

The Fundamental Rights Agency (FRA) and the EU's Digital Regulation: Giving Shape to Digital Constitutionalism in the Times of the Platformised Public Sphere and Autonomous AI*

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1. Introduction

In the contemporary digital environment, shaped by the rivalry among the “digital empires” identified by Anu Bradford¹ — the United States, China, and the European Union —, the European Union has distinguished itself by regulating new technologies through an approach based on fundamental rights, elaborating a model of digital constitutionalism². Rather than treating digital technologies as merely economic instruments, the Union has framed them as objects of constitutional concern, requiring governance consistent with the values enshrined in the EU Charter of Fundamental Rights. This “constitutionalisation” of the digital environment has been shaped by a plurality of institutional actors, most prominently the Court of Justice

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¹ A. Bradford, *Digital Empires: The Global Battle to Regulate Technology*, New York, 2023.

² O. Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?*, Oxford, 2021; E. Celeste, *Digital constitutionalism: the role of internet bills of rights*, London, 2022; G. De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, Cambridge, 2022.

of the European Union, the EU legislator, and specialised expert bodies. While courts often find themselves on the frontline of fundamental rights protection in the field of digital regulation³, the legislator's role is equally decisive, given the need for positive regulation capable of structuring the exercise and limits of those rights in the digital environment: through legislative intervention, digital constitutionalism acquires its concrete normative form⁴. In the context of the European Union's regulation of the digital sphere, this legislative activity is informed and influenced by the reports, opinions, and empirical research produced by specialised expert bodies. Among these, the European Union Agency for Fundamental Rights (FRA) occupies a prominent, yet underexplored position. Although lacking formal regulatory or adjudicatory powers, the Agency has significantly contributed to defining the framework of fundamental rights within which EU digital regulation evolves. This raises important questions regarding the role of epistemic and advisory bodies in the emergence of European digital constitutionalism.

Building on the existing literature on the FRA and its impact on fundamental rights in the EU⁵, this article examines whether the FRA has influenced the development of EU digital constitutionalism and shaped EU digital regulatory policies. In particular, it will explore which conception of fundamental rights has informed the FRA's contribution to shaping the EU's digital constitutionalism and to what extent this has influenced public policies in the field of EU digital regulation. In doing so, the article will also indirectly engage with the well-known debate concerning the potential overlap between the FRA and the institutions of the Council of Europe (CoE), an issue that was particularly salient at the time of the Agency's establishment⁶.

The FRA⁷ is an independent EU body established to provide EU institutions and Member States with assistance and expertise on fundamental rights, at the same

³ O. Pollicino, *Judicial Protection of Fundamental Rights on the Internet*, cit.

⁴ *Ibid.*; G. De Gregorio, *Digital Constitutionalism in Europe*, cit.

⁵ L. Violini, *The Fundamental Rights Agency of the EU: A step on the way toward an integrated EU policy in the domain of fundamental rights*, in L. Violini - A. Baraggia (eds.) *The Fragmented Landscape of Fundamental Rights Protection in Europe*, London, 2018; R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019; M. Moschovidis, *The Fundamental Right Agency's Influence in Reforming EU Roma Policy*, in *International Journal of Roma Studies*, 4, 2022.

⁶ M. Kolb, *The Fundamental Rights Agency*, in *Ibid.*, *The European Union and the Council of Europe*, London, 2013; T. Termacic, *Hand in Hand for a Better Protection of Human Rights in Europe*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019; O. De Schutter, *The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, in *Columbia Journal of European Law*, 14, 2008.

⁷ G.N. Toggenburg, *The European Union Fundamental Rights Agency*, in G. Oberleitner (ed.), *International Human Rights Institutions, Tribunals and Courts*, New York, 2018; J. Grimheden - M. Kjaerum - G. Toggenburg, *'Administering human rights': the experience of the EU's Fundamental Rights Agency*, in C. Harlow - P. Leino - G. Della Cananea (eds.) *Research Handbook on EU Administrative Law*, London, 2017; B. Bercusson, *The contribution of the EU Fundamental Rights Agency to the Realization of Workers' Rights*, in O.

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time contributing to more informed policymaking and the protection of fundamental rights across the Union. Although the Court of Justice of the European Union remains the ultimate authoritative interpreter of the Charter, the FRA nonetheless plays a central role in shaping EU policies from a fundamental rights perspective⁸, by collecting, analysing and publishing reliable and comparable data and assessments on the state of fundamental rights within the EU. The Agency formulates remarks and opinions on issues concerning specific rights, develops methodologies and standards to enhance the quality of the protection of fundamental rights, and promotes dialogue with civil society organisations to raise awareness of rights and freedoms. Although it does not enforce rights or handle individual complaints, the FRA also provides independent advice on fundamental rights to EU institutions, as well as contributing to the general understanding and monitoring of EU fundamental rights. Its work therefore supports not only the “monitoring” of the EU Charter’s implementation, but also the evidence-based drafting of legislation and policy by informing the EU legislator and other public authorities about challenges and trends concerning fundamental rights. Furthermore, the FRA frequently intervenes at the pre-legislative and monitoring stages of EU action, providing its “interpretation” of fundamental rights derived from its analysis of the case law of the Court of Justice and of the European Court of Human Rights (ECtHR).

This role appears to mirror that of National Human Rights Institutions (NHRIs)⁹, which contribute to the protection of fundamental rights, even though the primary responsibility for their interpretation and enforcement remains with the courts. Although the role of the FRA is sometimes described as limited to the analysis and systematisation of case law and of the application of fundamental rights by EU institutions and under the European Convention on Human Rights (ECHR), such work of systematisation inevitably entails a degree of interpretation. By adopting specific interpretations of rights and issuing opinions addressed to the EU legislator, the FRA ultimately contributes to shaping and consolidating particular frameworks and understandings of fundamental rights.

In this perspective, although Article 52 of the EU Charter¹⁰ provides for a coherent interpretation of EU fundamental rights in light of the ECHR, certain divergences can nevertheless be identified in EU practice. On several matters, the EU Charter is becoming increasingly autonomous from the ECHR, often establishing only

De Schutter - P. Alston (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, Oxford, 2005; M. Kolb, *The European Union and the Council of Europe*, London, 2013.

⁸ R. Byrne – H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy*, cit.

⁹ K.R. Lyster, *National human rights institutions*, in G. Oberleitner (ed.), *International human rights institutions, tribunals and courts*, London, 2018.

¹⁰ Cf. O. Scarcello, *Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?*, in *European Constitutional Law Review*, 16, 2020.

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minimum standards for the protection of human rights across Europe¹¹. Against this background, the analytical and systematizing work carried out by the FRA plays an even more important role in clarifying the scope of application of EU fundamental rights in the digital environment. In light of this, it appears particularly useful to investigate the role of the FRA in systematizing a *corpus iuris* of principles characterizing the concept of freedom of expression and rule of law, and to examine the impact of this work on EU policies in digital regulation. The interpretative nature of the FRA's contribution to the EU's understanding of fundamental rights warrants particular attention, given its potential to significantly influence legislation and practices relating to fundamental rights across the Union, as well as its role in shaping EU constitutionalism.

The methodological approach adopted in the paper is primarily that of comparative public law. The analysis will focus on examining the conception (and limitations) of fundamental rights promoted by the FRA, also in relation to that advanced by the Council of Europe (CoE). With regard to the analysis of the FRA's policy impact, this study does not rely on interviews but rather on a textual examination of the work of EU institutions, thus embracing an institutionalist approach¹². While we are fully aware of the informal influence that the FRA may exercise through consultations, the article concentrates on what emerges from institutional documents and verbatim records, in order to develop reflections on the role of the FRA in shaping that limited segment of public discourse which may be referred to as the “institutional public sphere”—namely, the public sphere of the EU institutions themselves. As far as the FRA's direct impact on EU policies is concerned, this investigation also acknowledges the limits stemming from the Agency's NHRI-like characteristics, particularly in light of its originally restricted mandate under the Multi-Annual Framework (MAF)¹³ and its origin as an institution primarily focused on anti-discrimination law¹⁴.

The article is structured into four sections. Following this Introduction, Section 2 analyses the concept of freedom of expression and information promoted by the

¹¹ This phenomenon could likely be traced back to a form of asymmetry in the protection of fundamental rights. This requires a distinction between the situations in which the core of a fundamental right is expanded and those in which, conversely, it is restricted or affected: on this topic, see M. Monti, *Subnational Constitutions between Asymmetry in Fundamental Rights Protection and the Principle of Nondiscrimination: A Comparison between Belgium (Charter for Flanders) and Switzerland*, in *Perspectives on Federalism*, 11, 1, 2019.

¹² This institutionalist approach has first been proposed by M. Dawson, *Fundamental Rights in European Union Policy-Making: The Effects and Advantages of Institutional Diversity*, in *Human Rights Law Review*, 20, 2020.

¹³ J. Wouters - M. Ovádek, *Exploring the Political Role of FRA. Mandate, Resources and Opportunities*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019.

¹⁴ O. De Schutter, *The Genesis of the EU Fundamental Rights Agency*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019.

FRA and the role of the FRA in shaping EU digital policies in this field, looking at the “digital constitutionalism 1.0”. Section 3 investigates the analysis conducted by the FRA regarding AI and the ways proposed to protect fundamental rights in this context, looking at the “digital constitutionalism 2.0”. Finally, Section 4 offers concluding remarks and reflections on the FRA’s role in promoting fundamental rights in EU digital regulation.

2. *“Digital Constitutionalism 1.0”: the FRA, freedom of expression and the platformised public sphere*

The choice of this section’s scope intends to reflect one of the main current regulatory impulses of the European Union in the field of fundamental rights¹⁵: the regulation of free speech and public discourse with a particular focus on its online form. This is one of the areas where the Union’s current action is both stronger and more structured¹⁶, and the FRA’s involvement has been particularly relevant. This section examines, first, the specific understanding of freedom of expression advanced by the FRA and, second, the manner in which the Agency has shaped and influenced EU policies and institutional public discourse. In doing so, this section adds a new dimension to the literature on the EU’s governance of freedom of expression, highlighting the emerging role of the FRA in this field.

In the first part of the analysis, particular attention will be dedicated to content-based limitations on freedom of expression as well as regulatory modalities that constrain or protect specific forms of expression, such as political speech during electoral campaigns or media freedom. To conduct this analysis and to fully appreciate the specificity of the European paradigm, it is useful to highlight certain features that distinguish it from the U.S. model, which is often used by the literature as a comparative benchmark. The predominance of the First Amendment in the United States, together with the ongoing transatlantic conflicts over the regulation of online free speech, makes the U.S.–EU comparison particularly relevant¹⁷.

¹⁵ On the centripetal force that ‘attracts’ fundamental rights discourse within the European project, contrasted with a centrifugal force that seeks to ‘push it away’, see E. Spaventa, *Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, in M. Dougan - S. Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford, 2009.

¹⁶ C. Caruso, *Towards the Institutions of Freedom: The European Public Discourse in the Digital Era*, in *German Law Journal*, 1, 2024; M. Monti, *Towards a Federal-Type Regulation of Online Public Discourse by the EU?*, in *European Public Law*, 30, 2024; J. Bayer, *Legislative Instruments Protecting Freedom of Expression in Europe - an Overview*, in *ERA Forum*, 2025.

¹⁷ G. Pitruzzella - O. Pollicino, *Disinformation and Hate Speech: A European Constitutional Perspective*, Milan, 2020.

The regulation of public discourse can be defined as the rules governing those forms of expression which form part of the democratic debate¹⁸. Within the EU, this regulation represents one of the most compelling regulatory developments of recent years, marking a renewed intervention by the Union in the governance of freedom of expression, especially in the digital sphere. Such regulatory activity is innovative from a fundamental rights perspective, since the regulation of public discourse and of freedom of expression and information has long been considered an exclusive competence of the Member States¹⁹. Notable examples of this new trend include: “Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online”, “Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act—DSA)”, “Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising”, and “Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act—EMFA)”.

2.1. The FRA's Conception of Freedom of Expression and Information Compared to that of the Council of Europe

Unlike the field of AI and digital constitutionalism 2.0, freedom of expression constitutes an area characterised by an extensive and well-established body of case law of the European Court of Human Rights, complemented by numerous standard-setting and interpretive instruments adopted by Council of Europe institutions. By examining the concept of freedom of expression and information under Article 11 of the EU Charter of Fundamental Rights as interpreted and articulated by the FRA²⁰, it is possible to identify a trend of interpretive choices and permissible limitations that largely align the Agency's understanding of free speech with the approach developed within the CoE²¹. Nonetheless, it is worth examining this trend in the FRA's policy

¹⁸ R. C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, in *Harvard Law Review*, 103, 1990.

¹⁹ This does not mean that there were no EU measures impacting freedom of expression, particularly in the field of media regulation, see C. Holtz-Bacha, *Media Regulation of the European Union*, in J. Krone, - T. Pellegrini (eds.), *Handbook of Media and Communication Economics*, Wiesbaden, 2024.

²⁰ G.N. Toggenburg, *The Implementation of the Charter of Fundamental Rights by the EU Member States (as Reflected in the Work of the EU Fundamental Rights Agency)*, in S. Peers - T. Hervey - J. Kenner - A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 2021.

²¹ J. Bayer, *Legislative Instruments Protecting Freedom of Expression in Europe*, cit.; D. Erdos, *The Development of European Human Rights and Freedom of Expression Law*, in *European Data Protection Regulation, Journalism, and Traditional Publishers*, 1, 2019.

recommendations and to analyse how the Agency has addressed specific changes to the concept of freedom of expression in the digital sphere. In this context, some balancing between freedom of expression and other fundamental rights and interests may indeed reach a different equilibrium. After all, the FRA was established as “a centre of expertise on fundamental rights issues at the EU level”, in the belief that “Establishing an Agency will make the Charter more tangible, and the close relation to the Charter is reflected in the Agency’s name”²². And making the Charter more tangible appears particularly significant in the context of the online environment.

From a content-based perspective, the FRA appears to have identified two types of expression considered “unprotected” under Article 11 of the Charter and Article 10 ECHR: hate speech and disinformation²³, intended as factually false content created with malice and the knowledge of their falsity. In parallel, the Agency appears to have endorsed forms of regulation concerning the modalities of free speech during electoral campaigns, as well as measures aimed at safeguarding media pluralism and media freedom²⁴.

