first time,¹⁹ arguing for the addition of eight specific legal bases to the proposal for the Founding Regulation on account of the relationship between the Agency and the Member States.²⁰ The Commission Legal Service rightly disputed such an extremely restrictive interpretation of EU competences which departed from the already then existing delimitation of the scope of EU human rights activity (applicable to Member States only 'when implementing Community law') and highlighted a number of inconsistencies in the reasoning of the CLS.²¹ Article 352 TFEU alone was ultimately chosen as legal basis; this was a conservative but hardly unexpected choice, given that a number of other EU agencies were based on the same provision and in light of the continued absence of a proper human rights competence.²² It should be added that while legal shrouding may sometimes appear as a technique in legal basis disputes, the latter does not always involve legal obfuscation of a political position. Rather, in legal basis disputes, winning the legal argument about a choice of legal basis may constitute an objective in and of itself, with the hope of establishing a procedural precedent beneficial for the challenging institution.²³

In terms of content, the overall result of the contestation of the proposal to establish the FRA had several consequences. First, references to the Charter

¹⁷ See also G. N. Toggenburg, *The Role of the New EU Fundamental Rights Agency: Debating the 'Sex of Angels' or Improving Europe's Human Rights Performance?*, 33 Eur. L. Rev. 385, 388–389 (2008).

¹⁸ J. Jupille, *Procedural Politics: Issues, Influence, and Institutional Choice in the European Union* (Cambridge University Press 2004); J. Jupille, *Contested Procedures: Ambiguities, Interstices and EU Institutional Change*, 30 W. Eur. Pol. 301 (2007).

¹⁹ P. Leino-Sandberg, *The Institutional Politics of Objective Choice: Competence as a Framework for Argumentation*, in *The Division of Competences Between the EU and the Member States: Reflections on the Past, Present and the Future* 221 (S. Garben & I. Govaere eds, Hart Publishing 2017).

²⁰ These were Arts 13 (2), 137(2), 149(4), 150(4), 151 (5), 152 (4)(c), 153 (4) and 175 (1) of the Nice version of the Treaty establishing the European Community, in addition to Arts 308 and 284 TEC.

²¹ See Council of the EU, Note from the Commission to the ad hoc Working Party on Fundamental Rights and Citizenship, Doc no 14702/05, 18 Nov. 2005; now available following a freedom of information request by the author.

²² J. Grimheden, M. Kjaerum & G. Toggenburg, 'Administering Human Rights': *The Experience of the EU's Fundamental Rights Agency*, in *Research Handbook on EU Administrative Law* 118 (G. della Cananea, C. Harlow & P. Leino-Sandberg eds, Edward Elgar 2016). The absence of a general human rights competence was noted in particular by the Court in Opinion 2/94, ECLI:EU:C:1996:140. Although since the Amsterdam Treaty Art. 13 TEC provided a non-discrimination competence, this could not entirely supplant the evident lack of conferral of a human/fundamental rights power on the EU.

²³ Having said that, the relationship between legal shrouding and procedural politics might be worth further exploration, as examples of practices intentionally amalgamating law and politics in the EU.

became confined to the preamble,²⁴ a point criticized nowadays given the importance of the Charter as the anchor of fundamental rights in the EU has become clear.²⁵ Second, the Commission's desire to keep FRA opinions outside the legislative process was partially curtailed on the initiative of the European Parliament (which formally had a merely consultative role under Article 308 TEC but with other actors wary of a judicial challenge, it was allowed more influence through informal dialogues²⁶) and those Member States wishing to establish a strong FRA, namely by providing for the possibility of FRA delivering opinions on legislative proposals and positions when requested by the Parliament, Council or the Commission.²⁷ Third, any mention of the possibility of FRA being involved in the Article 7 TEU procedure, or monitoring Member States' compliance with fundamental rights in general, was removed from the Regulation due to demands by sovereignty-conscious Member States and the Council of Europe,²⁸ meaning that even the rudimentary monitoring role of the EU Network of Independent Experts on Fundamental Rights was not preserved.²⁹ Fourth, the competence to adopt the MAF was given to the Council instead of the Commission. Fifth, the Commission's right to involve the FRA in relation to third countries was pruned, also thanks to successful lobbying by the Council of Europe³⁰; the only remaining external role was related to the possibility of Western Balkans countries to participate in the Agency as observers.

²⁴ Nevertheless, the preamble (recital 9) retained this sentence: 'The close connection to the Charter should be reflected in the name of the Agency'.

