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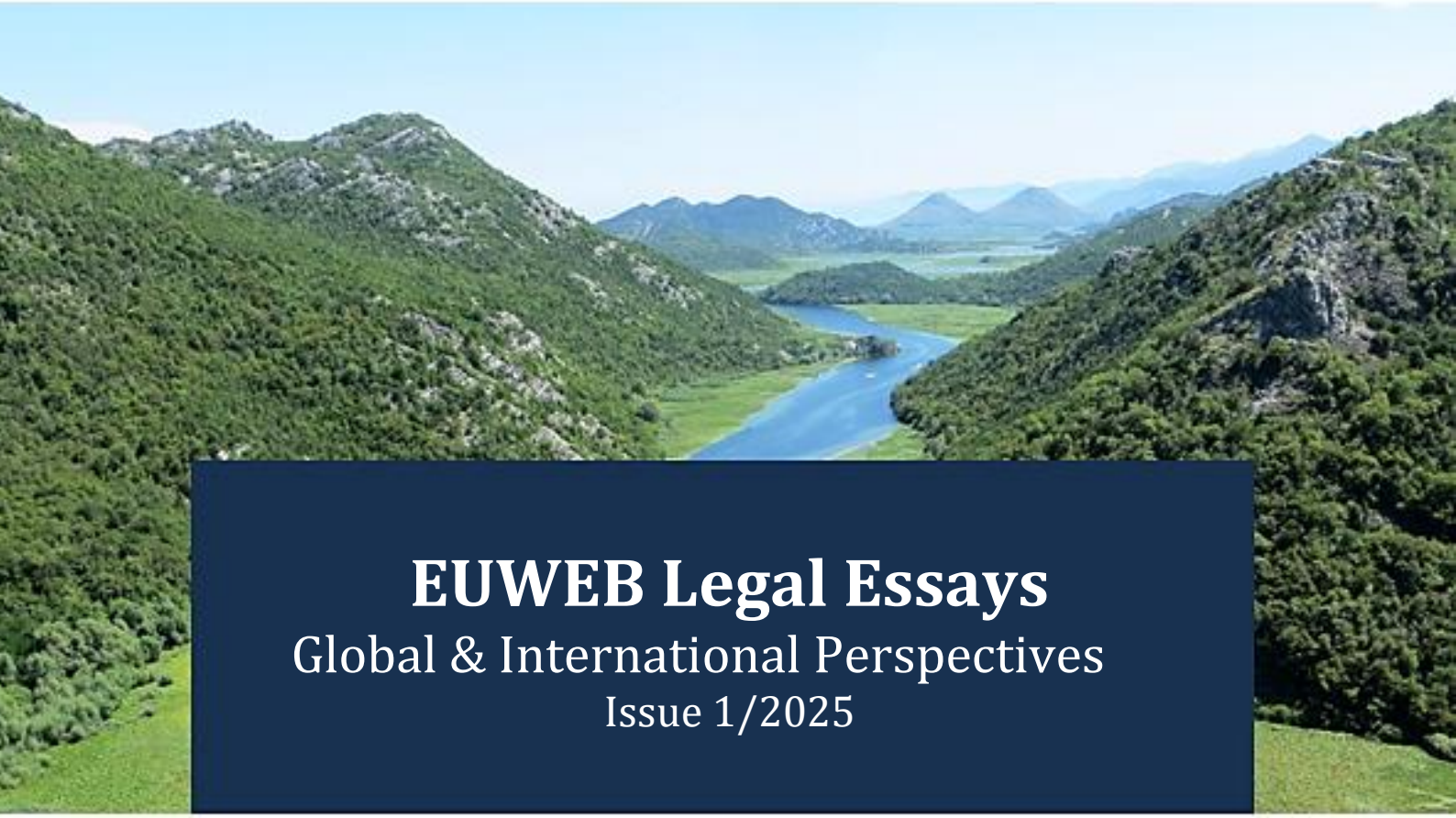

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COMMENTS

ON THE ROLE OF THE EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS ON THE MEASUREMENT OF THE COMPLIANCE OF FUNDAMENTAL RIGHTS INDICATORS WITH THE SHARED VALUES *EX* ART. 2 TEU

by Rosita Silvestre[*]

1. Introduction

According to a current narrative, there is an organic, consubstantial link between the values of art. 2 TEU, of democracy, fundamental rights and the rule of law, in the sense that they are interdependent and must be interpreted in light of each other as coessential conditions of a State based on democracy.

Nonetheless, this understanding has not transpired in the language of the European institutions and the absence of a co-constitutive monist approach to EU values has permeated the verification procedure on Member States' compliance with these values/principles.

One area that seems to have been ruled out from the European Commission's checks on respect for democracy is that of human rights, which, as revealed in past accession processes, among the conditions imposed in the pre-accession negotiations but much more than the others, has proved to be disconnected to a clear benchmark. The post-accession monitoring framework, in its claims of uniformity, has still appeared to be entrusted to an ambiguous language.

This *vacatio juris* has not been without consequences, in fact jeopardizing the consistency of the evaluation procedures on States' compliance with fundamental rights that, as a consequence, have received little space for verification.

Indeed, the strict distinction between pre-accession and post- accession regarding the implementation of conditionality, already particularly evident in the assessment procedures on the political criteria, has been more palpable in the abovementioned area to the point of minimizing the relevance of a more correct and effective protection of fundamentals rights and marginalizing it during the round tables' discussions with the candidates.

In the opposite direction, the European Parliament (EP) has instead not rarely taken the initiative for inter-institutional discussions on a general framework for the protection of EU values, being indeed oriented towards approving a combined approach to such values. Consistently, the European Parliament's commitment to the defense of human rights in conjunction with the rule of law and democracy has concerned all stages of European integration, not only during the "*crisis of the rule of law*", being understood as a "*crisis of values*", but since the Agenda 2000 resolution, in which the EP has assigned

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great importance in particular to the progress made by the States in the field of human rights.

Indeed, in the years between 2014 and 2019, when the Union faced serious challenges related to the protection of fundamental rights within its territory, as part of the persistent and serious violations of the rule of law and democracy in some EU Member States, the EP has appropriated an important space for discussion.