2.1.1. (Racist) Hate Speech & Terrorist Propaganda

The FRA’s policy guidance and reports on EU Member States’ actions, as well as on broader European policies, regarding hate speech regulation, both offline and online, seem to delineate a restriction and potential censorship of such expressions²⁵. In line with “Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law”²⁶, hate speech appears to be framed as a form of illegal expression in the EU when based on religion or ethnicity. In this field, the ECtHR has relied on Article 17 ECHR (prohibition of abuse of rights) to uphold the imposition of criminal sanctions for racist propaganda, whether carried out by members of minorities²⁷ or by white supremacists²⁸, as well as in cases involving forms of so-called “differentialist racism”²⁹.

²² See the *European Commission’s proposal for a Council regulation establishing a European Union Agency for Fundamental Rights*, COM (2005) 280 final, p. 2.

²³ G. Pitruzzella – O. Pollicino, *op. cit.*

²⁴ C. Holtz-Bacha, *Freedom of the Media, Pluralism, and Transparency. European Media Policy on New Paths?*, in *European Journal of Communication*, 39, 2024; D. Tambini, *Media Freedom*, Cambridge, 2021.

²⁵ F. Tulkens, *FRA’s Efforts to Combat Hatred, Xenophobia and Racism*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019.

²⁶ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.

²⁷ ECtHR, *Belkacem v. Belgium*, 27 June 2017.

²⁸ ECtHR, *Glimmerveen and Hagenbeek v. the Netherlands*, 11 October 1979.

²⁹ ECtHR, *Norwood v. the United Kingdom*, 16 November 2004. See P.-A. Taguieff, *The force of prejudice: on racism and its doubles*, Minneapolis, 2001.

In analysing policies both at the national and EU levels, the FRA has endorsed the definition of racist hate speech developed by the “Framework Decision 2008/913/JHA” and by the ECHR system³⁰. FRA Opinion 4.1 of 2019 clearly states that “EU Member States should ensure that any alleged hate crime, including illegal forms of hate speech, is effectively recorded, investigated, prosecuted and tried”³¹. As a matter of fact, the FRA’s understanding of the limits of free expression in the political sphere mirrors the case law of the ECtHR, which has consistently held that hate speech falls outside the scope of Article 10 ECHR without requiring proof of a concrete threat to public order. “[L]a tolérance et le respect de l’égalité de tous les êtres humains constituent le fondement d’une société démocratique et pluraliste. Il en résulte qu’en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner voire de prévenir toutes les formes d’expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l’intolérance (y compris l’intolérance religieuse), si l’on veille à ce que les ‘formalités’, ‘conditions’, ‘restrictions’ ou ‘sanctions’ imposées soient proportionnées au but légitime poursuivi (en ce qui concerne le discours de haine et l’apologie de la violence (...))”³².

Analogously, when dealing with the online environment, the Online Content Moderation report published by the FRA identifies that concrete incitement does not appear necessary³³, ultimately considering hate propaganda as unprotected expression under freedom of expression clauses³⁴. In this respect, the FRA’s position is consistent with CoE framework, as expressed in “Recommendation No. R (97) 20 of the Committee of Ministers on ‘Hate Speech’”³⁵ and with “Recommendation CM/Rec(2022)16 on combating hate speech”³⁶. Thus, the FRA has contributed to consolidating the constitutional conception according to which racist propaganda is not considered a protected form of expression under Article 11 of the EU Charter,

³⁰ See European Union Agency for Fundamental Rights, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 94 and ff.

³¹ FRA Opinion 4.1, *Fundamental Rights Report 2019* (Publications Office of the European Union 2019), p. 100. In the same way, Opinion 4.1, *Fundamental Rights Report 2021* (Publications Office of the European Union 2021), p. 110: “EU Member States should fully and correctly transpose and apply the Framework Decision on Racism and Xenophobia to criminalise racist hate crime and hate speech”.

³² ECtHR, *Erbakan v. Turkey*, 6 July 2006, § 56.

³³ “The Council of Europe is also very active in the area of hate speech. It has issued several relevant recommendations on this issue, such as its 1997 Recommendation No (97) 20 (13) and its updated 2022 Recommendation CM/Rec (2022) 16 of the Committee of Ministers to member states on combating hate speech (14). The latter also contains a broader definition of hate speech that goes beyond incitement and aims at combating hate speech in a comprehensive way, including in the online environment”. European Union Agency for Fundamental Rights, *Online content moderation – Current challenges in detecting hate speech* (Report, Publications Office of the European Union 2023), p. 21.

³⁴ FRA, *Online Content Moderation*, cit., p. 26.

³⁵ Council of Europe, Committee of Ministers, Recommendation No R (97) 20 on “Hate Speech”, adopted 30 October 1997.

³⁶ Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted 20 May 2022.

regardless of the risk to public order³⁷. In this context, racist hate speech may be regarded as subject to regulatory restrictions, potentially extending to forms of censorship and even criminalisation. This stands in stark contrast to the U.S. system³⁸, in which hate speech is generally protected under the First Amendment, subject only to restriction where there is incitement that could lead to a concrete risk of imminent unlawful action.

Ultimately, this approach strengthens the Digital Services Act in its fight against hate speech³⁹. Indeed, the FRA has further endorsed the approach to combat hate speech reflected in the DSA, which identifies hate speech as a systemic risk that Very Large Online Platforms are required to address pursuant to Articles 34 and 35 DSA. Thus, the FRA acknowledges that “the underlying principle of the balance to strike in legislating in a manner compliant with the freedom of expression is set out in ECtHR case-law⁴⁰, but in its role of interpreting freedom of expression and systematizing European case law the Agency strengthens the EU approach to contrast digital hate speech.

The FRA's Fundamental Rights Report 2023 also notes the attempt by the CoE to extend the umbrella category of hate speech in both online and offline environments, and encourages Member States to take action: “Member States should take all appropriate measures to effectively combat hate speech and address the harmful impact of homophobic and transphobic statements made in public debates, political campaigns, the media, and on the internet”⁴¹.

A comparable approach to restrictions on freedom of expression also applies to the specific category of hate speech disseminated in the form of online terrorist propaganda. In various reports, the FRA has observed that, in the field of counter-terrorism, the Directive (EU) 2017/541 defines relevant offences, including public provocation to commit a terrorist offence, while Regulation (EU) 2021/784 establishes binding obligations to remove terrorist content from online platforms⁴². Both instruments emphasise that tolerance and respect for the equal dignity of all human beings constitute the foundational values of a democratic and pluralistic society, thereby justifying restrictions on expressions inciting hatred or violence, provided that

³⁷ E. Stradella, *Hate Speech in the Background of the Security Dilemma*, in *German Law Journal*, 9, 1, 2008.

³⁸ See the landmark case *Brandenburg v. Ohio*, 395 U.S. 444 (1969), pursuant to which only racist hate speech that is likely to incite imminent lawless action may be subject to restriction, under what is commonly referred to as the “clear and present danger test” or the “imminent lawless action” test. See R. Post, *Hate Speech*, in I. Hare - J. Weinstein (eds.) *Extreme Speech and Democracy*, Oxford, 2009.

³⁹ FRA, *Online Content Moderation*, cit., p. 66 and ff.

⁴⁰ FRA, *Online content moderation*, cit., p. 22. Cf. A. Sardo, *Hate Speech: A Pragmatic Assessment of the European Court of Human Rights' Jurisprudence*, in *European Convention on Human Rights Law Review*, 4, 1, 2022.

⁴¹ FRA Opinion 3.3, European Union Agency for Fundamental Rights, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 79.

⁴² See, for instance: FRA, *Online Content Moderation*, cit., p. 23.

such restrictions comply with the principles of legality, necessity and proportionality⁴³. In the field of terrorist hate speech, the FRA has played a significant role in shaping a form of “proportionality test” applicable to the removal of terrorist content online, as ultimately reflected in Regulation (EU) 2021/784. The FRA’s interpretation of freedom of expression appears to have directly influenced the final regulatory framework governing the removal of online terrorist propaganda. At the request of the European Parliament, the FRA issued its Opinions on the proposal for a Regulation on preventing the dissemination of terrorist content online. In those Opinions, the Agency highlighted potential risks to fundamental rights and recommended, *inter alia*: (1) narrowing the definition of “terrorist content,” which it considered overly broad; (2) ensuring explicit safeguards for journalistic, academic and artistic expression; and (3) reinforcing procedural safeguards by requiring stronger involvement of the judiciary in removal procedures⁴⁴. The recommendations put forward by the FRA to ensure compliance with Article 11 of the Charter appear to have been incorporated into the current Regulation on terrorist content online⁴⁵. This Regulation enshrines a conception of freedom of expression under which hate speech cannot be tolerated irrespective of any concrete risk to public order, while at the same time providing for safeguards for artistic, academic and journalistic expression.

Thus, in the field of racist hate speech and its extreme manifestation in terrorist propaganda, the FRA appears to be fully aligned with CoE institutions and to advance an interpretation of Article 11 of the EU Charter that is consistent with Article 10 ECHR⁴⁶. This approach reinforces the view that racist hate speech and terrorist speech do not constitute protected categories of expression under Article 11 of the Charter and may therefore be subject to restriction, including in the online environment.

The FRA seems however to call for a stricter response to digital political hate: “The European Commission and EU Member States should deal with threats of violence and intimidation during elections using national and EU law. The DSA is one option of law that they can use to deal with threats. In doing so, they should balance

⁴³ See also ECtHR, *Erbakan v. Turkey*, 6 July 2006, § 56.

⁴⁴ FRA Opinion – 2/2019 [Online terrorist content] Vienna, 12 February 2019.

⁴⁵ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L 172/79.

⁴⁶ “At the EU level, in line with Article 52(1) of the Charter, any interference with the freedom of expression needs to be provided for by law. In this context, however, there is currently no EU law instrument that would address online hate in a comprehensive manner and provide a harmonised definition. Certain EU laws establish specific forms of speech that are illegal and not protected by freedom of expression. Notably, the Council framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of 2008 (‘the framework decision’) defines a common EU-wide criminal law approach to countering severe manifestations of racism and xenophobia. It requires Member States to legislate not only against the public expression of hateful speech related to the protected grounds but also against the dissemination of that speech. “. FRA, *Online Content Moderation*, cit., p. 23.

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any action with the right to freedom of expression and other fundamental rights”⁴⁷. This opinion, as clarified in the accompanying explanation, appears to call for a broader response to hate speech in all its forms across the digital environment, particularly in light of the increasing polarization that characterises online public discourse⁴⁸. Additionally, what is particularly noteworthy is the FRA’s call to address sexist hate speech, which cannot be directly traced to established ECtHR case law, even though certain trends in tackling this form of hate speech can be identified within the broader CoE framework⁴⁹: “Online platforms should have specific regard to protected characteristics of users in the context of their terms and conditions, content moderation practices and monitoring policies, including addressing sexist online hate”⁵⁰.

These two recent opinions represent a more innovative interpretive development concerning the scope of Article 11 of the EU Charter of Fundamental Rights, as they both advocate for stricter regulation of certain forms of expression in the online public sphere and endorse a particular understanding of the Charter’s free speech clause.

2.1.2. Disinformation as the deliberate creation of false facts/news in bad faith

Since 2021, the FRA has increasingly engaged with the issue of online disinformation⁵¹. The Agency adopted a definition of disinformation as false facts spread in bad faith: “In the first place, at least for us as an agency, we adopted the definition of disinformation put forward by the European Commission. In other words, verifiably false or misleading information that cumulatively is created, presented, and disseminated for economic gain or to intentionally deceive the public, and that may cause public harm. It is just one among many definitions of

⁴⁷ FRA Opinion 2, European Union Agency for Fundamental Rights, *Fundamental Rights Report 2025* (Publications Office of the European Union 2025), p. 46.

⁴⁸ As stressed in the explanation: “EU law requires the criminalisation of some forms and expressions of racism and xenophobia. The 2024 European Parliament elections witnessed cases of harmful rhetoric, including elements of racism, misogyny, xenophobia, and discrimination against Muslims. Incidents of intimidation persisted throughout the campaign and increasingly took place online, backed up by acts of political violence that contributed to the polarisation of the political climate”. Fra Opinion 2, *Fundamental Rights Report 2025*, cit., p. 46.

⁴⁹ K. Sękowska-Kozłowska - G. Baranowska - A. Gliszczyńska-Grabias, *Sexist Hate Speech and the International Human Rights Law: Towards Legal Recognition of the Phenomenon by the United Nations and the Council of Europe*, in *Int J Semiot Law*, 5, 2022; F. Ciccarella, *Sexist hate speech in the European and Italian legal framework*, in *Dirittifondamentali.it*, 2, 2023.

⁵⁰ FRA Opinion 1, *Online Content Moderation*, cit., p. 10.

⁵¹ “Tackling disinformation is one of the key topics on the Fundamental Rights Forum 2021, an international conference organised by the FRA. The same topic was explored by the network of human rights communicators in June 2021, also organised by the FRA”. A. Björk, *Facts, Narratives and Migration: Tackling Disinformation at the European and UN Level of Governance*, in M. Conrad – G. Hálfðanarson - A. Michailidou - C. Galpin – N. Pyrhönen (eds.), *Europe in the Age of Post-Truth Politics*, Cham, p. 177.

misinformation. It is the one we use⁵². The FRA's approach seemed to hold that disinformation can be legitimately countered under EU law and therefore – implicitly – does not constitute a protected category of expression under Article 11 of the EU Charter if it is liable to harm public debate⁵³. It appears that the FRA supports the DSA's view that this type of disinformation falls within the “grey zone”⁵⁴ of expressions that are either unprotected or subject to only weak protection, and may therefore be subject to regulatory countermeasures, even though such expressions are not in themselves unlawful or criminal. Otherwise, the FRA would have had to conclude that EU measures aimed at countering disinformation amount to unlawful censorship and constitute an infringement of freedom of expression guarantees. The countermeasures against disinformation must, however, be subject to a proportionality test. If journalists may be sanctioned for disseminating disinformation⁵⁵, or if online disinformation may be deprioritized in favour of so-called “reliable” news sources⁵⁶, this necessarily implies that disinformation is not treated as a protected category of expression. This conclusion is further confirmed by a comparison with the U.S. system. Under the U.S. constitutional framework – where disinformation is protected by the First Amendment⁵⁷ – public authorities are largely precluded from adopting policies aimed at restricting disinformation or from granting preferential treatment to journalistic or other “reliable” news sources.