²⁵ G. N. Toggenburg, *The EU Fundamental Rights Agency and the Fundamental Rights Charter: How Fundamental Is the Link Between Them?*, in *The EU Charter of Fundamental Rights: A Commentary* 1613 (S. Peers, T. Hervey, J. Kenner & A. Ward eds, Hart Publishing 2014); Management Board of the EU Agency for Fundamental Rights, 'Recommendations regarding changes in the Agency, its working practices and the scope of its mission', Decision 2017/05, 14 Dec. 2017.

²⁶ Leino-Sandberg, *supra* n. 19, at 221.

²⁷ Art. 4(2) of the Founding Regulation states in the relevant part: 'The conclusions, opinions and reports referred to in paragraph 1 may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d).' A strict interpretation of the wording of the provision ('respective institution') could lead to the conclusion that only the position of the requesting institution can be the subject of a FRA opinion.

²⁸ Blom & Carraro, *supra* n. 1, at 19. The Council annexed to its decision on the Founding Regulation a declaration stating that nothing precludes the possibility to obtain information from the FRA for the purposes of Art. 7 TEU. Moreover, it is notable that some Member States had previously complained about the supervisory-sounding name of the 'Monitoring Centre' which contributes to the explanation for why the word is entirely absent from the Founding Regulation as far as the FRA's functions are concerned. See European Commission, COM(2003) 483 final, *supra* n. 10.

²⁹ The Commission had previously appreciated the role the Network could play for the purposes of Art. 7 TEU. See European Commission, 'Communication from the Commission to the Council and the European Parliament on Art 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based', COM(2003) 606 final. See also De Schutter, *supra* n. 1, at 110.

³⁰ De Schutter, *supra* n. 1, at 120.

Finally, there was possibly the most contentious issue of whether FRA should be allowed to work on what were pre-Lisbon third pillar matters, police and judicial cooperation. According to one account, Germany, the UK, the Netherlands,³¹ Ireland and the Slovak Republic, with the support of the Council Secretariat, were strongly opposed to including third pillar issues in the FRA's mandate. On the contrary, Austria, Italy, the Scandinavian countries, the Commission, the Parliament and the European Economic and Social Committee were in favour.³² In the end, the third pillar has been excluded from the FRA's Founding Regulation,³³ although this exclusion does not apply to requests made by EU institutions.³⁴ The Council committed to re-examine the issue before 31 December 2009, inviting the Commission to submit a proposal by that date.

On the whole, the adopted version of the Founding Regulation truncated much of the ambition attached to the creation of an EU human rights agency by the human rights community. The Regulation represented in the first place continuity with the previous mandate of the EUMC which also reflected one of the more cost-efficient policy options for its design.³⁵ In the putative competition between the model of a traditional EU regulatory agency and the model of an NHRI compliant with the so-called Paris Principles,³⁶ the NHRI model had only limited influence on the final design.³⁷ There was awareness of the need for the FRA to be independent – in line with the Paris Principles – and this prescription has made it into the Founding Regulation.³⁸ However, with the thematic areas determined by the Council, the Commission having voting rights in the Management Board (MB), the FRA's inability to comment on legislative proposals of its own motion, as well as its constrained remit, the level of the Agency's independence does not satisfy the Paris Principles.³⁹ At the same time, it must be

³¹ More particularly, it was the Dutch Senate which was opposed – and had a domestic veto – to third-pillar involvement of the FRA.

³² Blom & Carraro, *supra* n. 1, at 19.

³³ At the close of 2006, the Council noted that '[w]hile a majority of delegations have taken the view that Articles 30, 31 and 34(2)(c) TEU form an appropriate legal basis for the Decision, a minority has denied the existence of a legal basis for the proposed Decision.' See Council of the European Union, *Proposal for a Council Regulation Establishing a European Union Agency for Fundamental Rights*, Doc no 16018/06 (29 Nov. 2006).

³⁴ See Art. 5(3) of the Founding Regulation and Declaration by the Council on the Consultation of the Agency within the Areas of Police and Judicial Cooperation in Criminal Matters.

³⁵ European Commission, COM(2005) 280 final, *supra* n. 15. The seat of the Agency remained in Vienna.

³⁶ The two models are compared in more depth in De Schutter, *supra* n. 1, at 102–112.

³⁷ The Paris Principles are mentioned in recital (20) of the preamble to the Founding Regulation. See Grimheden, Kjaerum & Toggenburg, *supra* n. 22, at 122.

³⁸ See Art. 16(1) of the Founding Regulation.

³⁹ See A. Von Bogdandy & J. von Bernstorff, *The EU Fundamental Rights Agency Within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of*

recognized that the limitations on the scope of application of fundamental rights in EU law,⁴⁰ the lack of a general fundamental rights competence in the Treaties,⁴¹ the principle of conferral⁴² and the *Meroni* doctrine⁴³ would in any case complicate the establishment of a ‘European NHRJ’.