Consolidating its parliamentary requests in the proposal for an EU mechanism on Democracy, the Rule of Law and Fundamental Rights[1], the LIBE Commission has pressured the Assembly to direct the Fundamental Rights Agency to a fundamental role in the assessment exercise on fundamentals rights. The Agency has received a request from the European Parliament dated 14 March 2016 to deliver an opinion "*on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values as listed in Article 2 TEU (democracy, rule of law, fundamental rights) based on existing sources of information and evaluation instruments already in place in this field*".

Based on the EU Regulation, laying down the activity of the Agency in cooperation with the Commission and the Member States, FRA's global approach is closely linked to the enforcement mechanisms of art. 7 TEU, whereas the decisions on taking action under the nuclear procedure "*need to be underpinned by objective and comparative analysis*", then ensuring an equal treatment to all the Member States. Substantially, FRA's mandate should be to develop methods and standards that improve data comparability, objectivity and reliability on the human rights legal framework under the auspices of the Office of the United Nations High Commissioner for Human Rights and the United Nations Treaty bodies, while using already existing mechanisms of evaluation and information on the respect for human rights in a more efficient and synergetic manner and through more specific advice or input.

Admittedly, the opinion issued by the Agency appears rather convincing, as it confirms an improvement in the procedures for assessing fundamental rights at the institutional level in terms of proactivity and pervasiveness.

However, as much as it is innovative, the opinion reveals some critical points that will be highlighted in the course of the discussion. One of these is that the Agency's involvement in the process of monitoring and evaluation fundamental rights, democracy and the rule of law in no way seems to refer to the accession procedures, *i.e.* to that peculiar stage that marks the first States' approach to shared values and consequently requires more incisive actions.

The consequence is clear to see. If the envisaged mechanism were to focus on the *status quo* of candidates to prevent any risk of violation, replacing conditional stigmas, it would undoubtedly ensure a better transition between pre-accession conditionality and the continuation of post-accession reforms.

2. The Weight of Fundamental Rights among Common European Values

The crisis of the rule of law in Europe, which today seems to find no setbacks, has taken on a universal scope, which is reflected in a widespread weakening of the European values and a decrease of benefits for citizens.

[1] Resolution 2015/2254 of the European Parliament, on *recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights*, of 25 October 2016, 2015/2254(INL).

The magnitude of the phenomenon leads to a far from outdated reflection, at the heart of which lies the rule of law and its various components. First of all, the distinction between the formal and the substantive conception of the rule of law[2] no longer seems adequate, since the signifier of the concept of the rule of law, *i.e.* the combination of form and content, the inseparable link between democratic institutions and political morality, social ethics, human rights, undoubtedly gives rise to a one-dimensional conception.

When we talk about the rule of law today, we are talking not only about the formal characteristics of composite legal orders, but we must also talk about all that intrinsic content that allows to conceive the rule of law as a legal principle, of universal value, creator of legal norms, from which, in turn, obligations and rights emanate[3].

The constitutionalisation of the rule of law and its identification as a founding principle of the common European identity also confirms this consideration[4]. The constitutional elevation of this principle, which is the primordial value of the European legal system, has made its potential qualification under various profiles of European policy, in its external action, but also and above all in its internal one: under the former as a requirement for the accession of the States to the Union, under the latter as an essential condition for the maintenance of their membership[5].

Thus, an all-encompassing approach to values and their consubstantial link, not just textual as it emerges from art. 2 TEU, with democracy, the rule of law and fundamental rights, widens the States' obligation to respect them. In fact, a dualistic view of values, which separates the rule of law from other fundamental values, in particular the respect of individual rights, traps this important principle in an idealistic, abstract and unworkable scheme of mere legality[6]. One thinks of liberal constitutional democracies, where the principles of legality, legal certainty, effective judicial protection, effective judicial review, separation of powers and equality before the law risk being empty formulas, far removed from any connection with substantive justice.

On the contrary, the interconnection between the values of which the ultimate beneficiaries are individuals is crucial, because it serves as a catalyst to make the protection of such values the overriding aim of the societies involved in the integration process.

Worthy of consideration are the fundamental freedoms and human rights such as those incorporated in art. 6 TEU and contained in the general principles of European law as well as in the Charter of Fundamental Rights, which are referred to primary sources of EU law. The placement of fundamental rights among the founding elements of the European legal and political constitution is truly important, because, on one hand, it makes respect for individual rights mandatory for States, since it ultimately operates as an institutional limit to governments in adopting acts contrary to these rights.

On the other hand, by expanding into the European space, individual fundamental rights are transformed into rights of the European community, whose constitutional protection is entrusted to a *super partes* judge, *i.e.* a jurisdiction over the States and

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[2] P. CRAIG, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework,* in *Public Law*, 1997, p. 467.

[3] A. VON BOGDANDY, *Founding Principles,* in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Oxford, 2009, p. 11.

[4] L. ROSSI, *La valeur legal des valeurs. Article 2 TEU : relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels*, in *Revuee Trimestrielle de droit europeén*, 2020.

[5] C. HILLION, *The Copenhagen Criteria and Their Progeny*, in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Portland, 2004, p. 1; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, The Hague, 2008.

[6] D. KOCHENOV, *The Missing EU Rule of Law?*, in C. CLOSA, D. KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Oxford, 2016, pp. 290-296.

beyond the States. The extension of the scope of fundamental rights, as values to be protected at supranational level, also facilitates to overcome the constitutional limits that for years have pitted national courts against the Court of Justice.

And beyond, it can be clearly stated that the individual dimension of the protection of fundamental rights is now to be considered obsolete in favor of the European constitutional identity dimension. However, the affirmation of these rights, at a collective level, does not exclude their inherence in the most intimate sphere of the individual. Perhaps it is precisely their identification as rights common to all European citizens that strengthens their individual dimension and, thus, the need for States to take action to protect them in the sphere of their governmental power.

3. The Flawed Supranational Strategy in Protecting the EU's Founding Values

The Treaties have enshrined the constitutional principles of the European Union, such as democracy and the rule of law, and anchored them to fundamental rights in a process of progressive stratification and reactive adaptation.

Thanks to an uninterrupted interpretative operation deferred to the European Court of Justice, to which national courts have not rarely applied through preliminary references, art. 2 TEU has been figured out as the standard norm that gives concrete expression to the membership constraints on the States. As seen, the membership conditions are interconnected on a dogmatic level to be, firstly, principles of the community of values underlying the European constitutional framework and, secondly, inescapable requirements of Union membership. However, the obligation to respect the values in their global meaning has barely been outlined since the Treaty of Amsterdam in the conditional framework of the accession process and this has made the perimeter of the necessary actions at state level equally unclear.