In essence, while the FRA broadly followed the interpretative approach of the Council of Europe regarding the role of the press in disseminating verified information⁵⁸, it appears to have placed greater emphasis on the non-protection of disinformation as a category of expression. This approach could represent a partial

⁵² European Union Agency for Fundamental Rights. *How to tackle disinformation? Speech by Michael O'Flaherty*, 28 June 2021, available at <<https://fra.europa.eu/en/speech/2021/how-tackle-disinformation>>.

⁵³ Indeed, the FRA, as early as in its 2020 Report, has stated that “Challenges with illegal online content and disinformation persisted, prompting national and international stakeholders to reconsider legal and technical avenues to tackle them effectively”. European Union Agency for Fundamental Rights, *Fundamental Rights Report 2020* (Publications Office of the European Union 2020), p. 143.

⁵⁴ One might draw a comparison with the U.S. concept of “low-value speech” for understanding the non-protection of such speech in the EU legal order. On the concept of “low-value speech”, see G. Lakier, *The Invention of Low-Value Speech*, in *Harvard Law Review*, 128, 8, 2015.

⁵⁵ ECtHR, *Khural and Zeynalov v. Azerbaijan*, 17 June 2025.

⁵⁶ These measures were set out by the Code of Practice on disinformation. European Commission, *Strengthened Code of Practice on Disinformation* (16 June 2022), available at <<https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>>.

⁵⁷ *United States v. Alvarez*, 567 U.S. 709 (2012). L. Levi, *Real Fake News and Fake Fake News*, in *First Amendment Law Review*, 16, 2017.

⁵⁸ This approach has subsequently been reinforced by the case law of the General Court of the European Union, which—within the specific context of the invasion of Ukraine—has even upheld the exclusion of certain Russian media outlets from the EU news market. Case T-125/22 *RT France v Council of the European Union*, 27 July 2022.

divergence in tone and emphasis⁵⁹ from the CoE framework. The CoE institutions—such as the Parliamentary Assembly of the Council of Europe⁶⁰—have often advocated for non-censorial approaches to countering disinformation. In this field, the FRA seems to advance a specifically EU-oriented perspective. In its 2024 and 2025 Reports, the FRA placed particular emphasis on the risks to fundamental rights posed by online disinformation⁶¹ and on the need to study and counter it⁶². These reports appear to further confirm the Agency's view that disinformation, as such, is not protected speech, in alignment with the broader EU paradigm. Indeed, the FRA seems to fully support the EU plan to combat disinformation: “The DSA can support combating the spread of disinformation and election interference or manipulation, if implemented effectively”⁶³. In doing so, the FRA corroborate the view that such action by the EU does not fall outside the scope of Article 11 of the EU charter. This is further proved by the fact that the Agency did not identify any inconsistencies between EU digital regulation and the guarantees enshrined in Article 11 of the EU Charter of Fundamental Rights. However, the FRA's 2024 and 2025 Reports also stated that disinformation cannot be countered without a proportionality test, especially when relying on criminal law and sanctions. The FRA's former Director explicitly highlighted

⁵⁹ B. Török, *The Fight against Disinformation in the Council of Europe, and the Relevant Case Law of the European Court of Human Rights*, in A. Koltay - C. Garden - R.J. Krotoszynski (eds.), *Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context*, Cambridge, 2025; A. Sardo, *Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights*, in *Canadian Journal of Law & Jurisprudence*, 33, 2, 2020. See; I. Katsirea, “Fake news”: reconsidering the value of untruthful expression in the face of regulatory uncertainty, in *Journal of Media Law*, 10, 2, 2018. G. Pitruzzella - O. Pollicino, cit. See: ECtHR, *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland*, 9 January 2018, § 68;

⁶⁰ In particular, Parliamentary Assembly of the Council of Europe Resolution 2255 (2019) emphasised that disinformation and propaganda undermine the democratic debate and highlighted the essential role of independent public service media in providing trustworthy information. This concern was further developed in Parliamentary Assembly of the Council of Europe Resolution 2326 (2020), which recognised the risks posed by online disinformation and micro-targeting to electoral integrity and called for forms of regulation of digital platforms consistent with freedom of expression. In parallel, the Committee of Ministers of the Council of Europe Recommendation CM/Rec(2018)2 established that internet intermediaries have responsibilities to address harmful content, including disinformation, as well as to ensure full protection of fundamental rights, in particular freedom of expression and access to information.

⁶¹ “This year's Fundamental Rights Report 2024 comes at a time when the EU is experiencing threats to democratic values and civic space. Online hatred and disinformation pose serious challenges to fundamental rights”. European Union Agency for Fundamental Rights, *Fundamental Rights Report 2024* (Publications Office of the European Union 2024), p. 5.

⁶² “The DSA can support combating the spread of disinformation and election interference or manipulation, if implemented effectively. Protecting fundamental rights online means protecting both the right to freedom of expression and information and the right to non-discrimination. This remains an area in which FRA will continue to work in 2025 and 2026 to provide for a better understanding of interferences with those rights in the online sphere”. FRA, *Fundamental Rights Report 2024*, cit., p. 14.

⁶³ FRA, *Fundamental Rights Report 2025*, cit., p. 10.

the need for proportionality in combating disinformation⁶⁴, echoing positions developed within the CoE. The FRA, however, analogously to the CoE framework, has not provided a clear proportionality test to determine when disinformation becomes legitimately sanctionable⁶⁵.

2.1.3. Elections, Media Freedom, and Media Pluralism

A particular aspect of online disinformation that has also come to focus in recent years is that of electoral disinformation⁶⁶. On this issue, the convergence between the FRA's and CoE's positions appears stronger, with both actors emphasizing the necessity of countering electoral manipulation.

The CoE institutions addressed this issue through, inter alia, "Resolution 2326 (2020)"⁶⁷, the "Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data by and for Political Campaigns"⁶⁸, and the "Venice Commission's Report on the Impact of Information Disorder on Elections"⁶⁹. In this perspective, the guidelines contained in the FRA's 2025 Report – particularly those regarding online campaigning – closely aligned with the CoE's positions⁷⁰, highlighting the importance of protecting electoral integrity from both disinformation and distortions created by social media, such as opaque political advertising and deceptions of campaign financing rules. In general, the FRA's 2025 report highlighted the need to

⁶⁴ European Union Agency for Fundamental Rights. *How to tackle disinformation? Speech by Michael O'Flaherty, 28 June 2021*, available at <<https://fra.europa.eu/en/speech/2021/how-tackle-disinformation>>.

⁶⁵ Cf. ECtHR, *Salov v. Ukraine*, 6 September 2005.

⁶⁶ "Although Member States took significant measures, and the Commission took a proactive approach to dealing with the potential misuse of online platforms to manipulate elections in 2024, there is evidence of the use of disinformation, the growing use of AI and the use of other techniques to attempt to exert undue influence on the conduct and outcome of elections in the EU." FRA, *Fundamental Rights Report 2025*, cit., p. 18. "Digital rights have a particular salience in the context of election campaigns. The threat that digital technologies pose to the integrity of elections, including through disinformation and cyberattacks, has become a serious concern for people living in the EU". European Union Agency for Fundamental Rights, *Fundamental Rights Report 2024*, cit., p. 13.

⁶⁷ Council of Europe, Parliamentary Assembly, Resolution 2326 (2020).

⁶⁸ Council of Europe, *Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data by and for Political Campaigns* (2018) <<https://rm.coe.int/guidelines-on-political-campaigns-and-data-protection/1680a1b2c3>>.

⁶⁹ Venice Commission, Report on the Impact of the Information Disorder on Elections (CDL-LA(2018)002).

⁷⁰ See the Venice Commission, *Code of Good Practice in Electoral Matters*, Strasbourg, CoE, 2025. C. Fasone - G. Piccirilli, *Towards a Ius Commune on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in "Harmonizing" Electoral Rights*, in *Election Law Journal: Rules, Politics, and Policy*, 16, 2017. On the digital issues: Venice Commission, *Interpretative Declaration Of The Code Of Good Practice In Electoral Matters As Concerns Digital Technologies And Artificial Intelligence*, Strasbourg, CoE, 2024.

limit electoral disinformation in order to safeguard democratic processes and affirmed to monitor the various policy measures implemented in the EU⁷¹.

The same report⁷² also explicitly suggested that the freedom of expression permits regulatory measures on electoral campaigning, such as transparency requirements, in line with “Recommendation (2022)12” on digital political communication and electoral campaigns⁷³ and the Venice Commission’s “Interpretative Declaration of the Code of Good Practice in Electoral Matters as Concerns Digital Technologies and Artificial Intelligence”⁷⁴. For instance, during its analysis of the Romanian case, the FRA’s 2025 Report emphasized the need for “a fundamental rights approach to transparent and fair elections in the online sphere”⁷⁵, underscoring the necessity of regulation in this area. It is then possible to underline that anonymous speech is not protected under the European conception of “electoral speech”, in contrast to the U.S. model, where transparency requirements often struggle to survive First Amendment scrutiny by the US Supreme Court⁷⁶. Furthermore, in the EU, online campaign financing is expected to comply with strict transparency standards. The FRA’s Report stresses that: “The European Commission and the EU Member States should ensure sufficient resources are available to implement and enforce the provisions of the DSA, AI Act and political advertising regulation. Applying and enforcing EU legislation, among other measures, can ensure the integrity of future elections in the EU. It can ensure elections are protected from manipulation by domestic or foreign actors and ensure respect for fundamental rights such as freedom of expression”⁷⁷. Thus, the FRA appears to support the EU’s digital regulation of electoral financing and transparency requirements, considering them fully compatible with Article 11 of the EU Charter of Fundamental Rights and, in some passages of its reports, even as part of the positive obligations of States.

On the general issues of media pluralism, media freedom, and the protection of journalists—which have also been addressed by the European Media Freedom Act (EMFA) in relation to the online environment—once again, the FRA’s position appears closely aligned with the CoE’s regulatory framework⁷⁸. In its 2016 study

⁷¹ FRA, *Fundamental Rights Report 2025*, cit., p. 32 and ff.

⁷² *Ibid.*

⁷³ Council of Europe, CM/Rec(2022)12 - Recommendation of the Committee of Ministers to Member States on Electoral Communication and Media Coverage of Election Campaigns (Adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers’ Deputies).

⁷⁴ Council of Europe, Venice Commission, *Interpretative Declaration of the Code of Good Practice in Electoral Matters as Concerns Digital Technologies and Artificial Intelligence* (2023) <<https://www.coe.int/en/web/electoral-assistance/ai-and-digital-tools>>.

⁷⁵ FRA, *Fundamental Rights Report 2025*, cit., 35.

⁷⁶ J.M. King, *Microtargeted Political Ads: An Intractable Problem*, in *Boston University Law Review*, 102, 3, 2022.

⁷⁷ FRA Opinion 1, *Fundamental Rights Report 2025*, cit., p. 46.

⁷⁸ E.g., Council of Europe, Committee of Ministers, Recommendation CM/Rec(2018)1 on Media Pluralism and Transparency of Media Ownership (7 March 2018); Council of Europe,

“Violence, Threats and Pressures Against Journalists and Other Media Actors”, the FRA highlighted the need to guarantee and protect media pluralism⁷⁹, while more recently the Agency emphasized the need to safeguard the press, particularly against abusive lawsuits (SLAPPs)⁸⁰, even though without developing a fully comprehensive approach to media pluralism. Indeed, despite the lack of a specific analysis of these issues, the FRA appears to suggest the existence of positive obligations for the EU and its Member States: on the one hand, to guarantee special protection for journalists; on the other, to ensure pluralism within the media environment. This approach again differs starkly from the U.S. free speech paradigm and its consideration of medial pluralism. In the U.S. system, regulation on this issue is regarded as an exceptional measure, which has been historically formulated only in connection with the scarcity of broadcasting frequencies⁸¹. Analogously, with regard to media freedom, any form of special protection for journalists is deemed inconsistent with the principle of epistemic equality underpinning the First Amendment⁸².

2.2. *The Policy Framework and the FRA's Influence on Public Discourse Regulation*

Although at the time of the FRA's establishment there were concerns that it might undermine the role of CoE institutions or create inconsistencies between the EU legal system and the CoE one, this analysis suggests that, regarding the issues of free speech, the opposite is true: in this field, the FRA has aligned itself with the CoE, thereby reinforcing uniformity between the rights protected under the ECHR and those guaranteed by the EU Charter of Fundamental Rights (cf. Article 52). In certain areas, the FRA has advanced a more precise interpretation of the limits of free speech for the online world; however, to date, no contradictions can be identified.

The key question, in this section, is whether these interventions have had a tangible impact on EU policies and on institutional public discourse. As an institution external to the EU decision-making process, the FRA occupies a unique position to influence institutional public discourse and to orient policy debates within the Union. As different scholars have shown, the impact of the FRA is evident across various

Parliamentary Assembly, Resolution 2382 (2021) on Media Freedom, Public Trust and the People's Right to Know.

⁷⁹ “The continued vigilance of institutions and bodies of the EU, its Member States, and non-governmental organisations is needed if media pluralism and democracy are to be upheld durably. The nature and extent of threats, abuses and pressures experienced by women journalists highlighted in this paper are a case in point. Their experience shows that there is no room for complacency when it comes to ensuring the safety of journalists and other media actors in the EU”. FRA, *Violence, Threats and Pressures Against Journalists and Other Media Actors*, 2016, p. 20.

⁸⁰ FRA, *Protecting Civil Society – Update 2023*, Publications Office of the European Union, 2023.

⁸¹ It is possible, for instance, to refer to the Fairness Doctrine. On this tradition: G. Lakier, *The Non-First Amendment Law of Freedom of Speech*, in *Harvard Law Review*, 134, 7, 2021.

⁸² S. R. West, *Favoring the Press*, in *California Law Review*, 106, 1, 2018.

domains of EU legislation—such as anti-discrimination policies and asylum law. Bearing in mind the Agency's role as “adviser” and “collector of data”⁸³, the present analysis aims to identify its impact on the regulation of online public discourse and of freedom of expression and information, by focusing primarily on institutional documents concerning recent EU regulations in the field of public discourse.