3 THE BATTLE FOR THE MAF

The legal and political contestation did not end with the adoption of the Founding Regulation. The aforementioned MAF needed to be adopted to enable the FRA to function properly, as the Agency must ‘carry out its tasks within the thematic areas determined by the Multiannual Framework’.⁴⁴ The MAF is therefore an integral part of the Agency’s mandate, decisive for its breadth. The supporters of a strong FRA mandate were fully aware of this and attempted to use the MAF for countering the limitations imposed by the Founding Regulation.⁴⁵

The Commission was on the same page and opened the negotiations with an ambitious proposal covering ten thematic areas and avoiding any wording recalling the pillar structure of the pre-Lisbon EU. Most notably, the Commission tested the Council once again on the question of criminal matters despite the Council’s refusal to countenance this area in the Founding Regulation – one of the proposed thematic areas of the MAF was ‘compensation of victims,

Administrative Law, 46 *Common Mkt. L. Rev.* 1035, 1067–1068 (2009); see also J. Dutheil de la Rochere, *Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty*, 33 *Fordham Int’l L.J.* 1776 at 1798 (2011).

⁴⁰ When it comes to fundamental rights at the EU level – be it as general principles of EU law or the Charter – it is a long-standing rule that they only apply to Member States when EU law applies. See Art. 51(1) of the Charter and the interpretation in Case C-617/10 *Åklagaren v. Åkerberg Fransson*, ECLI:EU:C:2013:105. Any EU institution or body must operate within those confines unless it is monitoring compliance with Art. 2 TEU for the purposes of Art. 7 TEU; however, whether there is any legal basis for such monitoring has been contested in the case of the Commission’s Rule of Law Framework. See Opinion of the Council Legal Service, Doc no 10296/14, 27 May 2014; and criticism by L. Besselink, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* 128 (A. Jakab & D. Kochenov eds, Oxford University Press 2017). Recently, Art. 19(1) TEU appears to constitute a new source of obligation going beyond the scope of the Charter insofar as requirements of effective judicial protection, such as judicial independence, are concerned. See Case C-64/16 *Associação Sindical dos Juízes v. Tribunal de Contas*, ECLI:EU:C:2018:117.

⁴¹ Since Opinion 2/94, ECLI:EU:C:1996:140 pointed out the absence of an EU human rights competence, three relevant powers have been added to the EU’s repertoire: Art. 19 TFEU concerning discrimination; Art. 16 TFEU concerning data protection; and Art. 6(2) TEU containing the obligation to accede to the ECHR. However, even together these provisions still fall short of a proper human rights competence.

⁴² See Arts 4(1), 5(1) and (2) TEU.

⁴³ See Case 9-56 *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7; Case 98/80 *Romano v. Institut national d’assurance maladie-invalidité*, ECLI:EU:C:1981:104.

⁴⁴ Art. 5(3) of the Founding Regulation.

⁴⁵ Blom & Carraro, *supra* n. 1, at 20–21.

prevention of crime and related aspects relevant to the security of citizens'.⁴⁶ The focus on victims, at least, was particularly warranted by the existence of EU legislative harmonization in this area.⁴⁷ The Council, however, was unwilling to budge and although the final array of thematic areas was by no means narrow, it did not include criminal matters.⁴⁸ At this point it became clear that opposition to the FRA working on what was perceived as a sensitive area belonging to the traditional purview of sovereign states was firmly entrenched in the positions of a handful of Member States. The supporters of the expanded mandate were more numerous in the Council and in addition counted the Commission, the Parliament, EU advisory bodies and the civil society. Nevertheless, with the adoption of the Founding Regulation and the first MAF, the status quo was set and extensive lobbying efforts, not least by the FRA itself, would be expended on overturning it in the subsequent years. In any case, the contestation was still *political* at this stage – all the actors involved in the negotiations, lobbying and decision-making held certain political positions, the squaring of which with the procedural rules (unanimity) and political culture in the Council (consensual) resulted in no mandate on criminal matters for FRA.

In between the adoption of the Founding Regulation (15 February 2007) and the first MAF (28 February 2008), a crucial event transpired: the Lisbon Treaty was signed 1 December 2007 and it envisaged the abolition of the pillar structure and the incorporation of police and judicial cooperation into the TFEU (former TEC). This change, which was to take effect from December 2009, raised expectations in relation to the FRA's mandate for two reasons. First, there was no longer a constitutional exception in the Treaties which would warrant treating police and judicial cooperation in criminal matters differently from other areas of EU competence enshrined in the TFEU.⁴⁹ Second, some scholars anticipated that the entry into force of the Treaty of

⁴⁶ See Art. 2(c) of European Commission, 'Proposal for a Council Decision implementing Regulation (EC) No168(2007 as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007–2012', COM(2007) 515 final.