Thus, the challenges faced by the Union especially in the field of the rule of law, democracy and the protection of fundamental rights become decreasingly sustainable and the road to tackle them is full of pitfalls and in some cases impassable.

In the report of the European Parliament of April 2016, the authors Van Ballegooji and Evas have highlighted three critical issues underlying the ineffective compliance by Member states with values and rights[7].

The first would concern the competence of the European Union to protect the rights and values contained in the Treaty; the second would concern the division of monitoring responsibilities between European institutions and Member States; the third and last would concern the inadequacy of the enforcement mechanisms.

As for the first, the aforementioned authors consider that the Treaties attribute a power of intervention to protect the founding values of the Union both to the European Union and to the Member States, while the principles of mutual trust and of loyal cooperation oblige Member States to commit to protecting shared values[8]. In this context, there can be no doubt that there is no guiding formula for the implementation of Treaties provisions, instead, the diversity of state approaches to values receives ample space in place of an unambiguous vision and appreciation of them. It is an objective fact that the considerable axiological gap, which concerns the content and meaning of values and their connection with the triad of principles of democracy, rule of law and fundamental rights,

[7] Directorate for Impact Assessment and European Added Value of the European Parliament, Rapporteur Sophie in T. VELD, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment Accompanying the Legislative Initiative Report*, April 2016.
[8] P. BÁRD *ET AL.*, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, CEPS, 2016.

in fact, significantly affects the unfeasibility of a system that is actually able to protect them.

The Copenhagen dilemma, as past example, perfectly explains the irreconcilability of the institutions' aim during the eastward enlargement to bring the candidates closer to the model of Western democratic systems and the implementation of this model by the States themselves[9]. This irreconcilability, that in the writer's opinion has become ineradicable, has led to the imposition of a strict pre-accession conditional regime not paired with remedies against the States, who, once they joined the Union, have disregarded the conditional rules without reservations. Precisely for this reason, the idea of imposing a predefined legal regime on the candidate States which implies the sudden achievement of democratic stability, the framing of governments in an institutional system inspired by democracy and human rights as early as the fifth enlargement, has proved to be utopian and unattainable. *A fortiori*, and following the accession of the States to the EU, when the dilemma has been brought back to the Court of Justice, its attempt to substantiate values has not been an exercise in pure legal formality, consigning the values the profile of foundations of the European legal order[10].

Nevertheless, the affirmation of the legal value of art. 2 TEU, which undoubtedly marked a step forward in the jurisprudence on the rule of law, has in no way coincided with a constitutional modelling of the European legal system, which, for its part, remains distinct and autonomous with respect to domestic legal systems[11].

Not even the intervention of international bodies seems to have been an effective deterrent. Their response in shaping the values, in the area of human rights, has sent a message of encouragement, since they have allowed to better identify the existence of fundamental rights as foundational values from a European perspective. However, although the compliance with the United Nations and Council of Europe's instruments, and the implementation of European Court of Human Rights' judgments, are mandatory under international law for the European institutions even before for the Member States, the efforts to struggle to commit to fulfilling this obligation is not yet rewarding.

The obstructing condition is unquestionably the absence of a regulatory process at European level to define the type of obligation and its relevance. However, this is a field where spheres of competence risk overlapping, calling into question the autonomy of the EU legal system as well as the undisputed ownership of the Court of Justice's power to interpret European law[12].

All of the above has not facilitated the recovery of a vision of values from the point of view of state systems, insofar as States might claim their sovereignty as opposed to any intervention in constitutional affairs[13].

As regards the monitoring of compliance with the principles enshrined in EU primary law, a plurality of mechanisms, which have even increased recently, are in place in this field. From the tools made available by the Treaties, including the nuclear option referred to in art. 7 TEU, the infringement procedures and within them to precautionary remedies,

[9] D. KOCHENOV, *Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, in *European Integration Online Papers*, 2004, Vol. 8, no. 10, pp. 1-24.
[10] CJEU, Judgment of 20 April 2021, Case C-896/19, *Repubblika*.
[11] CJEU, Judgment of 22 February 2022, Case C-430/21, *RS*; CJEU, Judgment of 21 December 2021, Case C-357/19, *Eurobox Promotion*.
[12] CJEU, Opinion of 18 December 2014, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties*.
[13] D. LEE, *Defining the Rights of Sovereignty*, in *American Journal of International Law*, Vol. 115, 2021.

to traditional standardization processes[14], up to the creation of mechanisms with a preventive protective function[15], the Union seemed genuinely committed to rebuilding the centrality of values and the rights embodied in them.

Nonetheless, this organic arsenal is equipped with soft-impact instruments, nor does it fully involve the Member States, due to the limits of application of these mechanisms outside EU law and likewise due to the insufficient incisiveness of the systematic monitoring of democracy, the rule of law and fundamental rights[16].

The 2020 financial conditionality instrument, which *prima facie* introduces a legal mechanism to sanction Member States that violate the rule of law, also has clear limitations. First of all, this instrument is implemented in the circumscribed hypotheses of damage to the EU budget and excludes its systemic implementation. Therefore, it can hardly be removed from the political dynamics that govern decisions on Member States.[17]

In parallel, consequent to the absence of proper sanctioning apparatus, the current enforcement framework tends to refer to art. 7 TEU, which to date has proven unfeasible. In addition to the high voting thresholds, which constitute, as is well known, the main critical issue, the Court of Justice's countervailing intervention is excluded. This shows, in effect, that the institutions' obstinacy in using non-rewarding means to curb serious and persistent violation of common values does not produce the desired results.

4. The DRF Pact

The system for the protection of democracy, the rule of law and fundamental rights is stratified on different levels. At the top are placed the instruments provided for by the Treaties, which have been strongly stigmatized in the face of the galloping crisis of democracy in some Central and Eastern countries. Indeed, in spite of the blatant threat of the rule of law and fundamental rights by some Member States, effective action on the part of the EU has been virtually impossible.