A first case in which the FRA's role has been particularly explicit, active, and recognizable is that of the Regulation on Terrorist Content Online. On 12th February 2019, following a request from the European Parliament, the FRA delivered an opinion addressing the potential impact of the proposed regulation on fundamental rights⁸⁴. This opinion significantly influenced the revision of the proposal: the final regulation incorporated most of the objections raised by the FRA and conformed to the Agency's interpretation and balancing of fundamental rights. Furthermore, in January 2023, the European Commission has also mandated the FRA to support a fundamental rights impact assessment of the Regulation⁸⁵. The Agency's ongoing monitoring process seeks to evaluate the impact of removal measures on the freedoms of expression, privacy, and non-discrimination, as well as the freedom to conduct a business, drawing on evidence from national authorities, digital platforms, civil society organisations, and academic experts. The FRA has therefore played a significant role both in the legislative process and in the subsequent monitoring of the Regulation. Nevertheless, explicit references to the FRA remain absent from the Commission's official documents, plenary debates in the European Parliament or parliamentary committee proceedings (e.g., LIBE). This would seem to suggest that, despite playing a central and substantial role, the Agency has not yet been recognized as an authoritative source to be explicitly invoked by political actors or by the Commission in support of policies concerning fundamental rights in the field of public discourse regulation.

The case of the Digital Services Act (DSA)⁸⁶ offers a more nuanced picture. There is no reference to the FRA neither in the impact assessment, prepared by DG CONNECT, nor in the legislative proposal published by the Commission on 15th December 2020⁸⁷. The FRA does not feature in the list of stakeholders consulted during the Commission's public consultation on the European Digital Strategy (June–

⁸³ G.N. Toggenburg, *The European Union Fundamental Rights Agency*, cit.

⁸⁴ FRA Opinion – 2/2019 [Online terrorist content] Vienna, 12 February 2019.

⁸⁵ FRA, *The impact of addressing terrorist content online on fundamental rights*, January 2023, available at <https://fra.europa.eu/en/project/2024/impact-addressing-terrorist-content-online-fundamental-rights?utm_source=chatgpt.com>.

⁸⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (OJ L 277, 27.10.2022).

⁸⁷ European Commission, Impact Assessment and Legislative Proposal, COM(2020) 825 final (15 December 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0825>>

September 2020) either⁸⁸. Similarly, during the legislative phase in Parliament (2020–2022), parliamentary resolutions on the DSA and fundamental rights made no mention of the FRA, and no record of a formal FRA hearing in committees or the plenary can be found. This is all the more remarkable when considering that the FRA's Multi-Annual Framework (MAF) expressly included the 'information society' within the Agency's mandate – a provision that could have positioned the FRA as an important actor in this field. This lack of references to the FRA, however, does not necessarily mean the absence of involvement or impact on the DSA. The FRA participated in various discursive engagements, such in a European Parliament panel discussion on 6th September 2021⁸⁹, showing an involvement at a public – albeit informal – level. In March 2022, the FRA was described as playing a “key role in evaluating respect for fundamental rights in order to avoid disproportionate actions” in the “Motion for a European Parliament Resolution on foreign interference in all democratic processes in the European Union, including disinformation”⁹⁰. Indeed, some of the FRA's crucial opinions—such as those on procedural rights in content moderation and on access to content moderation data⁹¹—would ultimately have been incorporated into the DSA, suggesting an indirect impact during the legislative phase. Most importantly, the FRA is expressly mentioned in Recital 107 of final text of the DSA⁹², which foresees a consultative role for the Agency with respect to the implementation of the DSA's codes of conduct. Finally, the FRA has played an active role in the application phase of the DSA. The Agency presented its 2023 “Report Online Content Moderation – Current Challenges in Detecting Hate Speech” to the IMCO Committee on 20th March 2024, providing evidence relevant to enforcement priorities under the DSA. In the Report, the FRA issued a series of opinions, including: i) the need for VLOPs to address “sexist online hate” under the systemic risk framework (Opinion 1)⁹³;

⁸⁸ European Commission, Public Consultation on the European Digital Strategy (June–September 2020) <<https://digital-strategy.ec.europa.eu/en/consultations>>.

⁸⁹ FRA joins discussion on fundamental rights and digital services, 9 September 2021, available at <<https://fra.europa.eu/en/news/2021/fra-joins-discussion-fundamental-rights-and-digital-services>>.

⁹⁰ European Parliament, *Motion for a European Parliament Resolution on Foreign Interference in All Democratic Processes in the European Union, Including Disinformation* (2020/2268(INI)) (Resolution A9-0022/2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0022_EN.html>.

⁹¹ FRA Opinion 7.2., European Union Agency for Fundamental Rights, *Fundamental Rights Report 2022* (Publications Office of the European Union 2022), p. 183: “EU institutions and Member States regulating digital services should ensure that both over- and underremoval of content are prevented and that moderation practices are not disproportionate, so as not to interfere with the rights to freedom of expression, freedom of information and non-discrimination. In view of the importance of evidencebased oversight for effective and fundamental rights-compliant moderation of online content, EU institutions and the Member States should ensure that the relevant legal framework allows academic and civil society experts to legally access data and conduct research”.

⁹² Recital 107, DSA.

⁹³ “For very large online platforms (VLOPs), such as X and YouTube, misogyny should be one of the systemic risks considered in the context of the risk assessment and risk mitigation measures required by Articles 34 and 35 of the DSA”. FRA Opinion 1, *Online Content Moderation*, cit., p. 10.

ii) the requirement for the EU and Member States to support “the creation of a wide and heterogeneous network of organisations acting as trusted flaggers to ensure that different forms of online hate are widely and reliably detected” (Opinion 2)⁹⁴; iii) the necessity for content moderation by AI systems to be non-discriminatory (Opinion 3)⁹⁵; iv) the importance of external review in content moderation (Opinion 4)⁹⁶. Additionally, in promoting the application of the EU freedom of expression paradigm to content moderation, the FRA appeared to recognize the need to address the excessive removal of content: “The European Commission should ensure in its implementing guidance that providers of online services interpret and implement the obligations laid down in the DSA in a fundamental rights-compliant manner, for example in relation to the risk of over-removal and the freedom of expression”⁹⁷. In the context of the regulation of digital public discourse, the Agency, while still less frequently cited in parliamentary debates or institutional documents than in other areas of EU policy, appears to be increasingly recognised as a key actor in overseeing and monitoring EU digital regulation.

In other EU regulations on online public discourse the FRA's role seems to have been more indirect, with interventions that have remained external to the legislative process. In Regulation (EU) 2024/900⁹⁸, there is no evidence of the FRA's input during either the drafting or implementation phases. The Agency has, however, drawn discursive connections between this Regulation, the DSA, and the AI Act in some of its opinions, emphasizing the need for proper implementation in light of fundamental rights⁹⁹. In addition, in light of the annulment of the Romanian

⁹⁴ An example being the reinforcement of a network of trusted flaggers for combatting hate speech: FRA Opinion 2, *Online Content Moderation*, cit., p. 12.

⁹⁵ “It must be ensured that AI-supported online content moderation decisions are not discriminatory. Providers and users (i.e. platforms) must assess the fundamental rights compliance of any AI system in line with the DSA and current and developing standards regulating the use of AI”. FRA Opinion 3, *Online Content Moderation*, cit., p. 13.

⁹⁶ FRA Opinion 4, *Online Content Moderation*, cit., p. 15.

⁹⁷ FRA Opinion 7.2, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 190.

⁹⁸ Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (OJ L 2, 4.4.2024).

⁹⁹ “The European Commission and the Member States should ensure sufficient resources are available to implement and enforce the provisions of the DSA, AI Act and political advertising regulation. Applying and enforcing EU legislation, among other measures, can ensure the integrity of future elections in the EU. It can ensure elections are protected from manipulation by domestic or foreign actors and ensure respect for fundamental rights such as freedom of expression. EU Member States should cooperate with the European Commission to ensure mutual learning”. FRA Opinion 1, *Fundamental Rights Report 2025*, cit., p. 46.

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elections¹⁰⁰ due to serious distortions of the electoral campaign, the FRA has called for closer collaboration between Member States and EU authorities¹⁰¹.

The situation is analogous in the field of EU regulation on media freedom and pluralism. The European Media Freedom Act (EMFA)¹⁰² and subsequent institutional debates about media freedom online contain no mention of the FRA. The oversight system established by the regulation is administered by the Commission and the European Board for Media Services, without any formal involvement of the FRA. Similarly, the anti-SLAPP initiative did not directly engage the Agency. This is the case despite the fact that the FRA's 2016 report "Violence, Threats and Pressures Against Journalists and Other Media Actors in the EU" was expressly cited in the "Motion for a European Parliament Resolution on Media Pluralism and Media Freedom in the European Union (2017/2209(INI))"¹⁰³. The FRA has however contributed to the "Rule of Law Report 2025"¹⁰⁴, in which media pluralism and freedom constitute one of the four main pillars. In this context, the FRA provided input at the request of the Commissioner, while civil society organisations explicitly called the Commission to build on the Agency's findings on civic space¹⁰⁵. These elements indicate a recognition—albeit indirect—of the FRA's informational role in the field of media pluralism.

In conclusion, it can be said that the FRA's role in shaping EU policies on public discourse appears less visible than in other areas of its mandate. Its influence emerges only sporadically in parliamentary debates and official documents. Rather than serving as a consistent reference point in the structuring of regulations on online public discourse, the FRA's contribution seems to operate largely in the shadows—either

¹⁰⁰ See Romanian Constitutional Court, Decision 32/2024. A. Mercescu, *The Romanian Constitutional Court Doing "Militant Democracy" (Twice and More to Come)*, in *Journal of Contemporary Central and Eastern Europe*, 33, 2025.

¹⁰¹ "the European Commission to ensure mutual learning. They should share promising practices and guarantee that new challenges, such as the use of AI, are addressed. This cooperation will help them respond effectively to the challenges associated with these transnational phenomena such as manipulation and undue influence". FRA Opinion 1, *Fundamental Rights Report 2025*, cit., p. 46.

¹⁰² Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (OJ L 202, 19.7.2024)—the Commission's proposal (COM(2022) 457 final, 16 September 2022).

¹⁰³ European Parliament, Resolution on Media Pluralism and Media Freedom in the European Union (2017/2209(INI)) https://www.europarl.europa.eu/doceo/document/TA-8-2018-0224_EN.html.

¹⁰⁴ Submission by the European Union Agency for Fundamental Rights to the European Commission in the context of the preparation of the annual Rule of Law Report 2025 Vienna, 30 April 2025, Vienna, 30 April 2025.

¹⁰⁵ *Upholding and Expanding the Rule of Law in the EU: Joint Recommendations Towards a Stronger and More Effective 2025 Rule of Law Report April 2025*, available at < <https://www.fidh.org/en/international-advocacy/european-union/joint-recommendations-for-upholding-and-expanding-the-rule-of-law-in>>, p. 4.

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informally, indirectly, or discursively—rather than in an explicit and institutional manner. Analysis of verbatim records and hearings also suggests that the FRA's role within the parliamentary and institutional public sphere¹⁰⁶ remains limited in this field¹⁰⁷.

3. "Digital constitutionalism 2.0": the FRA, the Rule of Law, and Artificial Intelligence

The growing autonomy of AI systems¹⁰⁸ — evolving from symbolic AI to machine learning and, more recently, agentic architectures — is reshaping the way power is exercised in the digital world and beyond, and significantly affecting fundamental rights. This transformation poses a new challenge for digital constitutionalism, which must evolve from its earlier focus on regulating digital platforms and online freedoms toward addressing artificial intelligence and its continuing development¹⁰⁹.

Early forms of symbolic AI were rule-based: deductive instructions, written in logical languages, were applied to data in order to produce transparent and predictable outputs. Such systems raised legal questions — including the validity of the legal basis for their deployment and the fairness of their outcomes — but within relatively inspectable structures. Contemporary AI, by contrast, is largely sub-symbolic. Modern AI techniques encompass a variety of processes: machine learning, deep learning, and neural networks no longer rely on predefined rules but instead extract patterns from large datasets. These techniques identify correlations, infer rules, and generate apparently autonomous behaviour. Generative AI, grounded in deep neural architectures, produces new content — including text, images, and code — by modelling linguistic and statistical patterns. The most recent development is agentic AI, designed to pursue complex objectives autonomously through reinforcement learning and adaptive decision-making, with limited human intervention.

In this context, machine learning may be either supervised or unsupervised. A particular branch of machine learning, deep learning, uses neural networks to model complex, high-dimensional data. One of its most prominent applications is the development of systems capable of understanding and analysing human language. Such

¹⁰⁶ A. Davis, *Citizens, Political Representation and Parliamentary Public Spheres*, in *Political Communication and Social Theory*, 2010.

¹⁰⁷ This is particularly evident when compared with other expert bodies, such as the Article 29 Working Party. See Y. Poulet - S. Gutwirth, *The Contribution of the Article 29 Working Party to the Construction of a Harmonised European Data Protection System: An Illustration of "Reflexive Governance"?*, in O. De Schutter - V. Moreno Lax (eds.), *Human Rights in the Web of Governance: Towards a Learning-based Fundamental Rights Policy for the EU*, Bruxelles, 2010.

¹⁰⁸ L. Floridi, *AI as Agency Without Intelligence: On ChatGPT, Large Language Models, and Other Generative Models*, in *Philosophy & Technology*, 36, 2023.

¹⁰⁹ O. Pollicino - F. Paolucci, *Regulating AI Autonomy: A Constitutional Framework for the Digital Era*, in M. Durante - U. Pagallo (eds.), *The De Gruyter Handbook on Law and Digital Technologies*, Berlin, 2025.

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systems are used, for example, in online content moderation, but they also raise challenges related to their complexity and opacity.

These technological developments have direct constitutional implications for the rule of law and the protection of fundamental rights. They raise novel questions for which consolidated case law of the European Court of Human Rights is still limited, while the European Union is assuming an increasingly autonomous role in shaping a form of “digital constitutionalism 2.0” capable of protecting the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union¹¹⁰. In this field, the actions of the EU and those of the Council of Europe are proceeding in parallel, and so the guiding role of Article 52 of the EU Charter, as regards the interpretation of EU fundamental rights in light of the ECHR, seems less strong than in the area of freedom of expression. The parallel enactment of the AI Act and of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law¹¹¹, which was finalised by the Council of Europe’s Committee on Artificial Intelligence (CAI) and adopted by the Committee of Ministers on 17 May 2024, illustrates this development. The European Union signed the Convention on behalf of its Member States¹¹², but in the meantime develops its own autonomous regulatory strategy.