⁴⁷ Council Framework Decision 2001/220/JHA of 15 Mar. 2001 on the standing of victims in criminal proceedings [2001] OJ L82/1; replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25 Oct. 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57.

⁴⁸ The thematic areas established by the 2007–2012 MAF were the following:

- (a) racism, xenophobia and related intolerance; (b) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination); (c) compensation of victims; (d) the rights of the child, including the protection of children; (e) asylum, immigration and integration of migrants; (f) visa and border control; (g) participation of the citizens of the Union in the Union's democratic functioning.

⁴⁹ Toggenburg, *supra* n. 17, at 391.

Lisbon would *automatically* bring criminal matters within FRA's remit,⁵⁰ the reason being that the scope of the Founding Regulation refers to the 'Treaty establishing the European Community'⁵¹ which is normally read as a dynamic reference taking into account Treaty changes.⁵² Following the entry into force of the Lisbon Treaty, that reference would be to the TFEU which incorporates police and judicial cooperation in criminal matters.⁵³ On the other hand, it must be noted that the thematic constraints of the MAF would not be removed merely as a result of Treaty change and given that the Framework did not list criminal matters as one of the themes, the Agency did not become entitled to work on these issues by virtue of the entry into force of the Treaty of Lisbon.

Nevertheless, it would have seemed to most observers that the Founding Regulation at least did not stand in the way of including police and judicial cooperation in criminal matters in the MAF.⁵⁴ Recognizing the new circumstances, which additionally included the fact that the Charter has become legally binding, the Commission proposed in December 2010 an amendment adding the disputed areas to the first MAF.⁵⁵ This time, the chair of the responsible Council Working Party (FREMP)⁵⁶ asked the CLS to assess the legal feasibility of the proposal. While the entry into force of the Lisbon Treaty may have appeared to decidedly shift the situational balance in favour of the pro-FRA coalition, the re-entry of the CLS on the scene – after its earlier role in debates on the legal basis of the Founding Regulation – shrouded political disagreement about the MAF in specialized legal discourse.

⁵⁰ Von Bogdandy & von Bernstorff, *supra* n. 39, at 1068. For a contrary but unsubstantiated opinion, see *ibid.*

⁵¹ Art. 3 of the Founding Regulation.

⁵² Von Bogdandy & von Bernstorff, *supra* n. 39, at 1068. The authors add:

One could only argue in favour of a continuing exclusion of this policy field if Article 3 were to be interpreted as a static reference to the EC Treaty as it stood in 2007. Yet, the normal form of reference within a legal order is a dynamic one, and there are no indications that this rule should not apply here. Recital 32 of the founding Regulation also reflects a dynamic understanding of the competence issue by stating that "nothing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters.

⁵³ Art. 5(3) of the Treaty of Lisbon explicitly provides: "The references to the recitals, articles, sections, chapters, titles and parts of the Treaty on European Union and of the Treaty establishing the European Community, as amended by this Treaty, contained in other instruments or acts shall be understood as referring to the recitals, articles, sections, chapters, titles and parts of those Treaties as renumbered".

⁵⁴ See G. N. Toggenburg, *Exploring the Fundament of a New Agent in the Field of Rights Protection: The Fundamental Rights Agency in Vienna*, 7 Eur. Y.B. Minority Issues 603, 614 (2010).

⁵⁵ European Commission, 'Proposal for a Council Decision amending Decision (2008/203/EC) of 28 Feb. 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007–2012', COM(2010) 708 final.

⁵⁶ Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons.

3.1[a] THE ISSUE OF LEGAL BASIS

The first legal issue which surfaced in the context of the proposed Commission amendment of the MAF was the choice of the correct legal basis. The Founding Regulation originally envisaged the MAF to be adopted under one of its provisions, Article 5(1), and this was the case for the first MAF without contestation. However, in the meanwhile, the ECJ decided that such 'secondary' legal bases are incompatible with the Treaties and therefore Article 5(1) could no longer be relied upon for the adoption of acts by the Council.⁵⁷ As a result, the Commission proposal to include criminal matters in the 2007–2012 MAF was based on the 'flexibility clause' (Article 352 TFEU) which also supplied the legal basis of the Founding Regulation.