At the bottom are ranked *soft law* measures, *i.e*. political dialogue aimed essentially at inducing the Member States to abstain from illegal conduct, and the interlocution of the European institutions with the most recalcitrant States[18], which, anyway, have not stopped the inexorable rise of antidemocratic governments and, therefore, their inability to guarantee the integrity, stability and the proper functioning of domestic institutions.

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[14] Regulations 2020/2092/EU and 2021/1060/EU of the European Parliament and of the Council, *on a general regime of conditionality for the protection of the Union budget*, of 16 December 2020, in OJ L 433I del 22 December 2020, pp. 1–10.

[15] *Ex multis*, the "*Copenhagen criteria*" based on arts. 2 and 49, para. 1 TEU, the Cooperation and Verification Mechanism applicable to Bulgaria and Romania, the European Semester, the EU Justice Scoreboard, and the EU Anti- Corruption Report.

[16] EU Commission's Annual Rule of Law Report is a mechanism that merely complement other instruments at EU level and the country-chapters here included do not purport an exhaustive description of the situation at national level. Furthermore, it consists of recommendations for each country based on mere encouragement to support reforms and on a "*soft*" dialogue between the Commission and Member States. Regulation 168/2007/EU of the Council *establishing a European Union Agency for Fundamental Rights*, of 15 February 2007, in OJ L 53 of 22 December 2007.

[17] J. ALBERTI, *Il Regolamento condizionalità è pienamente legittimo e, Ucraina permettendo, certamente attivabile. Prime riflessioni sulle sentenze della Corte di giustizia nelle cause C-156/21 e C-157/21*, in *BlogDUE*, 2022; A. BARAGGIA, M. BONELLI, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in *German Law Journal*, 2022.

[18] Communication 2014/0158 of the European Commission to the European Parliament and to the Council, *A New Framework to strengthen the rule of law*", of 11 March 2014, COM/2014/0158 final; Council of the European Union with the Rule of Law Dialogues since 2020.

However, the debate on the implementation of instruments to protect the rule of law and fundamental rights has not suffered any setbacks, thanks to the European Parliament, which has demonstrated to be oriented towards a combined approach of values, due to its strong pan-European vocation and its proximity to citizens' rights[19].

The MEPs', in fact, proposed a European mechanism on democracy, rule of law and fundamental rights (DRF)[20], which would make up for the absence of a legally binding mechanism to regularly monitor the compliance of the Member States and Union institutions with the common values and fundamentals rights, and which, at the same time, would supplant the Commission's annual rule of law Report and the Council's rule of law dialogue[21], through a graduated approach, both preventative and corrective.

The resolution on an inter-institutional pact in the protection of the aforementioned principles, indeed, inaugurated cooperation between Member States and institutions within the framework of Art. 7 TEU, a cooperation strengthened by an annual cycle on the health of the values, which would primarily involve the national parliaments. Within the pact, a new role would be assigned to the Council of the EU, which, on the basis of a Commission report containing generic assessments on DRF conditions, would adopt individual recommendations to be addressed to the States concerned which, in turn, are called upon to express their opinion on possible proposals or reforms in the area of democracy, the rule of law and fundamental rights. Furthermore, the European Parliament called for independent experts, including the European Agency for Fundamental Rights and the Council of Europe, in the monitoring activities to support an annual European report. Finally, the annual report and the interparliamentary debate would eventually feed into a DRF Policy Cycle within the Union institutions.

This considerable effort, reflecting the importance of ensuring effective protection of fundamental values and Parliament's perseverance despite the Commission's initial objections regarding the inappropriateness of the instrument, culminated in the approval of a further resolution for the establishment of an all-encompassing and inclusive mechanism on 7 October 2020[22].

A rather promising commitment towards strengthening the protection of these values came, indeed, from the European Parliament throughout the 2014-2019 legislature, when the aforementioned institution, with the help of the LIBE Commission, proposed a new methodology of action for filling existing gaps. The objective is to condense the Commission's recommendations on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights in an interinstitutional agreement, which overtakes the exclusive role of the Commission on the verification of risks and violations of fundamental rights in the EU and is based on the proactive involvement of co-legislators in monitoring the situation in Member States.

[19] J. SARGENTINI, A. DIMITROVS, *The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?*, in *Journal of Common Market Studies*, 2016, p. 1085.
[20] Resolution 2015/2254, cit.
[21] The annual rule of law cycle was announced by the European Commission. Communication 2019/343 of the European Commission, *Strengthening the Rule of Law within the Union: A blueprint for action*, of 17 July 2019, COM (2019) 343 final. For the first annual rule of report see: European Commission report launched in September 2020. The Council's annual rule of law dialogue has been established in 2014. See: Press Release 16936/14 of the Council, General Affairs, of 16 December 2014, pp. 20-21. The Finnish Presidency undertook an evaluation of this tool in 2019; Conclusions 14173/19 Presidency of the Council, *on the evaluation of the annual rule of law dialogue*, of 19 November 2019.
[22] Resolution 2020/2072 of the European Parliament, *on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, of 7 October 2020, 2020/2072(INI).

5. The Role of the European Agency for Fundamental Rights in Protecting the Founding Values of the EU

The role of the European Agency for Fundamental Rights (FRA) has increased, in line with its founding function providing assistance and advice on fundamental rights with regard to both the European institutions and the States members, "*when they adopt measures or formulate lines of action within their respective spheres of competence to fully respect fundamental rights*"[23].

Indeed, the Agency's action was invoked by the European Parliament in March 2016, for the delivery of a preliminary opinion for the adoption of the 2016 resolution[24]. The opinion focuses on the identification of an integrated tool of objective fundamental rights indicators, a summary of data and information on each Member State, as well as the results collected through ordinary evaluation mechanisms, capable of measuring compliance with the shared values listed in art. 2 TEU.

Experience in the identification of indicators for measuring respect for fundamental rights has been boasted by FRA Agency since 2011, when it entrusted a symposium of experts to discuss the development and implementation of indicators signaling progress in the European Union in this area. This is the first example of concrete implementation of its mandate in the setting up of a mechanism and collection of criteria to improve data comparability, objectivity and reliability in this field, drawing inspiration from the conceptual and methodological framework on human rights indicators, a framework within which the United Nations High Commissioner for Human Rights and United Treaties bodies operate[25].