While the Convention adopts a principle-based approach centred on state responsibility and rights protection, the AI Act employs a risk-classification model imposing specific compliance requirements, such as risk management systems, data governance standards, and fundamental rights impact assessments. In this different regulatory approach, as will be shown, the FRA has played a major role. Thus, the two approaches contain significant differences¹¹³, and even if the CoE initiatives started before the EU ones, “the EU has tried to exert a certain influence on the standard-setting process taking place at the CoE level, once again, through its active participation in its negotiations”¹¹⁴. And in this process, the FRA was also involved¹¹⁵,

¹¹⁰ As noted “The performed analysis seems to confirm that. When it comes to the regulation of ai, the dynamics between the two organisations in the process of standard- setting and the protective potentialities of the substantive provisions they propose seem to confirm that the EU has taken the lead”. F.P. Levantino - F. Paolucci, *Advancing the Protection of Fundamental Rights through AI Regulation: How the EU and the Council of Europe Are Shaping the Future*, in P. Czech – L. Heschl – K. Lukas - M. Nowak – G. Oberleitner (eds.) *European Yearbook on Human Rights 2024*, Nijhoff, 2025, p. 36.

¹¹¹ *Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law* (CETS No. 225, Council of Europe 2024).

¹¹² E. De Capitani, *The coe Convention on Artificial Intelligence, Human Rights and the Rule of Law*, in *free-group.eu*, 4 March 2024 (<free-group.eu>).

¹¹³ F.P. Levantino - F. Paolucci, cit.

¹¹⁴ F.P. Levantino - F. Paolucci, cit., p. 24.

¹¹⁵ Idem, p. 25. See Fundamental Rights Agency of the European Union, ‘Fra joins Council of Europe ai Committee meeting’, Press Release, 23.10.2023, available at <<https://fra.eur opa.eu/news/2023/fra-joins-coun-cil-eur-ope-ai-commit-tee-meet-ing-0>>, last accessed 30.03.2024>.

seeking to guarantee compliance with rule of law requirements as regards fundamental rights protection.

Indeed, the notion of the rule of law concerns not only the limitation of public authority through general and predictable norms, but also the guarantee of rights and access to remedies. This dual function — law as a constraint on power and the rule of law as a mechanism for the protection of rights — explains why debates on artificial intelligence cannot be reduced to purely technological or efficiency-based considerations¹¹⁶. The Venice Commission's "Rule of Law Checklist" synthesises these traditions into five operational pillars¹¹⁷: legality, legal certainty, prohibition of arbitrariness, equality before the law, and access to justice. Within the EU legal order, these elements have become justiciable through Article 19(1) TEU and Article 47 of the Charter, which the Court of Justice has interpreted in conjunction with Article 2 TEU¹¹⁸ to produce binding institutional standards. For present purposes, what matters is that the rule of law operates as a bridge between legality and rights. Its formal dimension regulates the exercise of power: laws must be clear, general, and foreseeable; decisions must be adopted by competent authorities in accordance with legal procedures; records must be kept and reasons provided. Its substantive dimension ensures that legality does not become an empty shell: decisions must respect equality and non-discrimination, remain proportionate, and allow effective remedies before an independent tribunal. This combination of form and substance makes the rule of law the primary mechanism through which fundamental rights are guaranteed in practice.

Artificial intelligence simultaneously engages both dimensions¹¹⁹. Exogenously, when automated systems are used in areas such as welfare, education, migration, or credit allocation, their legitimacy depends on compliance with the principles just outlined: the existence of a legal basis, transparency, meaningful human oversight, and the availability of timely remedies. Endogenously, AI raises questions concerning the legality of the design and governance of the systems themselves: the origin and management of data, the definition of objectives and thresholds, retraining procedures and change control, and the distribution of responsibility along the provider–user chain. These are not merely technical matters but normative choices that determine who is accountable, what constitutes an error, and which values prevail in trade-offs between efficiency and fairness.

¹¹⁶ K. Crawford, *The atlas of AI: Power, politics, and the planetary costs of artificial intelligence*, Yale, 2021; G. De Gregorio, *The Normative Power of Artificial Intelligence*, in *Indiana Law Journal*, 30-2, 2023, p. 55 ff.

¹¹⁷ "Report on the Rule of law", adopted in Venice, March 25-26, 2011 - CDL-AD (2011)003rev., and the "Rule of Law Checklist", adopted in Venice, March 11-12, 2016 - CDL-AD(2016)007.

¹¹⁸ See W. Schroeder, *The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?*, in A. von Bogdandy – P. Bogdanowicz – I. Canor – C. Grabenwarter – M. Taborowski – M. Schmidt (eds.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Heidelberg, 2021, p. 106.

¹¹⁹ P. Burgess, *AI and the Rule of Law: The Necessary Evolution of a Concept*, in P. Burgess (ed.), *AI and the Rule of Law: The Necessary Evolution of a Concept*, Oxford, 2024.

The plurality of approaches to defining the rule of law does not represent a weakness but rather reflects its layered character in contemporary constitutionalism. Nevertheless, the fragility identified by András Sajó¹²⁰ and manifested in the so-called “rule of law crisis” reminds us that these guarantees are never definitively secured and require constant vigilance, particularly when new forms of power — such as AI systems — enter the legal order.

By redistributing the locus and modalities of decision-making, AI systems directly engage the guarantees that the European Union has linked to the rule of law. As observed elsewhere, “the autonomy of AI systems challenges traditional conceptions of accountability and control, prompting scholars and policymakers to identify new regulatory frameworks capable of governing these technologies while safeguarding constitutional values such as democracy, the rule of law, and fundamental rights. For instance, the lack of transparency in certain algorithmic decisions may constitute a direct challenge to the constitutional principle of due process, which requires that decisions — especially those affecting individual rights — be understandable and subject to review”.

The evolution of AI represents a profound transformation of the regulatory landscape, requiring a shift from principles of algorithmic governance toward instruments capable of addressing the complexity of AI autonomy. Autonomous systems, unlike traditional automated processes, introduce new challenges because of their ability to operate without direct human supervision, relying on machine-learning mechanisms and adaptive algorithms. While these capabilities enable unprecedented levels of efficiency and innovation, they also pose risks to transparency, accountability, and the protection of fundamental rights, particularly in fields such as law enforcement. The pervasive influence of algorithmic society extends beyond information management to sectors such as healthcare, labour, justice, and public security, where the diffusion of automated decision-making systems reveals an increasing entanglement between public and private actors and a significant transformation of governance structures.

The transition from an algorithmic society to one increasingly driven by artificial intelligence further intensifies this complexity. In this context, the European Union Agency for Fundamental Rights occupies a crucial position, performing research, advisory, and monitoring functions concerning the scope of fundamental rights in relation to autonomous AI. As will be discussed in the next section, this role has developed since 2019 and has involved the FRA increasingly in AI regulatory processes and in the protection of the rule of law.

In order to carry out this study, the first subsection explores the specific understanding of AI and fundamental rights embraced by the FRA and, the second

¹²⁰ A Sajó, *The Rule of Law*, in R. Schütze-R. Masterman (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Oxford, 2019, p. 258–290.

subsection draws some considerations on how the Agency has shaped and influenced EU policies in the domain of AI.

3.1. The Theoretical Framework of Fundamental Rights and the Rule of Law in the FRA's Approach

Compared with the analysis developed in the previous section, it is more difficult to draw a comparison between the position of the European Union Agency for Fundamental Rights and that of the Council of Europe institutions on fundamental rights and digital challenges to them, given both the innovative nature of artificial intelligence and the limited case law of the European Court of Human Rights in this field¹²¹. In this new and unexplored context, however, the Agency's commitment to examining and interpreting the fundamental rights enshrined in the Charter in relation to emerging technologies becomes particularly evident.

With regard to the second focus of this article — namely, the role of the FRA in relation to the regulation of artificial intelligence — it is possible to observe that the Agency has been actively engaged, since 2019, in producing a series of studies applying the fundamental rights framework of the Charter of Fundamental Rights of the European Union to this new technology.

In 2019, the FRA report “Facial Recognition Technology: Fundamental Rights Considerations in the Context of Law Enforcement”¹²² represents one of the first analyses at EU level of AI-based biometric systems from a fundamental-rights perspective. The report examines the growing use of facial-recognition technologies by law-enforcement authorities and evaluates their implications for privacy, data protection, non-discrimination, and effective judicial oversight¹²³.

The FRA identifies facial recognition as a particularly sensitive application of artificial intelligence because it combines biometric identification with large-scale data processing, potentially enabling forms of surveillance that may affect the fundamental rights protected by the EU Charter. The report distinguishes among different uses of facial recognition, including real-time identification in public spaces, retrospective identification through archived images, and identity-verification systems, and examines how these technologies are actually employed in EU Member States by public authorities¹²⁴. Each of these uses raises distinct legal and proportionality questions under EU law¹²⁵. In this sense, the impact of these new technologies is assessed in light

¹²¹ G. Repetto, *The constitutional relevance of the ECHR in domestic and European law*, Cambridge-Antwerp-Portland, 2013.

¹²² European Union Agency for Fundamental Rights, *Facial recognition technology: fundamental rights considerations in the context of law enforcement* (Publications Office of the European Union 2019).

¹²³ FRA, *Facial recognition technology*, cit., p. 18 and ff.

¹²⁴ *Idem*, p. 11-13.

¹²⁵ *Idem*, p. 20.

of the rights to privacy and personal-data protection, but also more broadly in relation to democratic freedoms. For the first time, an institution has engaged directly with a technology used in other legal systems, such as the Chinese one, highlighting the impact of AI on fundamental rights.

In line with its tradition in the development of EU anti-discrimination law, the report expressed particular concern regarding the risk of inaccuracies and algorithmic bias in facial-recognition systems, which may disproportionately affect certain demographic groups and lead to discriminatory outcomes¹²⁶. The report also emphasises the importance of strict legal bases, necessity and proportionality assessments, and independent oversight mechanisms when biometric technologies are used by law-enforcement authorities¹²⁷. In this sense, the FRA suggests the type of proportionality test that should be carried out, without formulating a binding one, a task that belongs to courts and, subsidiarily, to the legislature. Departing, to some extent, from the proportionality test developed by the ECtHR, the FRA suggests that: “Once it has been established that the inalienable, essential core of a right is not violated by a measure, the necessity and proportionality test as outlined in the Charter is to be conducted as a next step in respect of non-core aspects of that right”¹²⁸.

But already in this first report, transparency and accountability are identified as fundamental safeguards. According to the FRA, individuals must be able to understand when biometric identification technologies are used and must have access to effective remedies in cases of misuse or error¹²⁹. The report anticipates subsequent regulatory debates in the European Union concerning biometric surveillance and high-risk AI systems.

As noted elsewhere¹³⁰, if, for example, a national police agency intended to adopt an artificial-intelligence-based facial-recognition system to monitor sensitive public areas, such as airports or central urban zones, it would be necessary to balance this legitimate interest with the fundamental rights of citizens. The objective of the agency — to increase levels of security and identify in real time individuals suspected of crimes — would be legitimate, but its impact would need to be considered. A system of this kind would fall among those classified as “prohibited risk” under Article 5 of the AI Act, since it involves the use of biometric data and may significantly affect individuals’ fundamental rights. The use of these tools may be authorised in exceptional situations, for example to prevent or identify suspects of crimes listed in Annex II of the Regulation, such as terrorism. In such circumstances, before activating the system, the public authority concerned is required to carry out a fundamental rights impact assessment (FRIA). This analysis must first identify which rights could be compromised by the use of AI, such as privacy, personal liberty, and the presumption

¹²⁶ Idem, p. 27 and ff.

¹²⁷ Idem, p. 23-25.

¹²⁸ Idem, p. 21.

¹²⁹ Idem, p. 30-31.

¹³⁰ O. Pollicino - F. Paolucci, cit.

of innocence. Although published before the development of the EU AI Act, the FRA report (2019) contributed to framing facial-recognition technologies as a high-risk AI application requiring strengthened fundamental-rights safeguards. By combining legal analysis and technological assessment, the report illustrates the broader role of the FRA in identifying emerging risks associated with digital technologies in law-enforcement contexts and also its role in highlighting legislative gaps that may affect fundamental rights in the field of new digital technologies.

The report “Getting the Future Right: Artificial Intelligence and Fundamental Rights” (FRA, 2020) represents one of the first comprehensive attempts at European level to analyse, through empirical research, the implications of artificial intelligence for fundamental rights. Published before the adoption of the EU Artificial Intelligence Act, the report contributed significantly to shaping the policy debate on risk-based AI governance, documenting how AI systems were already used in public administration in several Member States. The report shows awareness of the use of AI-based tools by public authorities in areas such as social services, healthcare, predictive policing, and online public services, and highlights the specific fundamental rights affected by these uses¹³¹. Rather than addressing AI in abstract terms, the FRA examines administrative practices, highlighting how automated decision-support systems increasingly influence access to public services and benefits¹³². This empirical orientation reflects the Agency’s broader mandate to provide evidence-based expertise to EU institutions and Member States. “When introducing new policies and adopting new legislation on AI, the EU legislator and the Member States, acting within the scope of EU law, must ensure that respect for the full spectrum of fundamental rights, as enshrined in the Charter and the EU Treaties, is taken into account. Specific fundamental rights safeguards need to accompany relevant policies and laws”¹³³.

One of the central findings of the report is that AI systems used in public administration often operate in complex legal and institutional contexts in which decision-making responsibility formally remains human but is substantively influenced by algorithmic outputs. This raises questions concerning accountability, transparency, and effective judicial protection. The FRA observes that individuals affected by AI decisions frequently encounter difficulties in understanding how decisions are made or in challenging them through existing administrative and legal procedures¹³⁴. “To ensure that available remedies are accessible in practice, the EU legislator and Member States could consider introducing a legal duty for public administration and private companies using AI systems to provide those seeking redress information about the operation of their AI systems. This includes information on how these AI systems

¹³¹ European Union Agency for Fundamental Rights, *Getting the future right: Artificial intelligence and fundamental rights* (Publications Office of the European Union 2020), p. 57 and ff.

¹³² FRA, *Getting the future right*, cit., p. 50 and ff.

¹³³ FRA Opinion 1, *Getting the future right*, cit., p. 7.

¹³⁴ FRA, *Getting the future right*, cit., p. 78.

arrive at automated decisions. This obligation would help achieve equality of arms in cases of individuals seeking justice¹³⁵.