In its first Opinion concerning FRA's mandate, the CLS recommended to reject the Commission's amendment. The Service argued that it was not possible to mix the secondary legal basis of the existing MAF with the legislative legal basis (Article 352 TFEU) relied upon for the proposed amendment.⁵⁸ Moreover, the Service was of the opinion that if it was truly the case that Article 5(1) was an illegal basis for the MAF, the whole legal act was invalid and needed to be readopted under a different procedure.⁵⁹ The Legal Service suggested two avenues (with preference for the second): (1) amending the Founding Regulation so as to remove Article 5 and integrate the MAF into that act directly or (2) amend the implementing procedure in line with Article 291 TFEU concerning implementing powers.

It must be said that the CLS Opinion appears correct on the issue of legal basis. Legally it was indeed the most 'clean' solution to remedy the invalid secondary legal basis in the Founding Regulation and readopt the entire MAF. However, this was not a practicable recommendation: reopening the Founding Regulation was not in the interests of the 'FRA-sceptic' Member States which were happy with negotiating a circumscribed mandate for the Agency. In addition, reopening a legislative file of such salience requires political capital, a scarce resource in the EU legislative machinery. The Commission's proposal to amend the MAF based on Article 352 TFEU would not have offended any institutional prerogatives, as the Council would have retained its unanimity rule and the Parliament's consent would have been required. From a pragmatic perspective, the Commission's proposal could have been adopted despite the problem of legal basis which in any case plagued also other acts.⁶⁰ Indeed, the alleged illegality of

⁵⁷ See Case C-133/06 *Parliament v. Council*, ECLI:EU:C:2008:257.

⁵⁸ Opinion of the Council Legal Service, Doc no 6138/11, 9 Feb. 2011, para. 23.

⁵⁹ *Ibid.*, para. 22.

⁶⁰ Legal basis litigation is a routine part of inter-institutional struggles for power. See Jupille 2004, *supra* n. 18. For a more general discussion of how EU institutions attempt to influence the reach of their

the 2007–2012 MAF in the end continued unresolved until the expiry of the act, showing that the principled position of the CLS bred legislative inertia.

3.1[b] THE ISSUE OF SCOPE OF THE FOUNDING REGULATION

The second legal issue raised by the CLS Opinion related directly to the substance of the Commission amendment proposal. Consistent with the explanation concerning the legal effects of the entry into force of the Treaty of Lisbon provided above, the Commission predicated its proposal on the plausible hypothesis that police and judicial cooperation was now within the general remit of the Agency but that an amendment of the MAF was still required as this latter instrument defined FRA's areas of activity.

The CLS disagreed:

[the Service] does not subscribe to the thesis that the objectives and scope of the tasks of the Agency have been enlarged as a mere result of the entry into force of the Lisbon Treaty, so as to cover areas which were previously deliberately excluded from that scope and from these tasks and that it would not be necessary to amend the establishing act to that end.⁶¹

There are two major problems with the Opinion. First, it plainly disregards the effects of the Treaty of Lisbon which replaced references to 'the Community' and its law with references the 'Union' and 'Union law', the latter terms including the disputed areas. This effect of the Treaty of Lisbon occurred across the board in the EU legal order, affecting thousands of acts adopted under previous treaties. Second, the CLS disregarded recital (32) of the Founding Regulation which stipulates that:

[n]othing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters.

This recital appears to clearly contradict the negative conclusion of the CLS which turned on the references to 'Community law' and the 'Treaty establishing the European Community'. The CLS read these references as *prejudicing* the remit of FRA's mandate when, in fact, recital (32) states the exact opposite. Third, the spirit of the Lisbon changes, but also the spirit of pre-Lisbon EC law, points towards unity of the EU legal order.⁶² In the landmark *Pupino* case, the ECJ extended the constitutional features of the EC system to third-pillar legislation,

competences see H. Farrell & A. Héritier, *Introduction: Contested Competences in the European Union*, 30 J. Eur. Pub. Pol'y 227 (2007).

⁶¹ Opinion of the Council Legal Service, Doc no 6138/11, 9 Feb. 2011, para. 23.

⁶² See A. Von Bogdandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16 Eur. L.J. 95 (2010).

including the protection of fundamental rights enshrined then in Article 6(2) TEU which is also mentioned in Article 3(2) of the Founding Regulation.⁶³

As a result of the Opinion of the CLS, the Commission amendment was not adopted. The same scenario repeated when the Commission proposed a new MAF for 2013–2017. The Commission once again based the proposal on Article 352 TFEU and suggested the inclusion of police and judicial cooperation in the MAF. The Polish chair of FREMP immediately requested another Opinion from the CLS on exactly the same issues as before (legal basis and possibility to add criminal matters). The Opinion was delivered almost exactly a year after the first one and contained the same recommendations, with the exception of allowing the proposed legal basis of the MAF, as this was a new act and not an amendment mixing legal bases.⁶⁴ Criminal matters were once again dropped from the mandate – in line with the CLS Opinions – but somehow the process of adopting the MAF was slowed down so much that an emergency measure was necessary to keep the FRA operational.⁶⁵