In particular, the United Nations High Commissioner developed 40 human indicators under the provisions of the Universal Declaration of Human Rights, such as freedom of opinion and expression, from which it devised a methodology that includes the examination of national legislation, the media code of ethics and the property rights they insist on. In this respect, the system thus architected under international law may enable a better understanding of human rights indicators also in the European legal system, although it does not cover in sufficient detail all the issues that arise at a European level.

In the wake of the previous experiment in the collection of human rights indicators, in 2013 the Irish Presidency of the European Council reported to the FRA the need to test the adaptability of the described mechanism to European values, giving rise to a technical-exploratory process thanks to which Finland and the Netherlands also attempted to identify indicators on specific aspects. Relevant sources of population of the indicators emerged from the data obtained, to the point that the Agency, for at least a decade, exploited their potential in different areas, such as the rights of children, persons with disabilities, and Roma, but also to other contexts, such as the rights of victims of crime or violence against women.

This time, however, the approach used will be rather innovative, first, because it refers to a broader issue on which a generic and large-scale commitment is required, in the sense that it is simultaneously synergistic and efficient and aims at systematically monitoring respect for the values of art. 2 TEU. Second, the requested action fits into the

[23] Regulation 168/2007/EU of the Council, *establishing the Union Agency for Fundamental Rights* (FRA), of 15 February 2007, in OJ L 53, of 22 February 2007.

[24] Opinion 2/2016 of the European Union Agency for Fundamental Rights, *on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information*, of 8 April 2016,

[25] FRA Symposium, *Using indicators to measure fundamental rights in the EU: challenges and solutions 2nd Annual FRA Symposium Vienna*, May 2011.

framework of strengthening the sanctions procedure governed by art. 7 TEU, deriving from the comparison of reliable and homogeneous information a system that ensures equal treatment among Member States. The indicators would contribute to the improvement of benchmarking on the health of values in the Member States by pointing out the main critical issues for each thematic area, and therefore, the potential areas of intervention.

However, the creation of an integrated information system on fundamental rights is not an end in itself; rather, it would generate regular reports targeted towards summarizing the various fundamental rights reports submitted by the European Parliament, the Council of the EU and the European Commission, and strengthening the annual dialogue on the rule of law in the Council of EU, in addition to the numerous debates within the European Commission on the situation in the EU Member States.

A series of key elements emerged within the opinion issued by the Agency. First, human rights rise to superordinate sources for the values referred to in art. 2 TEU. Second, the indicators can be used effectively to measure respect for the aforementioned values, to the extent that they capture the commitment of the Member States to human rights and their effective enjoyment by the community. Third, data and information resulting from international and European monitoring mechanisms can constitute credible sources to populate indicators and provide the necessary additional context. Finally, the use of additional tools can make existing data more operational by creating support for the various EU processes concerned with fundamentals rights and EU values more broadly.

Given these conditions, it will be a question of understanding how to bring the system's capabilities to efficiency.

6. The Unexpected Development of the Role of the European Union Agency for Fundamental Rights

As already anticipated in the previous paragraph, in the 2020 European Parliament initiative, which was followed by several other actions[26], the EU Agency for Fundamental Rights was to be part of a permanent inter-institutional working group on EU values and its role would be expressed in a wide-ranging preventive monitoring and *ex post* control cycle.

The aim of the inter-institutional agreement foreseen in the resolution was to allow experts to contribute to the collection of homogeneous information among Member States on art. 2 and to transmit the results in the Commission's annual rule of law report. The results of the activity, which, as suggested by the European Parliament, would be triangularly carried out by the European Commission, the EP and the Council, would be aimed at activating the political procedure under art. 7 TEU, infringement procedures, as well as the rule of law conditionality Regulation.

However, albeit with a late response, on 3 March 2021 the European Commission committed to taking into due consideration the inter-institutional cooperation but only for the future, in fact, rejecting the entrustment to external bodies of the verification of compliance with EU values by Member States and delegating itself entirely with regard to the rule of law report. It then underlined the breadth of the sectors taken into consideration in the current rule of law assessment which is being monitored.

[26] Resolution 2015/2254 of the European Parliament of 25 October 2016; Resolution 2018/2886 of the European Parliament of 14 November 2018; Resolution 2020/2072 of the European Parliament of 7 October 2020; Resolution 2021/2025 of the European Parliament of 24 June 2021 and Resolution 2022/2535 of the European Parliament of 10 March 2022.

With this decision of the Commission, therefore, the DRF Pact has foundered, depriving the FRA of that central importance that the European Parliament has recognized in its resolution and that would have allowed it, by virtue of its characteristics of independence and apolitical nature, to play a leading role in the preventive phase of evaluation and monitoring of compliance with the values in national legal systems and, as originally envisaged, providing the essential input to the initiation of a systemic infringement or the procedures provided for by art. 7 of the TEU, not only in the case of a serious and persistent infringement, but also in cases where there is a clear risk of a serious infringement of the values referred to in art. 2 TEU.

In particular, the advantage of involving a group of experts acting under conditions of political autonomy has been declined by the European Commissioners, who have contested its institutional illegitimacy pursuant to art. 344 TFEU and art. 4, para. 3 TEU.

As regards the first, the regulation establishing the Agency has already excluded the extension of the powers expressly attributed to it, although the Council, at the time of adopting the regulation, granted it a *rendez-vous* similar to the clause of implicit powers pursuant to art. 352 TFEU, on the basis of which to allow the revision of its mandate. Furthermore, according to the Commission, an extension of the powers of the Agency charged with carrying out certain functions in the field of human rights is not comparable to the role attributed by the Treaties to the Court of Justice of the Union in the protection of fundamental rights.

As regards art. 4, para. 3 TEU, as is known, it establishes the principle of sincere cooperation by virtue of which, again according to the European Commission, the Agency may not adopt acts that could compromise the achievement of the EU purposes.

However, the Commission's intention is not to exclude any intervention by the Agency for fundamental rights, but rather to attribute to it an instrumental role with respect to the mechanisms already foreseen at supranational level and especially within the framework of the instruments already active in the EU legal system, *ex pluribus* the 2019 monitoring cycle, to the extent of its intervention in the information stage[27].

Furthermore, even under Regulation (EU) 2020/2092 on the conditionality regime[28], the intervention of independent agencies external to the institutions is not envisaged, thus reserving the main actions for the protection of values to the institutional circuit, without, however, renouncing any coordination with a broader platform of bodies participating in the verification process.