The report identifies several risks to fundamental rights associated with the use of AI. These include risks related to data protection and privacy, but also broader concerns regarding non-discrimination, access to social rights, and the right to good administration¹³⁶. The FRA emphasises that automated systems may reproduce or amplify existing structural inequalities when trained on biased or incomplete datasets, disproportionately affecting vulnerable groups¹³⁷. In signalling these potential risks to fundamental rights, the FRA interprets their scope on the basis of both EU law and the ECHR framework. At the same time, the report does not limit itself to assessing substantive impacts, but also highlights procedural guarantees and institutional safeguards. Again, transparency and explainability emerge as central governance challenges. This creates potential tensions with procedural rights protected under EU law, including the right to be heard and the right to an effective remedy.

Another important contribution of the report is the emphasis on the need for preventive governance mechanisms. The FRA argues that fundamental-rights safeguards should be integrated into the design and procurement of AI systems used in public administration, rather than addressed only after implementation¹³⁸. This anticipates subsequent developments in EU digital regulation, including the integration in the AI Act of risk-management obligations and conformity-assessment procedures. The report also highlights the importance of strengthening institutional capacity within public administrations. Many authorities using AI systems lack sufficient technical expertise to assess the reliability, fairness, and legality of algorithmic tools: therefore, specialised expertise¹³⁹ and effective oversight mechanisms¹⁴⁰ are necessary. Consequently, the FRA recommends strengthening interdisciplinary cooperation between lawyers, data scientists, and public officials involved in the acquisition and supervision of AI systems.

From a governance perspective, “Getting the Future Right” illustrates the role of the FRA as an epistemic actor within the European fundamental-rights architecture. By combining legal analysis and empirical research on administrative and private practices, the Agency contributes to bridging the gap between normative principles and technological implementation. The report demonstrates that effective protection of fundamental rights in the context of AI requires not only legal frameworks, but also institutional learning and methodological development. These constitute clear invitations to the European legislator to adopt regulation in this area of the digital environment that takes into account the development of AI in a preventive

¹³⁵ FRA Opinion 1, *Getting the future right*, cit., p. 13.

¹³⁶ FRA, *Getting the future right*, cit., p. 60 and ff.

¹³⁷ FRA, *Getting the future right*, cit., p. 72; see also FRA Opinion 4, *Getting the future right*, cit., p. 10.

¹³⁸ FRA Opinion 2, *Getting the future right*, cit., cit., p. 8.

¹³⁹ FRA, *Getting the future right*, cit., p. 3.

¹⁴⁰ FRA Opinion 3, *Getting the future right*, cit., p. 9.

perspective, aimed at managing risk rather than correcting its effects. The findings of the report proved particularly influential in subsequent policy debates on AI governance. Many of the issues identified by the FRA — including AI bias, lack of transparency, and insufficient impact assessment — later became central themes in the EU legislative process leading to the adoption of the Artificial Intelligence Act. In this sense, the report may be understood as an early contribution to the development of a European model of trustworthy AI grounded in fundamental-rights protection.

Across its annual Fundamental Rights Reports (2021–2024), the European Union Agency for Fundamental Rights (FRA) progressively integrates artificial intelligence into its broader monitoring of digitalisation and fundamental-rights protection in the European Union. These reports address AI-related issues in discussions of digital public administration, data protection, non-discrimination, and law-enforcement technologies. The FRA consistently emphasises that automated decision-making systems must comply with the EU Charter of Fundamental Rights, particularly with regard to data protection, equality, transparency, and access to effective remedies¹⁴¹. Through thematic observations and FRA opinions, the reports underline the importance of human oversight, accountability, and risk-awareness in the deployment of digital technologies by public authorities. By documenting national practices and emerging technological governance challenges, the FRA's annual reporting contributes to identifying fundamental-rights risks associated with automated decision-making and reinforces the need for rights-based governance of digital transformation in the European Union.

Thus, the FRA integrates the AI issue into the monitoring of Charter implementation and technological transformation in the EU. In the Fundamental Rights Report 2021, the Agency highlights the expansion of digital public services and data-driven decision-making, noting in its opinions that technological innovation must remain consistent with fundamental-rights guarantees, including data protection and effective remedies¹⁴². As indicated in the FRA opinion section, public authorities should “assess the impact on fundamental rights of any AI use in the area of home affairs, including asylum, visa, immigration and borders Stringent, effective and independent oversight mechanisms should accompany the use of AI”¹⁴³.

¹⁴¹ See for instance: FRA Opinion 7.4, *Fundamental Rights Report 2021* (Publications Office of the European Union 2021), p. 201: “EU institutions and EU Member States should ensure that any future EU or national AI-related legal and political instruments are grounded in respect for fundamental rights. To achieve this, they should include strong legal safeguards, promote fundamental rights impact assessments, and ensure independent oversight and access to effective remedies”.

¹⁴² European Union Agency for Fundamental Rights, *Fundamental Rights Report 2021* (Publications Office of the European Union 2021), p. 194 and ff.

¹⁴³ FRA Opinion 6.4, *Fundamental Rights Report 2021*, cit., p. 174.

The Fundamental Rights Report 2022 further develops this concern by addressing risks of algorithmic discrimination, the growing use of automated systems, and the Achilles' heel of fundamental rights in the race to regulate AI¹⁴⁴.

The Fundamental Rights Report 2022 further develops this concern by addressing risks of algorithmic discrimination and the growing use of automated systems, described as the Achilles' heel of fundamental rights in the race to regulate AI. In particular, the FRA looks at the AI Act proposal, stating: “Notably, the EU legislator should ensure that the scope of use cases in the different risk categories is clear and that sufficient guidance and protection – with respect to fundamental rights compliance – is offered in relation to diverse practical contexts. The reliance on self-assessment, although a welcome first step, should be underpinned with effective oversight by independent bodies that are sufficiently resourced and possess the necessary fundamental rights expertise”¹⁴⁵.

In 2022, the FRA also published the report “Bias in Algorithms – Artificial Intelligence and Discrimination” (2022). This report emphasises that algorithmic bias can emerge from data, design choices, and deployment contexts, and may “amplify over time and affect people’s lives, potentially leading to discrimination”¹⁴⁶. The report highlights predictive policing and automated content-detection systems as examples of AI applications where bias risks may materialise. It stresses the importance of testing algorithms for bias before and during use, improving transparency and documentation practices, and enabling the collection of equality-relevant data where necessary to detect discrimination. Overall, the FRA frames algorithmic bias as a fundamental-rights issue requiring preventive governance, oversight, and accountability mechanisms: “algorithms that are used to make or support decisions about people, such as predictive policing, need to be assessed before and regularly after deployment. Special attention needs to be paid to the use of machine learning algorithms and automated decision-making. The EU legislator should make sure that regular assessments by providers and users are mandatory and part of the risk assessment and management requirements for high-risk algorithms”¹⁴⁷.

In the Fundamental Rights Report 2023, references to artificial intelligence become more explicit, particularly in discussions of predictive-policing tools, automated content-detection systems, and the ongoing legislative debate on the EU Artificial Intelligence Act and EU Member State initiatives¹⁴⁸. As stated in the opinions section of the report, the FRA took a stance on the AI Act and the protection of fundamental

¹⁴⁴ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2022* (Publications Office of the European Union 2022), p. 167.

¹⁴⁵ FRA Opinion 7.1, *Fundamental Rights Report 2022*, cit., p. 19.

¹⁴⁶ European Union Agency for Fundamental Rights, *Bias in algorithms – Artificial intelligence and discrimination* (Publications Office of the European Union 2022), p. 106.

¹⁴⁷ FRA Opinion 1, *Bias in algorithms*, cit., p. 11.

¹⁴⁸ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 179 and ff.

rights: “The EU co-legislators should ensure appropriate reference to fundamental rights safeguards in the proposal for the AI Act. The generic definition of AI should avoid narrowing down its scope, as this may unduly narrow the Act’s scope of protection. Existing laws, such as data protection and nondiscrimination laws, should also be used to address fundamental rights challenges posed by the use of AI, as these laws apply both online and offline”¹⁴⁹.

The Fundamental Rights Report 2025 situates artificial intelligence within broader reflections on digitalisation and democracy, reiterating in its opinions that emerging technologies must be accompanied by governance mechanisms grounded in fundamental rights, given the emerging diffusion of AI¹⁵⁰. The FRA 2025 Report states: “The AI Act is a welcome and timely development that will support the safeguarding of fundamental rights. (...) Fundamental rights impact assessments under the AI Act should, when implemented correctly, play a major role in ensuring rights compliance. FRA is involved in providing input in the development of these impact assessments”¹⁵¹. Taken together, these annual reports show a progressive consolidation of the FRA’s position that AI governance in the European Union requires preventive safeguards, rights-impact-assessment practices, and institutional oversight to ensure that automated decision-making remains compatible with the Charter. The expansion of artificial intelligence, particularly in its generative and agentic forms, increasingly affects the values that Article 2 TEU places at the foundation of European democracies — pluralism, non-discrimination, tolerance, justice, solidarity, and gender equality — and this makes an update of digital constitutionalism necessary.

This update has taken place with the AI Act, which follows many of the FRA’s indications while remaining general with regard to the balancing between fundamental rights and the impact of AI. Given the breadth of AI’s impact on multiple fundamental rights, it remains impossible for legislation to propose a balancing model comparable to that developed in the field of online speech, as discussed in the previous section. The AI Act therefore introduces a mechanism that incorporates balancing between fundamental rights and AI through a regulatory model based on risk and impact assessment. The attempt to reconcile sometimes divergent objectives — on the one hand, the promotion of technological innovation and market competitiveness, and on the other, the protection of democratic principles and values — has been pursued through a risk-based regulatory approach. This model provides for the classification of artificial-intelligence applications according to the level of risk they entail, accompanied by a progressive and differentiated system of legal obligations¹⁵². The risk classification established by the AI Act distinguishes, in general terms, three main categories — to which a fourth category concerning general-purpose generative-

¹⁴⁹ FRA Opinion 7.2, *Fundamental Rights Report 2023*, cit., p. 192.

¹⁵⁰ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2025* (Publications Office of the European Union 2025), p. 15.

¹⁵¹ FRA, *Fundamental Rights Report 2025*, cit., p. 14.

¹⁵² Cf. G. Finocchiaro, *The regulation of artificial intelligence*, in *AI & SOCIETY*, 39, 4, 2024.

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AI models with systemic risk has been added: unacceptable-risk systems, high-risk systems, limited-risk systems, and general-purpose generative-AI models with systemic impact.

Unacceptable-risk systems are prohibited because they are considered incompatible with the protection of fundamental rights; these include certain forms of biometric recognition, social scoring, and subliminal manipulation techniques (Article 5 AI Act), albeit with some exceptions that raise questions concerning rights protection.

The category of high-risk systems represents the core of the regulation and concerns sensitive areas such as biometrics, critical infrastructures, education, employment, essential services, security, migration, justice, and democratic processes. For these systems, preventive risk-assessment obligations are established, aimed at preventing violations of fundamental rights such as privacy, data protection, and non-discrimination. Limited-risk systems are mainly subject to transparency obligations, as in the case of chatbots or deepfakes, while for general-purpose generative-AI models attention focuses on possible systemic risks.

Overall, the AI Act's approach combines the regulation of the most dangerous uses of AI with differentiated obligations depending on the type of system, privileging, in less critical cases, transparency measures and risk-mitigation mechanisms, while leaving open questions concerning effective accountability in the integration of AI into democratic processes. The use of such tools may be permitted in exceptional circumstances, for example to prevent or detect particularly serious crimes such as terrorism, listed in Annex II of the Regulation. In such cases, the public authority concerned must carry out in advance a Fundamental Rights Impact Assessment (FRIA), aimed at identifying the rights potentially affected by the use of AI, including privacy, personal liberty, and the presumption of innocence.

The FRIA obligation is relatively clear for public authorities, as they are directly bound by the Charter of Fundamental Rights of the European Union. Its application to private actors is more complex, however, since not all rights enshrined in the Charter have direct horizontal effect in private relationships, as in the case of the right to liberty and security under Article 6 of the Charter. It is therefore possible to observe a continuity between the FRA's position — even without examining individual cases of AI impact on fundamental rights — and that reflected in the Regulation. With the growing use of artificial-intelligence systems in public administration and private decision-making processes, the role of European institutions tasked with safeguarding fundamental rights in the digital environment has intensified, including the European Union Agency for Fundamental Rights (FRA). The FRA has indeed established itself as one of the principal knowledge-based institutions supporting the development of rights-sensitive AI governance.

The FRA report “Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks” (FRA, 2025) represents one of the most significant recent contributions in this field, providing empirical evidence and methodological guidance for the

implementation of the EU's risk-based AI regulatory framework. The report must be understood within the broader context of the evolution of EU digital regulation, in particular the adoption of the Artificial Intelligence Act and its risk-classification model for AI systems. Within this regulatory architecture, the FRA contributes primarily through research, data collection, and methodological development aimed at ensuring that fundamental-rights considerations are effectively integrated into the lifecycle of AI systems. Regardless of the level of complexity, the FRA issues a series of opinions which stress some of the most problematic issues of the AI Act, inviting the Commission to encourage authorities responsible for applying the AI Act to adopt a broad definition of AI systems: "The Commission should encourage authorities in charge of the implementation of the AI Act (e.g. market surveillance authorities) to apply a broad interpretation of the definition when providing further guidance to providers and deployers of AI"¹⁵³.

A central contribution of the FRA (2025) report lies in its empirical examination of AI systems used in high-impact areas such as employment, education, asylum procedures, law enforcement, and access to public benefits. The report discusses concrete examples, including automated tools for job-application screening, AI systems for assessing reading abilities in schools, and automated decision-support tools used in the allocation of social benefits etc. Through different case studies, the FRA identifies a persistent gap between formal regulatory requirements and operational implementation in society¹⁵⁴.

FRA opinions 4 and 5¹⁵⁵ call for developing guidance to help the impact evaluation in different cases and considering different rights at stake: "Guidance related to FRIAs under the standards under Article 9 and the FRIA template under Article 27 of the AI Act should cover the main crosscutting fundamental rights concerns, namely privacy and data protection, equality and non-discrimination, and access to effective remedies. In addition, the impact on other rights should be considered and set out in accompanying guidance. The guidance should be tailored to specific high-risk areas and should provide examples of how high-risk AI systems might have an impact on certain rights in a practical and understandable manner"¹⁵⁶.