The Opinions of the CLS have blocked the ‘lisbonization’ of FRA’s mandate on the basis of what is by most accounts an erroneous legal argument ever since their espousal, and with the adoption of the latest MAF, seemingly until at least 2022. Over the years, FRA, the European Parliament, the Commission, civil society actors and external evaluators of FRA have all argued countless times on legal and policy grounds for the expansion of the MAF to cover police and judicial cooperation in criminal matters. The reason why all these appeals and lobbying efforts failed is of course not only, or even mainly, legal.⁶⁶ Nevertheless, the unpersuasive legal argument prepared by the CLS served all along as an effective barrier protecting the political positions of a minority of Member States in the Council that wished to see FRA’s mandate kept to a minimum. The status quo became entrenched even though Member States recognized that the legislative procedure through which the MAF is adopted is cumbersome and inappropriate for the objective.⁶⁷

4 LEGAL SHROUDING AND DEMOCRATIC POLITICS

The practice of engaging the deflective capacity of the CLS’s Opinions, which can for simplicity be referred to as ‘legal shrouding’, clearly represents an issue from a

⁶³ Case C-105/03 *Pupino*, ECLI:EU:C:2005:386.

⁶⁴ Opinion of Council Legal Service, Doc no 6318/12, 9 Feb. 2012.

⁶⁵ Council conclusions of 20 and 21 Dec. 2012 on a request to the European Union Agency for Fundamental Rights in accordance with Art. 4(1)(c) and (d) of Council Regulation (EC) No 168/2007 of 15 Feb. 2007 establishing a European Union Agency for Fundamental Rights [2012] OJ C400/3.

⁶⁶ Interview with a Member State official (at the margins of an international conference), Bratislava, 9 Nov. 2016; Interview with a senior FRA official, Vienna, 17 Mar. 2017.

⁶⁷ Interview with a Member State official, Brussels, 11 July 2017.

democratic perspective. Opinions can enable Member States to buck political engagement in favour of legal scholastics. This is particularly problematic when unanimous agreement is required – as in the case of Article 352 TFEU – as legal arguments allow even a single blocking Member State to deflect political pressure of the majority and other EU institutions. Legal shrouding of political disagreements exacerbates the already subpar transparency and openness, which are known to be crucial for EU democracy,⁶⁸ of the law-making process and in particular the Council's role therein.⁶⁹ In this regard, the phenomenon of legal shrouding, hard as it may be to discern without in-depth knowledge of legislative files, is at odds with the concept of openness which should govern EU decision-making for democratic reasons,⁷⁰ as well as more broadly with the concept of good governance.⁷¹ As recently reaffirmed by the General Court with respect to access to information about dialogues:

[o]penness [...] contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.⁷²

As a consequence, legal shrouding impacts the ability of citizens to participate in democratic discourse and politics. In addition to obfuscating the political positions and motivations of the Member States, legal shrouding de-politicises the EU legislative process by making it inaccessible to non-experts. Instead of debating the merits of including police and judicial cooperation in FRA's mandate, a Member State can simply point to legal argumentation developed by the CLS. Only other interested experts, typically from other EU institutions, will then be in a position to take issue with the submitted legal argumentation. Even many civil society organizations might lack the capacity to dispute legal arguments and/or discern a bogus interpretation of the law, let alone the general public. In turn, the legitimacy and accountability of the EU suffers as well.⁷³

To this sketch of legal power in EU decision-making one needs to also add the common knowledge that institutions' Legal Services deliver legal advice tinged with institutional bias. Without it, Member States would be hardly ever keen on

⁶⁸ A. Héritier, *Composite Democracy in Europe: The Role of Transparency and Access to Information*, 10 J. Eur. Pub. Pol'y 814 (2003).

⁶⁹ M. Hillebrandt, D. Curtin & A. Meijer, *Transparency in the EU Council of Ministers: An Institutional Analysis*, 20 Eur. L.J. 1 (2014).

⁷⁰ A. Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, 39 Eur. L. Rev. 72 (2014).

⁷¹ D. Curtin & I. Dekker, *Good Governance: The Concept and Its Application by the European Union*, in *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* 3 (D. Curtin & R. A. Wessel eds, Intersentia 2005).

⁷² Case T-540/15 *De Capitani v. European Parliament*, ECLI:EU:T:2018:167, para. 80.