Despite the reluctance to improve the Agency's functions, the latter has shown a high capacity to produce qualitatively relevant results and an important adaptation to requests for opinions from European institutions since 2007. Given the inadequacy, however ascertained, of the regulatory framework under which the Agency operates, on 7 July 2021 the Council released a note in which it communicated the adoption of a more general approach to a new legislation in the sense of strengthening the Agency's mandate and improving its functioning through the streamlining of procedures[29].

Thus, the European legislator subsequently adopted on 5 April 2022 the Regulation (EU) 2022/555, amending the founding Regulation (EC) 168/2007. As has emerged, the aim of the amendments is to align the legal basis on which the Agency's mandate is based

[27] COM(2019) 343 final, cit.

[28] Proposal for a regulation of the European Parliament and of the Council of the European Commission, *on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*, of 2 May 2018, COM 324/2018, art. 5, para. 2.

[29] Press release of the Council, *Fundamental rights: Council approves its general approach on the Fundamental Rights Agency*, of 7 June 2021.

with the Treaty of Lisbon, since its founding legal framework dates back to before the entry into force of the Treaty of Lisbon.

The main innovations of the amendment consisted, firstly, in conferring on it the initiative activity in the field of judicial cooperation in criminal matters; secondly, in an extension of the competences which, under the 2007 Regulation, were circumscribed by the multiannual framework established by the Council to define the Agency's work program[30]. Furthermore, the amendment introduced some technical changes in line with the principles common to EU decentralized agencies.

On close examination, the amendment in question aims at a requalification of the European Agency for Fundamental Rights in the process of verifying the state of health of common values and human rights throughout the European territory and an increase in their level of protection. The presence of an impartial and politically independent body, in fact, will lead to overcoming the politicization of the procedures for monitoring compliance with fundamental rights and will allow the examination of democracy and the rule of law in the Member States according to objective parameters.

There is no doubt that a balanced and fair assessment of the level of protection of democracy and the rule of law in national legal systems and the commitment of Member States to promote and respect them is an extremely complex operation.

The abstractness of the two standards makes it difficult to elevate them to specific fundamental rights, not allowing them to be evaluated according to general criteria and consequently such evaluation, carried out by the same human rights monitoring bodies, cannot simplistically be based on human rights indicators.

Similarly, the content of the value of democracy can hardly be evaluated on the basis of the current catalogues of fundamental rights, already experimented by the Agency itself.

Nevertheless, the assignment of a more visible role to the FRA in the monitoring process would have a number of advantages, including eliminating the risk of politicization and selectivity in the use of art. 7 TEU and allowing the various institutions involved to exercise their political role more clearly in order to assess the opportunity to activate art. 7 TEU. For its part, the Agency, having an independent and non-political nature, would be instrumental in tracking state conduct that could threaten the values listed in art. 2 TEU, making, at the same time, the preventive phase provided for by art. 7 TEU truly functional in outlining situations of systemic threat.

7. The Role of the European Union Agency for Fundamental Rights in the Area of Freedom, Security and Justice

Until the amendment to the Regulation establishing the Agency for fundamental rights was approved by the Council[31], it had not been possible to find an agreement on the extension to the entity of competence in the field of fundamental rights and of judicial cooperation in criminal matters, excluding an alignment of the latter with the introduction of the third pillar-previously covered by Title VI of the Treaty on European Union- in the Community competence established by the Treaty of Lisbon.

Under the former Regulation (EC) 168/2007 and in accordance with its art. 5, para. 3, the Agency formally dealt with the field of judicial cooperation in criminal matters, but

[30] O. DE SCHUTTE, *Study Paper for the European Parliament, Strengthening the Fundamental Rights Agency,The Revision of the Fundamental Rights Agency Regulation*, May 2020.

[31] Regulation (EU) 2022/555 of the Council, *amending Regulation 168/2007/EU establishing a European Union Agency for Fundamental Rights*, of 5 April 2022, in OJ L 108, 7 April 2022, recital 3.

in the shape of opinions and exclusively upon request by the institutions during the legislative process, as well as by the Member States when they intended to avail themselves in the implementation of legislative acts relating to sensitive aspects concerning fundamental rights.

Indeed, the legal discussion around the extension of the Agency's mandate, with a view to making it versatile and adaptable to the changing global human rights framework, focused on the amendment of the founding regulation of the Agency or, alternatively, on the abolition of the multiannual framework approved by the Council and regulating the FRA's areas of competence, in accordance with the 2012 common approach on EU decentralized agencies.

The dynamic interpretation of the founding regulation endorsed by the European Commission, after Lisbon and despite numerous political obstacles, had, however, allowed the expansion of those assistance functions already within the thematic competence of the Agency but, this time, in all sectors of competence of the Union[32].

The above-mentioned amendment, then, confirmed the importance of the Agency's activities in the area of freedom, security and justice, with particular regard to issues relating to fundamental rights at the external borders *pursuant to* art. 77 TFEU. Furthermore, as feared by the EP[33], the modified legislation, by its art. 4, lett. a), also envisaged the possibility of cooperation between the Agency and third countries, not only on the basis of Association and Stabilization agreements, but also on the basis of the rules of the European Economic Area and the European Free Trade Association, including the United Kingdom.

However, the deepening of the Agency's role in the field of human rights protection besides the increasing relations with third States do not seem to coincide with the orientation of EU jurisprudence on this issue.

In a recent decision, the Court of Justice of the European Union has established that the restrictions on the surrender of a person subject to criminal prosecution or the execution of a sentence in an EU State in the event of serious and consistent evidence of a violation of human rights in line with the case law on the European Arrest Warrant do not apply to the Trade and Cooperation Agreement concluded between the United Kingdom, Northern Ireland, and the European Union in 2020 (TCA).[34]

The background to the Court of Justice's ruling on the issue of arrest warrants applicable to the United Kingdom is the issuing of several arrest warrants against an individual accused of terrorist offences on Irish territory. The said individual challenged the arrest decision issued by the Irish High Court for violation of the principle of legality under art. 7 ECHR and art. 49, para. 1 of the EU Charter of Fundamental Rights, on the grounds that the new legislation on surrender in the United Kingdom imposes a more severe penalty than that envisaged at the time of the commission of the offence.