The FRA emphasises that fundamental-rights considerations should be integrated throughout the entire lifecycle of AI systems, from design and procurement to implementation and monitoring. This lifecycle-based approach reflects a shift from

¹⁵³ FRA Opinion 1, European Union Agency for Fundamental Rights, *Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks* (Publications Office of the European Union 2025), p. 7.

¹⁵⁴ FRA, *Assessing High-Risk Artificial Intelligence*, cit., p. 36 and ff.

¹⁵⁵ "The Commission and Member States are encouraged to provide guidance on how the AI Act can be best implemented in practice. Any simplification considerations need to be based on evidence and informed by the experiences of various stakeholders involved in the AI Act's implementation. They must not lower existing fundamental rights protection". FRA Opinion 5, *Assessing High-Risk Artificial Intelligence*, cit., p. 10.

¹⁵⁶ FRA Opinion 4, *Assessing High-Risk Artificial Intelligence*, cit., p. 9.

reactive rights protection — traditionally centred on judicial review — toward preventive governance mechanisms embedded in administrative and technological processes. For this reason, the FRA calls for action: “the Commission and Member States should invest in establishing an evidence base that allows for a better understanding of fundamental rights risks and effective mitigation practices. As part of the current financial investment in AI in the EU, research and testing facilities on the safe use of AI are essential. Investments need to be made in studies on and the testing of AI systems’ compliance with fundamental rights, particularly in high-risk areas. Most notably, bias testing needs to be further developed to allow for a better understanding of when and how AI can be used in practice without infringing fundamental rights”¹⁵⁷. This is quite important because it shows how the EU’s National Human Rights Institution — the FRA — could play a role in involving different stakeholders and society in the assessment of AI.

One of the most important conceptual contributions of the report concerns the operationalisation of the Fundamental Rights Impact Assessment (FRIA). The FRA identifies FRIA as a key instrument for translating fundamental-rights principles into practical governance tools. However, the report also shows that FRIA practices remain fragmented across Member States and sectors, with organisations often lacking methodological guidance, institutional capacity, and standardised indicators for assessing rights-related risks¹⁵⁸. The need for supervision is also emphasised: “While self-assessment is important, it functions appropriately only in combination with effective oversight by independent bodies that are sufficiently resourced and possess the necessary fundamental rights expertise”¹⁵⁹. As stressed by the same Opinion explanation: “In previous reports, FRA has called for existing human rights structures – including data protection authorities, equality bodies, national human rights institutions, ombuds institutions and consumer protection bodies – to be built on to address fundamental rights risks stemming from the use of AI. The AI Act assigns some of these bodies additional responsibilities”¹⁶⁰.

In this sense, the FRA demonstrates both its impact on legislation and its monitoring function, complementing the role of judicial bodies.

Another relevant observation concerns the interpretation of “high-risk AI” in EU regulation. The FRA notes that certain AI-based tools with significant social impact may fall outside narrower regulatory definitions, and so a correct understanding of the risk-classification system should be implemented¹⁶¹. This highlights a structural tension within risk-based regulation: legal categories designed to ensure proportionality may inadvertently create gaps in rights protection if interpreted narrowly.

¹⁵⁷ FRA Opinion 6, *Assessing High-Risk Artificial Intelligence*, cit., p. 12.

¹⁵⁸ See FRA Opinions 4 and 5, *Assessing High-Risk Artificial Intelligence*, cit.

¹⁵⁹ FRA Opinion 7, *Assessing High-Risk Artificial Intelligence*, cit., p. 13.

¹⁶⁰ FRA Opinion 7, *Assessing High-Risk Artificial Intelligence*, cit., p. 13.

¹⁶¹ See FRA Opinions 2 e 3, *Assessing High-Risk Artificial Intelligence*, cit. p. 8.

From a governance perspective, the FRA's contribution reflects the growing importance of epistemic institutions within the European fundamental-rights ecosystem. Rather than exercising regulatory or judicial powers, the Agency supports policymaking through comparative research, data collection, and methodological standard-setting, in line with its mandate under Regulation (EC) No 168/2007.

Despite these institutional limitations, the FRA report represents an important step in operationalising fundamental-rights protection in AI governance. By identifying implementation gaps, clarifying methodological challenges, and promoting impact-assessment practices, the Agency strengthens the preventive dimension of rights protection within the European digital regulatory framework.

Finally, in the specific context of the digitalisation of justice, AI tools and fundamental rights, the FRA report "Digitalising Justice: A Fundamental-Rights-Based Approach" (FRA, 2025) examines how digital technologies — including AI-based tools — are integrated into judicial systems in the European Union and evaluates their implications for fundamental rights. The report is based on comparative research on 31 digital tools used in seven Member States, including remote-hearing platforms, electronic case-management systems, online legal-assistance portals, and AI-based anonymisation and transcription tools. Although digitalisation is widely recognised by justice professionals as improving efficiency and access to justice, the FRA emphasises that these benefits can be realised only if fundamental-rights safeguards are integrated into the design and implementation of such technologies. As the report notes, digital tools must "ensure fair outcomes for all"¹⁶² and remain accessible to users in diverse social and technological conditions.

The FRA identifies several rights-related risks associated with the digitalisation of judicial systems, including potential impacts on the right to a fair trial, data protection, equality before the law, and access to justice: "Member States should systematically consider the impact and possible risks regarding fundamental rights when designing digital tools for the justice sector. This assessment should not be limited to the right to respect for private and family life (Article 7 of the Charter) and protection of personal data (Article 8). It should also consider, as a minimum, the right to nondiscrimination (Article 21), the right to a fair trial and effective remedy (Article 47) and the right of defence (Article 48)"¹⁶³. In particular, the report stresses that technological solutions developed primarily for efficiency may inadvertently create new barriers for individuals lacking digital skills or adequate resources. Reflecting this concern, the FRA's opinion sections emphasise the importance of maintaining "non-digital alternatives" and providing training to justice professionals on fundamental-rights risks, including bias, privacy violations, and errors in automated systems¹⁶⁴.

¹⁶² European Union Agency for Fundamental Rights, *Digitalising justice: A fundamental rights-based approach* (Publications Office of the European Union 2025), p. 80.

¹⁶³ FRA Opinion 1, *Digitalising justice*, cit., p. 4.

¹⁶⁴ FRA Opinions 2, 3, 4, *Digitalising justice*, cit., p. 4 and ff.

The report thus situates artificial intelligence within the broader process of digital transformation of judicial systems, highlighting both opportunities and risks. By recommending early risk identification, stakeholder consultation, and the integration of safeguards from the design phase, the FRA promotes a preventive, fundamental-rights-based approach to technological innovation in judicial contexts, while also promoting the safe and informed use of these tools by users¹⁶⁵.

This approach reinforces the Agency's broader position that digitalisation — including the use of AI — must be accompanied by institutional oversight and rights-impact-assessment mechanisms to ensure that technological innovation strengthens, rather than weakens, access to justice.

3.2. The Policy Framework and the FRA's Influence on AI Legislation

As briefly mentioned above, the FRA has progressively developed a set of policy guidelines devoted to the relationship between artificial intelligence and the protection of fundamental rights in the European Union. Although the FRA does not exercise regulatory or supervisory powers, its reports, opinions, and empirical research play an important role in shaping evidence-based policies and supporting the implementation of EU digital regulation. In its publications on artificial intelligence — including research on biometric technologies, automated decision-making in public administration, predictive policing, and the digitalisation of judicial systems — the FRA consistently promotes a preventive approach to AI governance grounded in fundamental rights.

One of the earliest contributions in this field is the FRA report *Facial recognition technology: fundamental rights considerations in the context of law enforcement*, which identifies biometric-identification systems as particularly sensitive technologies requiring strict legal safeguards, independent oversight, and proportionality assessments. The report anticipates subsequent European policy debates on biometric surveillance, highlighting the risks that inaccuracies, bias, and large-scale processing of biometric data may pose to privacy, non-discrimination, and effective judicial protection.

The FRA further developed its policy guidance in “Getting the future right: Artificial intelligence and fundamental rights”, which examines the growing use of AI in public administration. This report highlights the importance of integrating fundamental-rights safeguards into the design and procurement of automated decision-making systems, promoting transparency, human oversight, and strengthened institutional capacity within public authorities. These recommendations anticipate key elements of the EU's subsequent risk-based approach to AI regulation.

¹⁶⁵ FRA Opinions 5 and 7, *Digitalising justice*, cit., p. 7 and ff.

The FRA's policy guidance on AI also emerges in the Agency's annual Fundamental Rights Reports (2021–2024), in which artificial intelligence appears primarily in relation to digitalisation, algorithmic decision-making, and technologies used by law-enforcement authorities. Through its opinion sections, the FRA repeatedly emphasises that technological innovation must remain consistent with the EU Charter of Fundamental Rights, highlighting the importance of transparency, oversight, and safeguards against algorithmic discrimination.

More targeted empirical research reinforces these policy messages. FRA work on predictive policing and automated detection systems highlights the need to address risks of bias, improve data quality, and avoid excessive reliance on algorithmic risk-assessment tools in law-enforcement activities. Similarly, FRA research on algorithmic bias and data quality underscores the importance of representative datasets, documentation practices, and interdisciplinary oversight in the development of AI systems. More recent FRA publications situate these recommendations within the evolving EU regulatory framework on artificial intelligence. The report “Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks” focuses on the practical implementation of the EU's risk-based AI governance model and identifies persistent gaps in the assessment of fundamental-rights risks by AI providers and public authorities. The FRA supports the systematic use of Fundamental Rights Impact Assessment (FRIA) methodologies and the further development of institutional expertise in assessing AI-related risks. In parallel, “Digitalising justice: A fundamental-rights-based approach” extends this preventive perspective to judicial systems, recommending rights-impact assessments, training for justice professionals, and safeguards to prevent digital exclusion.

Taken together, these publications reveal a coherent set of policy indications emerging from the FRA's work on artificial intelligence. These include the promotion of preventive fundamental-rights impact assessment, the preservation of human oversight in automated decision-making, the strengthening of transparency and accountability mechanisms, the improvement of data quality and safeguards against discrimination, and the development of institutional capacity within public authorities. Although not legally binding, these policy orientations contribute to shaping the European model of AI governance by translating fundamental-rights principles into operational recommendations for policymakers and public administrations.

Although the European Union Agency for Fundamental Rights (FRA) is not explicitly cited in the text of the Artificial Intelligence Act, a comparative analysis of the regulation's core provisions reveals a significant degree of substantive convergence with the policy orientations and risk configurations developed in FRA research on artificial intelligence and fundamental rights. This convergence is particularly evident in five key areas: the regulation's fundamental-rights-based rationale, the treatment of biometric-identification technologies, the adoption of a risk-based regulatory model, the introduction of fundamental-rights impact-assessment obligations, and the requirement of human oversight.

First, the AI Act explicitly recognises that artificial-intelligence systems “AI may generate risks and cause harm to public interests and fundamental rights that are protected by Union law” (AI Act, Recital 5). This foundational premise closely reflects the analytical framework developed by the FRA in “Getting the future right: Artificial intelligence and fundamental rights”, in which the Agency identifies automated decision-making in public administration and the private sector as a structural challenge for fundamental rights such as human dignity, right to privacy and data protection, equality and non-discrimination, access to justice, right to social security and social assistance, consumer protection, and right to good administration¹⁶⁶. The FRA’s insistence on treating AI primarily as a fundamental-rights issue, rather than merely a technological or economic one, is therefore reflected in the normative rationale of the regulation.

Second, the AI Act’s restrictive approach to biometric-identification technologies — in particular remote biometric identification in publicly accessible spaces¹⁶⁷ — closely corresponds to the concerns expressed in the FRA report *Facial recognition technology: fundamental rights considerations in the context of law enforcement*. In that report, the FRA emphasises that biometric-identification systems entail high risks for privacy, non-discrimination, and effective judicial protection, thus requiring strict legal bases, necessity and proportionality assessments, and independent oversight¹⁶⁸. The legislative choice to identify biometric identification as a particularly sensitive AI application reflects this earlier rights-based risk analysis.

Third, the overall structure of the AI Act is explicitly based on a risk-based regulatory model¹⁶⁹, introducing graduated obligations according to the level of risk posed by AI systems. This approach is consistent with FRA recommendations promoting ex ante and proportionate governance mechanisms calibrated to the social and rights-related impact of AI technologies. In “Getting the future right”, the FRA explicitly calls for preventive safeguards and differentiated governance responses depending on context and use¹⁷⁰, a logic later consolidated in the AI Act’s classification of unacceptable-risk, high-risk, and limited-risk systems.

Fourth, the introduction of the obligation to conduct fundamental-rights impact assessments for certain high-risk AI systems¹⁷¹ constitutes one of the clearest examples of conceptual uptake of FRA research. In several publications, the FRA promoted the development of fundamental-rights impact-assessment methodologies as preventive governance tools capable of addressing risks before implementation¹⁷². The FRA

¹⁶⁶ FRA, *Getting the future right*, cit., p. 57 and ff.

¹⁶⁷ AI Act, Art. 5; Recitals 32–33.

¹⁶⁸ FRA, *Facial recognition technology*, cit., p. 20.

¹⁶⁹ AI Act, Recitals 26–27.

¹⁷⁰ FRA, *Getting the future right*, cit., p. 87 and ff.

¹⁷¹ AI Act, Art. 27.

¹⁷² FRA, *Getting the future right*, cit., p. 87 and ff. “Learning from data protection impact assessments” as stressed by the same report (*ibid.*, p. 89).

report “Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks” explicitly presents such assessments as essential for operationalising Charter compliance in high-risk contexts, a position now reflected in binding regulatory obligations.

Finally, the AI Act requirement that high-risk AI systems be designed and used with effective human oversight¹⁷³ corresponds to a recurring theme in FRA research emphasising the need to preserve human accountability in automated decision-making. FRA reports on predictive policing, digitalisation of justice, and AI in public administration consistently warn against excessive reliance on algorithmic outputs and emphasise the importance of human review and responsibility¹⁷⁴.

Taken together, these convergences suggest that FRA research has indirectly but substantively contributed to the normative architecture of the AI Act. Rather than influencing legislative drafting through explicit citation, the FRA's influence operates at the level of problem definition, risk conceptualisation, and governance methodology. From a doctrinal perspective, this illustrates how EU agencies lacking regulatory or legislative powers may nonetheless contribute to the formation of binding legal norms by providing the epistemic foundations upon which regulatory choices are built.