⁷³ Alemanno, *supra*, n. 70, at 85, 90.

using CLS argumentation to shroud their policy positions. Already in the early 1990s Barents poignantly commented on the dual role played by Legal Services when it comes to choosing the legal basis of an act:

On the one hand, the lawyers are called to interpret the relevant provisions in the light of objective elements, such as the system of the Treaty and the Court's case law (a kind of internal legality control). On the other hand, they have to carry out the instructions of the political management of these institutions to "find" or even to "invent" an appropriate legal basis for a proposed measure.⁷⁴

At the expense of democratic politics, legal shrouding empowers the lawyers of the Legal Services, in particular of the CLSs. According to Jacqué, and as the case of FRA's mandate demonstrates, it is chiefly the Member States that have an appetite to '[transform] their political misgivings about a matter into legal objections', in step with their preference to 'oppose a measure through legal arguments that give an objective appearance to their political preferences rather than openly displaying a political position that is purely based on national interest'.⁷⁵ The influence of the CLS is at its peak where Member States disagree; even if some Member States, or other directly affected institutions and bodies such as FRA, might take issue with the interpretation of the CLS, short of a judgment on the issue (but see below) only the Commission and EP Legal Services enjoy comparable institutional veneer as the CLS within their respective domains.⁷⁶ In these conditions, Opinions of the CLS are capable of de facto deciding policy outcomes, as those Member States benefitting from the CLS's position will invoke the legal impossibility of a contrary course of action, thus shrouding political disagreement with legal arguments. By most accounts, the CLS appears largely aware of its often critical and political role in Council decision-making.⁷⁷

Legal shrouding resulting from CLS Opinions obscures Member State politics in the Council and it therefore fits well with the existing criticism of the Council's lack of transparency as notably expressed by the European Ombudsman. Recognizing the adverse effects of opacity on representative democracy – on which the EU is meant to be founded according to Article 10 TEU – the Ombudsman recommended the Council to, among others, '[s]ystematically record

⁷⁴ See R. Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, 30 Common Mkt. L. Rev. 85 (1993), n. 40.

⁷⁵ J.-P. Jacqué, *The Role of Legal Services in the Elaboration of European Legislation*, in *Lawyering Europe: European Law as a Transnational Social Field* 43, 50 (A. Vauchez & B. De Witte eds, Hart Publishing 2013); cited in Leino-Sandberg, *supra* n. 19, at 217.

⁷⁶ In an acknowledgment of the weight of the Legal Service's Opinions in the Council institutional milieu, two CLS lawyers write that '[t]he Legal Service's views are rarely ignored', even though 'they are not always followed'. M. Bishop & F. Naert, *The Role of the Council Legal Service*, in *The EU as a Global Actor – Bridging Legal Theory and Practice: Liber Amicorum in Honour of Ricardo Gosalbo Bono* 104 (J. Czuczai & F. Naert eds, Brill 2017).

⁷⁷ Bishop & Naert, *supra* n. 76.

the identities of Member States expressing positions in preparatory bodies'.⁷⁸ Such a measure could also help reveal Member States relying on legal shrouding instead of engaging in genuine political deliberation.⁷⁹ Tackling the effect of legal shrouding on democratic politics will likely require innovative thinking about openness and transparency which, as Curtin and Leino argue, should go beyond 'passive transparency in the form of access to documents'.⁸⁰

Nonetheless, in the Council but not only, even improved access to documents would represent a step forward for participation and democratic politics. The European Ombudsman has criticized the Council for its practice of abundantly limiting access to its preparatory documents.⁸¹ Legal advice provided by the Service typically falls within the LIMITE (‘limited’) category of documents which are kept from the public until the completion of the given legislative file (some even beyond that point). In addition, it can benefit from protection under Article 4(2) of Regulation 1049/2001 concerning public access to documents of the three main institutions, and which precludes the publication of the legal Opinions at the source of shrouding.⁸² The protection of legal advice, in particular when it relates to the legislative process, has been judicially contested but with no hard and fast result. Although the ECJ stated in *Turco* that ‘Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process’,⁸³ more recent case law of the General Court contains examples where the exception protecting legal advice from disclosure has been successfully upheld.⁸⁴ Therefore even accessing the source of legal shrouding can be difficult at times, and in any case requires the submission of a freedom of information request.⁸⁵ It would be democratically beneficial if Opinions of the EU institutions’ Legal Services were automatically made public

⁷⁸ Recommendation of the European Ombudsman in case OI/2/2017/TE on the Transparency of the Council legislative process, 2 Feb. 2018.

⁷⁹ And also help reveal the scale at which Member States prefer arguing through legalese rather than politics.