The referring court, on the one hand, considered that a violation of the contested articles and the principles contained therein could not be inferred from the failure to demonstrate systemic and generalized deficiencies in the United Kingdom.

On the other hand, addressing the Court of Justice, it also asked whether its thesis could be corroborated in the adverse hypothesis of a violation of the principle of legality

[32] Commission statement annexed to the minutes of the Council meeting of 7 December 2017, reproduced as Annex IV to the Commission Staff Working Document. *Analysis of the recommendations to the Commission following the second external evaluation of the European Union Agency for Fundamental Rights*, of 26 July 2019, SWD (2019) 313 final.

[33] Resolution 2020/0112R of the European Parliament, *on the proposal for a Council regulation amending Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights (COM (2020)0225)*, of 20 May 2021.

[34] CJEU, Judgment of 29 July 2024, Case C-202/24, *Alchaster*.

and whether the executing State is competent to rule on an argument concerning the incompatibility with art. 49, para. 1 of the Charter of provisions on penalties which may be applied in the issuing State, where the latter is not required to respect the Charter and where the Court of Justice has established high standards as regards taking into account the risk of violation of fundamental rights in the issuing Member State.

In this context, according to the referring court, the applicable Irish legislation falls within the framework of the 2002 Decision on the Arrest Warrant[35], and that the principles set out therein would apply to the United Kingdom given that the offences with which the accused is charged took place prior to the statutory amendment.

With the pronouncement of its judgment the Court of Justice of the EU has established that the Framework Decision on the European Arrest Warrant does not apply to the case in question and that its execution is not affected by the exceptions provided for by the European legislation. However, the cooperating parties under the TCA – the United Kingdom, the EU and the Member States – have committed themselves to respecting the fundamental values enshrined in the Human Rights Treaties, including the Charter of Fundamental Rights of the EU[36], the provisions of which cannot be subject to regression due to the inapplicability of the Charter to the United Kingdom.

If, therefore, the real risk of a violation of a right contained in the Charter is sufficient to allow the refusal to surrender an individual prosecuted in the United Kingdom, at the same time the *Aranyosi* test, which the Court of Justice has confirmed as the risk assessment mechanism to prioritize also in cases on judicial independence[37], cannot be used in the cases falling under the TCA.

In this regard, the Union judges have recalled that mutual trust and mutual recognition which form the basis of judicial cooperation in criminal matters create a presumption of conformity by the Member States with European Union law and its founding values, other than exceptional circumstances[38]. However, this trust is limited to internal borders, although it cannot be excluded that an international agreement may also establish a high level of trust between Member States and third countries, as is the case with Norway, which has joined the Schengen *acquis* and the Common European Asylum System[39]. This condition, therefore, cannot be extended to the United Kingdom or to all third countries[40].

In the Court's opinion, the executing judicial authority could invoke the risk of a serious violation of human rights only after an appropriate examination which, by reducing the *Aranyosi test* to a single test, takes into account the United Kingdom's respect for human rights and fundamental freedoms, "*at the same time, for the rules and practices in force in general in that country and, in the absence of application of the principles of mutual trust and recognition, for the specific features of the individual situation of the person concerned*"[41], not revealing any presumption of mutual trust and, therefore, of respect for fundamental rights.

Conversely, the judge must not only decide only on the basis of factual elements sufficient to reconstruct the risk of a serious violation of the rights of the person

[35] Framework Decision 2002/584/JHA of the Council, *on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision*, of 13 June 2002, in OJ L 190 of 18 July 2002.
[36] CJEU, *Alchaster*, cit., para. 49.
[37] CJEU, Judgment of 18 April 2023, Case C-699/21, *EDL*; CJEU, Judgment of 25 July 2018, Case, C-216/18 PPU, *LM*; CJEU, Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.
[38] CJEU, *Alchaster*, cit., paras. 57-63.
[39] *Id*., paras. 66-69.
[40] *Id*., para. 69.
[41] *Id*., para 82.

surrendered and, therefore, examine the individual situation of that person on the basis of objective, reliable, precise and appropriately updated elements[42], but he cannot avoid the necessary dialogue with the issuing authority, from which he can obtain additional guarantees regarding the execution of the surrender[43].

In this case, according to the Court of Justice, the real risk of a serious violation of the principle of legality pursuant to art. 49, para. 1 of the Charter of Fundamental Rights contested by the appellant could be found exclusively in the case of modification of the scope of the penalty imposed on the day of the commission of the crime, resulting in an increase in the penalty imposed compared to that initially foreseen[44]. The fulfillment of this condition is, therefore, to be excluded in the case in question.

The consequences of this pronouncement are multiple: some of an internal nature, others of an external nature.

1. First, the lowering of the cooperation threshold between the EU and the UK.

The latter, in the Court's view, is exempt, together with its national courts, from the presumption of compliance with European obligations, provided that human rights must receive equivalent protection. The simplification of the risk assessment test does not imply a reduction in the level of commitment of the United Kingdom in terms of human rights, giving them a capital importance since their protection is a common value that cannot be derogated.

2. The outcome of the ruling will undoubtedly have an impact on relations with other States which, instead, are part of the Schengen area in whose legal systems extradition agreements of the same specific weight as the TCA are in force.

3. Since judicial cooperation covers those areas where fundamental rights are at great risk, there is no doubt that a stronger role for the FRA could encourage trust in the EU and its justice system among EU citizens but also promote the EU's status externally.[45]

8. Conclusions

Several relevant elements have emerged from the framework previously outlined.

There is no doubt that the FRA's activity, as requested by the EP and planned by the commissioned experts, reveals a more proactive and above all more detailed strategy, which aims to more industriously and analytically deal with problems related to respect for common values, extending to them a fully reserved attention in line with its mandate on fundamental rights.