As observed, these indications have been reflected in the AI Act. But has this impact translated into public recognition of the FRA within the legislative process — that is, within institutional public discourse?

A qualitative analysis of institutional databases shows that explicit references to the European Union Agency for Fundamental Rights are largely absent from European Parliament plenary debates on the Artificial Intelligence Act, where discussion instead focuses on broader normative principles such as human-centred artificial intelligence and the protection of fundamental rights. During the plenary debate preceding the adoption of the regulation, for example, the AI Act was described as an important step to ensure that artificial intelligence develops in a human-centred way and respects fundamental rights¹⁷⁵. This emphasis on value-based governance reflects themes extensively analysed in FRA research, even though the Agency is not mentioned in the debate transcripts.

By contrast, FRA expertise emerges more clearly in preparatory documents accompanying the legislative process. The Commission Impact Assessment supporting the proposal for the AI Act explicitly includes the FRA report “Getting the future right: Artificial intelligence and fundamental rights” within its evidence base¹⁷⁶. The same document notes that the introduction of stronger fundamental-rights risk-assessment mechanisms had been proposed by several stakeholders, including “the

¹⁷³ AI Act, Art. 14.

¹⁷⁴ See above in this section.

¹⁷⁵ European Parliament, Artificial Intelligence Act (debate) - Tuesday, 12 March 2024. See, for instance the speech of the rapporteur Dragoş Tudorache.

¹⁷⁶ Impact Assessment (SWD(2021) 84 final).

Fundamental Rights Agency” (European Commission, SWD(2021) 84 final). Parliamentary research documents prepared by the European Parliamentary Research Service (EPRS) likewise refer to FRA work when discussing risks associated with biometric technologies and automated decision-making, illustrating how FRA research informed the knowledge context of the legislative process.

This pattern reflects the FRA's institutional position within the EU fundamental-rights system. As an advisory agency tasked with providing expertise, comparative data, and methodological guidance, the FRA primarily contributes to the evidentiary and analytical foundations of EU policymaking rather than to political debate as such. Its reports on facial-recognition technologies (2019) and artificial intelligence in public administration (2020) helped frame artificial intelligence as a fundamental-rights issue requiring preventive governance mechanisms, including risk assessment and oversight. These themes later became central to the EU's risk-based approach to AI regulation and to the development of obligations such as fundamental-rights impact assessment in the AI Act.

As the 2025 report stresses, “At the time of publishing this report, the European AI Office was in the process of developing the FRIA template, with FRA's assistance”¹⁷⁷. Thus, the role of the FRA seems increasingly relevant in giving application to fundamental rights in the AI field. The FRA also highlights how, “In 2025, discussions took place concerning the simplification of existing EU laws, including in the digital area. Given that it is still early days in the implementation of the AI Act, simplifying the law may be better addressed by providing sufficiently practical guidance for its implementation. Any simplification considerations need to be based on evidence and informed by the experiences of various stakeholders involved in the AI Act's implementation. Civil-society actors have already expressed concerns about the potential lowering of the fundamental rights protection offered by the AI Act and have called for a focus on its proper implementation”¹⁷⁸.

The limited visibility of references to the FRA in parliamentary debates therefore does not indicate a lack of influence, but rather reflects the indirect manner in which EU agencies shape legislative processes. FRA research contributes to agenda-setting, problem identification, and policy design through impact assessments, parliamentary research briefings, and expert consultations. In this sense, the Agency's role in the development of the AI Act may be understood as epistemic and preparatory: by documenting risks associated with automated decision-making, biometric identification, and algorithmic bias, the FRA helped establish the fundamental-rights framework underpinning the Union's approach to artificial-intelligence governance. The absence of references to the FRA in public discourse may nevertheless constitute a challenge if the Agency seeks to assume the role of a European NHRI and to become,

¹⁷⁷ FRA, *Assessing High-Risk Artificial Intelligence*, cit., p. 33.

¹⁷⁸ FRA, *Assessing High-Risk Artificial Intelligence*, cit., p. 63.

at the societal level as well, a point of reference for the protection of fundamental rights in the digital sphere.

4. Conclusions

This analysis has examined the role of the FRA in EU digital regulation, focusing on the interplay between fundamental rights, institutional practice, and the evolving regulatory framework of the Union. Section 2 aimed to evaluate the FRA's conception of free speech and its influence both on the drafting and discussion of legislative proposals, as well as in the monitoring and implementation phases of online public discourse regulation. Section 3 focused on the FRA's contribution in protecting fundamental rights in relation to the risks posed by AI and its impact on EU legislation. Two aspects of the Agency's role in EU digital regulation have emerged as particularly significant.

Firstly, at the normative level, the FRA's conception of fundamental rights largely aligns with the paradigm developed within the Council of Europe. The FRA has not sought to depart from ECtHR case law, but rather to consolidate a common interpretative framework within the EU context. However, in certain fields, such as sexist hate speech, disinformation, and AI regulation, the FRA appears to have developed an autonomous standing¹⁷⁹, adapting fundamental rights to the digital environment and proposing specific solutions to address the risks posed by technologies that may undermine these rights. In doing so, the FRA effectively proposes specific interpretations of EU fundamental rights, reinforcing its position as a key actor in their protection at the EU level. Through its opinions and analyses, the Agency has contributed to adapting the principles of constitutionalism to the digital age. In the field of freedom of expression and information, it supports the gradual emergence of a distinctly EU-centred understanding of freedom of expression—anchored in the ECHR tradition but adapted to the Union's regulatory ambitions in the digital domain. In the area of AI, its role appears even more prominent, shaping the application of the rule of law in the digital sphere in an autonomous yet interconnected manner with Council of Europe institutions. In this framework, the FRA could, in principle, evolve into an actor capable of fostering an interpretation of fundamental rights under the EU Charter that is independent from that of the

¹⁷⁹ This could be considered part of the trend created by Opinion 2/13 of EU Justice Court on the autonomous nature of the EU legal order, however this autonomous standing could generate some problems for what concerns the equivalent protection doctrine. Cf. P. De Hert - F. Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights*, in *German Law Journal*, 13, 7, 2012.

ECHR—especially in light of Opinion 2/13 of the CJEU¹⁸⁰. So far, however, the Agency does not appear to have pursued such a role.

Secondly, at the policy level, the FRA's influence on EU legislative and regulatory processes in the field of digital regulation has been uneven. In some cases—such as the Regulation on Terrorist Content Online, the Digital Services Act, or the AI Act—the Agency has played a visible and constructive role, both by issuing formal opinions and by contributing through forms of impact assessments and monitoring activities. These contributions have strengthened the fundamental rights dimension of these regulations, ensuring attention to proportionality, procedural safeguards, and the protection of journalistic and academic expression. By contrast, in other cases—such as the Regulation on Political Advertising and the European Media Freedom Act—the FRA's role has remained marginal, limited to discursive interventions or indirect contributions. In general, it is worth emphasising that the regulation of digital technologies based on risk management appears consistent with the approach proposed by the FRA for governing the digital sphere, an approach the Agency has adopted since 2019: “Given that only a rights-based approach guarantees a high level of protection against possible misuse of new technologies and wrongdoings using them, Member States should put fundamental rights at the heart of national strategies on AI and big data. Such strategies should incorporate know-how from experts in various disciplines such as lawyers, social scientists, statisticians, computer scientists and subject-level experts. Ethics can complement a rights-based approach but should not replace it”¹⁸¹.

However, the FRA does not appear to play a central role in the EU's institutional public discourse: the Agency is not systematically invoked as a reference in parliamentary debates or Commission proposals. In the field of the regulation of digital technologies, the FRA does not appear to have acquired the role of an authoritative source to be cited in support of policy-making, unlike other national human rights institutions (NHRIs)¹⁸² within their respective legal systems, or even the

¹⁸⁰ G. Martinico, *Building Supranational Identity: Legal Reasoning and Outcome in Kadi I and Opinion 2/13 of the Court of Justice*, in *Italian Journal of Public Law*, 8, 2016; E. Spaventa, *A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13*, *Maastricht Journal of European and Comparative Law*, 22, 2015.

¹⁸¹ FRA Opinion 7.4, *Fundamental Rights Report 2019* (Publications Office of the European Union 2019), p. 166.

¹⁸² See the proposals contained in European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Strengthening the Fundamental Rights Agency – The Revision of the Fundamental Rights Agency Regulation* (Study, May 2020) PE 653.056. The following revision of the FRA Regulation in 2022 significantly strengthened the Agency's mandate, expanding its competence to all areas of EU law and confirming its role as an independent provider of expertise on fundamental rights to EU institutions and Member States, thereby enhancing its capacity to contribute to emerging regulatory domains such as artificial intelligence (Council Regulation (EU) 2022/555 of 5 April 2022 amending Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2022] OJ L108/1).

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FRA itself in other domains, such as asylum law. However, it cannot be denied that the FRA has increasingly become a significant actor in EU policy-making on digital regulation and, above all, has established itself as a source of expertise and legitimacy in an area traditionally dominated by the Member States and the Council of Europe. Its impact often operates in the background—through expertise, reports, and participation in consultations—without necessarily translating into explicit political and institutional recognition. This analysis suggests that, in certain cases, the FRA has played a pivotal role in shaping the vocabulary, categories, and proportionality standards employed in policy debates. The Agency may thus have influenced the terms of discussion even where its name is not formally cited. This situation reflects both the structural limits of the Agency's mandate and its positioning as an advisory body external to the legislative process. The degree to which the FRA's role will be consolidated in future regulatory cycles—particularly through the full implementation of the Digital Services Act (DSA), the Regulation on Political Advertising, the European Media Freedom Act (EMFA), and the Artificial Intelligence Act (AI Act)—will constitute a key test of the Agency's capacity to shape not only policy, but also the Union's institutional public discourse in the field of digital regulation. As highlighted in a recent 2025 speech by the FRA Director, the Agency aspires to play an increasingly significant role in both the regulation of online freedom of expression and AI¹⁸³.

¹⁸³ Sirpa Rautio, Director, *The Effects of Digital Technologies on Fundamental Rights* (speech at University of Florence, 15 May 2025), European Union Agency for Fundamental Rights (FRA), <https://fra.europa.eu/en/speech/2025/effects-digital-technologies-fundamental-rights>.

For what concerns the regulation of freedom of expression and the challenges of hate speech and disinformation, the Director stressed how “the EU already has the tools to tackle this and ensure effective content moderation. The Digital Services Act – the DSA – requires platforms to remove illegal content and to reduce the risks their systems pose to fundamental rights. (...) However, the law on paper is not enough. To truly tackle online hate and abuse, we need to ensure the DSA is properly implemented and enforced – and that platforms are held accountable. There is currently an urgent need for more information, data and analysis of the protection of fundamental rights online. At FRA, we are contributing to filling this gap through our work on online hate and content moderation and, in the coming months, we will come out with new reports on the topic”. Regarding the regulation of online electoral campaigning, the Director stated: “Our upcoming Fundamental Rights Report – which is FRA's annual flagship report – focuses on the need for fair, transparent, and safe elections – including the online dimension. It repeats FRA's calls for proper implementation and enforcement of existing EU rules – from the Digital Services Act and AI Act to the Political Advertising Regulation. This will help to ensure that the integrity of future elections in the EU is fully protected from attempts at manipulation. At the same time, it will make sure that fundamental rights, such as the freedom of expression, are fully respected”. As far as AI is concerned, the Director highlighted that “The AI Act is the first piece of legislation globally that sets standards for AI and calls for the assessment of fundamental rights risks. My Agency is actively contributing to this process. We develop ways to assess fundamental rights risks, we advise on the implementation of the AI Act, and we scrutinise high-risk AI applications. We analyse how police forces use remote biometric identification, including facial recognition technology, and later this year, we will publish a report on the digitalisation of our justice systems and compliance with fundamental rights. Based on hundreds of interviews with practitioners and technicians in the justice

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In conclusion, the findings of this paper also invite a broader reflection on the evolving constitutional identity of the European Union. Freedom of expression and the rule of law, long considered domains reserved to Member States and primarily safeguarded through the Council of Europe, are now increasingly subject to EU regulatory intervention, particularly in the digital sphere. In this transition, the FRA plays a subtle yet significant role: by analysing EU policy in light of ECtHR standards while simultaneously reinforcing an autonomous dimension of EU fundamental rights, it contributes to the construction of a distinct EU voice in digital technology regulation. This “Europeanisation”¹⁸⁴ of digital regulation does not represent a departure from the ECHR system, but rather a gradual layering of EU-specific instruments and practices on top of a shared normative foundation. The FRA’s mediating presence is thus emblematic of the Union’s broader trajectory: one that does not seek to replace existing human rights architectures but to adapt and reframe them in accordance with the EU’s institutional and regulatory ambitions¹⁸⁵.

ABSTRACT: Building on the existing literature on the European Union Agency for Fundamental Rights (FRA) and its impact on the protection of fundamental rights within the European Union, this article examines whether, and to what extent, the FRA has contributed to the development of EU digital constitutionalism and the shaping of EU digital regulatory policies. In particular, it explores the conception(s) of fundamental rights underpinning the FRA’s interventions and assesses how these have informed both the evolution of EU digital constitutionalism and the design of public policies in the field of digital regulation. The article is structured as follows. Section 1 provides an introduction and outlines the methodological considerations underpinning the analysis. Section 2 examines the understanding of freedom of expression and information advanced by the FRA, as well as its role in shaping EU digital policies in this domain, with reference to what may be termed “digital constitutionalism 1.0.” Section 3 turns to the FRA’s work on artificial intelligence, analysing its rights-based approach and the safeguards it proposes for the protection of fundamental rights within the framework of “digital constitutionalism 2.0.” Finally, Section 4 offers concluding remarks and reflects on the FRA’s broader role in promoting fundamental rights in EU digital regulation.

field, the findings focus on real applications of digital tools and the fundamental rights considerations that emerge when we examine them in practice”.

¹⁸⁴ A. Bradford, *Europe’s Digital Constitution*, in *Virginia Journal of International Law*, 64, 2023.

¹⁸⁵ A. Bradford, *Digital Empires*, cit.

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KEYWORDS: EU Fundamental Rights Agency – National Human Rights Institutions – European Union Agency for Fundamental Rights – Digital constitutionalism – Artificial Intelligence – Freedom of expression.

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