⁸⁰ D. Curtin & P. Leino, *In Search for Transparency for EU Law-Making: Trialogues on the Cusp of Dawn*, 54 *Common Mkt. L. Rev.* 1673 (2017). By most accounts, the trialogues seem to be a particularly apposite place where transparency and democratic politics are in dire straits. See G. J. Brandsma, *Transparency of EU Informal Trilogues Through Public Feedback in the European Parliament: Promise Unfulfilled*, *J. Eur. Pub. Pol’y*, published online 8 Oct. 2018.

⁸¹ Recommendation of the European Ombudsman in case OI/2/2017/TE, *supra*, n. 78.

⁸² Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

⁸³ Case C-39/05 P *Kingdom of Sweden and Turco v. Council of the European Union*, ECLI:EU:C:2008:374, para. 68.

⁸⁴ Case T-755/14 *Herbert Smith Freehills v. Commission* [2016] ECLI:EU:T:2016:482, para. 73.

⁸⁵ The Opinions analysed in the present article can today be found in the Council’s register of documents.

and attached to the legislative file when produced (*before* the adoption of the legislation),⁸⁶ unless an overriding ground necessitating non-disclosure is put forward.

Finally, it is pertinent to ask in the context of the FRA case, but also more generally, whether it is possible for EU institutions to challenge legal advice provided by a Legal Service of another institution in order to disprove erroneous legal argumentation and remove the source of legal shrouding in that way. The answer is likely no: Article 263 TFEU permits the review of legality of acts of EU institutions or bodies 'intended to produce legal effects vis-à-vis third parties'. Opinions of Legal Services quite simply do not produce legal effects in the formal sense, let alone in relation to third parties. Potential litigants would consequently have to look for an indirect way of obtaining a judgment or at least an *obiter dictum* on a legal opinion produced by one of the Legal Services. The Commission could have – though such an action would be time-barred now – challenged the MAF on a different ground and in the course of this action it could have complained about the CLS's Opinions and hope that the ECJ would be kind enough to pronounce on them. This hypothetical scenario, however, entails disproportionate costs and high uncertainty for the sake of a relatively minor issue. Legal shrouding resulting from CLS Opinions is therefore not only an effective but also a cheap strategy to pursue Member State interests without bearing political costs and risks.

5 CONCLUSION

The present contribution took as its starting point a detailed case study of the mandate of the EU Fundamental Rights Agency to reveal a phenomenon termed 'legal shrouding' – the practice of using Opinions of Legal Services to envelop political disagreement in a more or less fictitious legal dispute in order to avoid political pressure and deliberation. The case of the FRA is particularly apposite in this regard, as the Agency's creation was accompanied by salient political contestation which was with respect to certain issues never overcome in subsequent discussions over the scope of FRA's mandate. Legal shrouding aided a minority of Member States which persisted in blocking a seemingly minor amendment to the mandate at little to no political cost.

The generalization of the case study requires further corroboration drawing on other instances of legal shrouding, but the contours of the democratic damage caused by this practice can already be discerned. Legal shrouding exarcebates the openness

⁸⁶ The practice of the Council nowadays is to make most LIMITE preparatory documents available in its register only after the legislative file has been completed, i.e. when intervention of the public and interest groups can no longer affect the decision-making.

and transparency deficit at the Council identified by the European Ombudsman which feeds into the EU's democratic deficit. The hiding of politics under a legal blanket furthermore raises barriers for democratic participation in the legislative process. Finally, legal shrouding is comparatively low-cost and the legal advice at its heart is very difficult to judicially disprove for even privileged litigants in the EU.

The opacity of Union decision-making makes the identification of legal shrouding potentially difficult. This is not to say, however, that the case of FRA is an isolated case. For example, the circumstances and parameters of the CLS's Opinion on the Commission Rule of Law Framework resemble legal shrouding.⁸⁷ The Member States requested the Opinion when faced with a daunting political challenge of addressing rule of law transgressions by one of their fellow members. The CLS Opinion interpreted EU competences narrowly; in other words, in a way favourable to preserving the status quo and justifying political inertia. Outside observers have criticized the soundness of certain parts of the legal analysis, as well as the lack of willingness on the part of the Member States to face the core problem (rule of law backsliding) head on by, for example, triggering Article 7 TEU.⁸⁸ While closer inspection of the process would be necessary to establish whether the Rule of Law Framework was subjected to legal shrouding, the bottom line remains that, regardless of the issue area, the contribution of legal shrouding to instrumental de-politicization of the EU should be a cause for democratic concern.

⁸⁷ Opinion of the Council Legal Service, Doc no 10296/14, 27 May 2014.

⁸⁸ Besselink, *supra* n. 40.