In general, the proposal envisages a series of future actions such as: *a*) the simultaneous sharing of data collected by thematic areas for Member States by European and international monitoring and evaluation bodies; *b*) the confluence of information in the EU political processes (such as the European Semester, the Justice Scoreboard, the European Commission's annual report on the implementation of the Charter, the European Parliament resolution on the situation of fundamental rights and, through a interinstitutional agreement, the transmission to all European actors of the system reporting the results of the analyses on the status of fundamental rights); *c*) the promotion of an active approach based on annual summary reports which could contribute to the

[42] CJEU, Judgment of 19 September 2018, Case C-327/18 PPU, *RO*; CJEU, Judgment of 6 September 2016, Case C-182/15, *Petruhhin*, para. 59.
[43] CJEU, *Alchaster*, cit., para. 91.
[44] *Id.*, para. 97.
[45] Opinion of the Management Board of the EU Agency for Fundamental Rights, *on a new Multi-annual Framework* (2018–2022) *for the agency*, of 12 February 2016.

dialogue between institutions and Member States, as well as the deepening of the European Parliament's annual report, the Council's annual debate on the rule of law and the European Commission's Rule of Law mechanism, better structured on the basis of a more objective overview; *d*) the participation of civil society to make the integrated system more democratic; *e*) the development of a complex process of identifying indicators on the most relevant critical issues with regard to fundamental rights, which would allow the identification of issues that need to be covered by a more in-depth contextual assessment to determine a real risk to the values of art. 2 TEU.

However, the limitations that emerged both from Parliament's resolution and from the proposal put forward by the FRA give rise to a variety of considerations.

The integrated tool for evaluating common values is certainly a mechanism that operates *ex ante*, serving to prevent persistent violations, but the issue of possible actions to deter manifest violations remains uncovered. It is a temporally indefinite process and is likewise overly complex, incurring the risk of congesting rather than streamlining the evaluation procedures, while simultaneously evading the problem that recalcitrant States may not cooperate. On the contrary, concrete operationalization should be a crucial aspect for systematic effectiveness.

Furthermore, although the use of international bodies' human rights guidelines provides greater guarantees in identifying the thematic areas being assessed, it can at the same time be misleading. In this regard, the interest in entrusting States with the protection of human rights seems to prevail, bypassing the fact that a State has the freedom to decide whether or not to be bound to certain standards set by the international Treaties.

And not only. The monitoring mechanisms established by international organizations cannot and should not replace those established by the EU. First, not all of the aforementioned bodies currently produce data and information that can be used to populate the indicators. Indeed, they are concerned with carrying out assessments on the States with respect to the prescribed standards, not necessarily being obliged to compare them. Second, if it is true that art. 2 TEU evokes values inherent in the States' institutional structure and violations of those values represent structural vulnerabilities which affect internal political and legal context, it is also true that a focus on individual anomalies does not allow for an objective and overall picture on which to intervene.

The perspective offered by international law is in no way comparable to that of an integrated organization such as the EU currently is. In fact, it is not clear how the indicators developed by international bodies could constitute pilot standards for the prevention of systemic violations within the European Union. Nor could such a function be attributed to European monitoring mechanisms, such as the common framework, Eurostat, the European Semester, the framework on justice and the various monitoring mechanisms already explored, which have, on several occasions, been revealed to be ineffective.

Nor, finally, can the use of monitoring performed at national level according to the Paris principles compensate for the potential impasse of a supranational data collection process. The reference cannot be *erga omnes* given the critical situation in some States. Similarly, the indicators offered by civil society cannot structurally intervene.

Last but not least, the parliamentary strategy, which has legitimated FRA to already take action through the intervention of stakeholders and key experts, would cover the Union's future policy in the field of human rights, while it is about understanding of how

the strengthening of human rights instruments can just as imperatively involve the new candidates[46].

Yet, the latter could be more exposed to the fallacy of existing mechanisms for the protection of democracy and human rights, as much as the creation of a continuous and comprehensive assessment of compliance with the values of art. 2 TEU would not be sufficient to generate decisive institutional efficiency in providing for respect for the rule of law. The context in which a method for the effective protection of human rights could be identified is certainly different from that in which EU Members are already largely accommodated, such that domestic legislation is already variously adapted to the community *acquis*, while the constitutional challenges to the enlargement of newcomers are still being discussed.

ABSTRACT

The crisis of the rule of law and of the common values in Europe has raised and continues to raise questions about the European institutions' ability to intervene concretely to curb its unstoppable progress. However, the supranational authorities do not play an exclusive role in reacting to anti-democratic drifts in Europe within the European legal order. On the contrary, they might cooperate with the European Union Agency for Fundamental Rights, which, pursuant to the founding Regulation 168/2007, has been assigned to advisory and assistance functions on fundamental rights in the implementation of EU law. Despite the reluctance of the European Commission to hand over more extensive tasks to the Agency, this latter has indeed demonstrated that it actively offers a significant contribution to the protection of fundamental rights both in the present and future framework in every sector and field of action, while also assisting the Member States so that they do not engage in regressive conducts.

KEYWORDS

Backsliding, EDR Pact, EU Agency for Fundamental Rights, EU Shared Values' Protection Mechanisms, Rule of Law.

SUL RUOLO DELL'AGENZIA EUROPEA PER I DIRITTI FONDAMENTALI NELLA MISURAZIONE DELLA CONFORMITÀ DEGLI INDICATORI DEI DIRITTI FONDAMENTALI CON I VALORI CONDIVISI *EX* ART. 2 TUE

ABSTRACT

La crisi dello Stato di diritto e dei valori comuni in Europa ha sollevato e continua a sollevare interrogativi sulla capacità delle istituzioni europee di intervenire concretamente per frenarne l'inarrestabile progresso. Tuttavia, le autorità sovranazionali non svolgono un ruolo esclusivo nel reagire alle derive antidemocratiche in Europa all'interno dell'ordinamento giuridico europeo. Al contrario, potrebbero cooperare con l'Agenzia dell'Unione europea per i diritti fondamentali, che, ai sensi del Regolamento istitutivo 168/2007, è stata investita di funzioni consultive e di assistenza in materia di diritti fondamentali nell'attuazione del diritto dell'Unione. Nonostante la riluttanza della Commissione europea ad affidare compiti più ampi all'Agenzia, quest'ultima ha dimostrato di offrire attivamente un contributo significativo alla tutela

[46] The Commission's Rule of Law Report of 24 July 2024 "has opened the door" to the dialogue with Albania, Montenegro, North Macedonia and Serbia.

dei diritti fondamentali sia nel quadro presente che in quello futuro in ogni settore e campo d'azione, aiutando al contempo gli Stati membri affinché non adottino comportamenti regressivi.

KEYWORDS
Agenzia dell'UE per i Diritti Fondamentali, Meccanismi di Protezione dei Valori Condivisi dell'UE, Patto EDR, Regressione, Stato di Diritto.