European Integration online Papers ISSN 1027-5193

Vol. 18 (2014), Article 1

How to cite?

Blom, Tannelie and Valentina Carraro (2014): 'An information processing approach to public organizations: The case of the European Union Fundamental Rights Agency', *European Integration online Papers* (*EIoP*), Vol. 18, Article 1, http://eiop.or.at/eiop/texte/2014-001a.htm, pp. 1-36.

DOI: 10.1695/2014001

An information processing approach to public organizations: The case of the European Union Fundamental Rights Agency*

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Abstract: This article presents the results of a single-case study done in order to probe a specific version of an information processing approach to the study of (public) organizations. The case used for this probe is the European Fundamental Rights Agency. The article demonstrates that the information processing approach to public organizations as sketched out in the first sections of this article provides a conceptual framework that enables a fine-grained descriptive analysis of bureaucratic processes and their essential structures. It is shown how the rather fierce ('constitutive') politics behind the Fundamental Rights Agency establishment resulted in specific organizational structures that, from a strictly formal point of view, seem to effectively put the agency in shackles. This article also shows that although seemingly weak, the Fundamental Rights Agency is able to circumvent its formal restrictions through the exploitation of the structural incoherencies and gaps that are inevitable concomitants of political compromise in its daily operations.

* The authors would like to thank two anonymous reviewers for their useful and inspiring comments on previous versions of this article. In addition, the authors wish to thank the interviewees for their willingness to share their knowledge and information, and for providing valuable comments and suggestions.

Keywords: European Agencies; Third Pillar; fundamental/human rights; public administration; institutions; Council of Europe; European Commission; Council of Ministers; political science.

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Introduction

This article presents the results of a single-case study of the type that Alexander George and Andrew Bennet have labeled 'plausibility probes' – "preliminary studies on relatively untested theories and hypotheses to determine whether more intensive and laborious testing is warranted" (George and Bennet, 2005: 75). 'Probed' is a specific version of an information processing approach to the study of (public) organizations. The case used for this probe is the European Fundamental Rights Agency.[1]

The idea to perceive organizations from an information processing perspective instead of from a structure-oriented point of view – 'for which the organizational chart is the ever-present tool' (Shafritz, Ott, and Yang, 2005: 193) is certainly not new. Basic components of such an approach can be traced back (at least) to Herbert Simon's doctoral dissertation, published in 1945 as *Administrative Behavior: A Study of Decision-Making Processes in*

[1] As Von Bogdandy and Von Bernstorff (2009: 1036) point out, the expression 'human rights' is typically used in the context of international agreements while, at least in Europe, the term 'fundamental rights' "denominates domestic constitutional guarantees of an individual polity".

Administrative Organization.[2] What *is* new about the information processing approach presented in this article is, first, that it refines the basic model of organizations as information processors geared to the generation of decisions (cf. March and Simon, [1958] 1993; Tushman and Nadler, 1978; Poole, 1978) by complementing it with Niklas Luhmann's emphasis on the 'reflexivity' of organizational decision-making as a central mechanism for the development of formal structures, including his distinction between the temporal, substantive and social dimensions of structuring (cf. Luhmann, 1985; Heidenescher, 1992; Luhmann, 2000b). In a next step we enrich this model with insights from post-rationalist decision-making theory (e.g. Simon, 1955; 1956; Beach and Mitchell, 1978; Payne, Bettman, and Johnson, 1988; Sniderman, Brody, and Tetlock, 1991). Third, by introducing the distinction between 'constitutive' and 'operational' politics of information, we seek to accommodate Terry Moe's repeated plea for a genuine *political* theory of public bureaucracies, in contrast to a theory of organizations that has its origins in economics as e.g. provided by the currently popular 'transaction costs'-based Principal/Agent models (cf. Moe, 1990; 1991). Or as Coulam and Smith complain "what is generally missing is research that integrates the political and information processing perspective" (Coulam and Smith, 1985: 13).

Our case, the European Fundamental Rights Agency (henceforth the FRA), is a case of a European agency, in particular an example of an 'information', or 'observatory' (cf. Geradin and Petit, 2004) agency. Specifically, the main task of the FRA is

> "to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights" (Council Regulation 168/2007, article 1).

We chose the FRA for several reasons. For a start, the FRA is rather neglected by political scientists studying the EU. That is not to say that nothing of academic standing has been published on the FRA – quite the contrary. Yet what is available is most often produced by legal scholars specialized in the field of human rights, such as Nowak (2005), Toggenburg (2007a; 2007b; 2008), De Schutter (2009), and Bogdandy and Bernstorff (2009). Unsurprisingly these authors concentrate predominantly on normative-legal issues: on the status of the FRA in the broader European architecture of (monitoring) human rights, on whether the governance structure of the FRA satisfies the so-called 'Paris Principles' concerning the independence of human rights monitoring institutions, etc. Yet as this article will show, the FRA is also interesting from a political science perspective when observed through the lenses of an information processing approach. Moreover, the FRA's constitutive and operational politics exhibit some features we expect to be conducive to a further elaboration of our information processing approach to public organizations. As hinted above, our case study is of an exploratory nature; as such it is not an attempt to test one or more empirical hypotheses.

[2] Many other authors could of course bring it to mind - Weick (1969; 1982), Galbraith (1973; 1977), Tushman and Nadler (1978), Larkey and Sproull (1984), Stinchcombe (1990), Workman, Jones, and Jochim (2009), Jones and Baumgartner (2012).

However, we claim that our information processing approach to public organizations enables a conceptually more fine-grained analysis of the establishment and content of bureaucratic structures than the theory of 'institutional design' as offered by rational institutionalism (cf. Jones, 2003: 406). The latter's ongoing focus on monitoring and control mechanism does inform us, although only partly, about the possible structuration of the relations between bureaucracies and politicians (cf. Waterman and Meier, 1998: 178), yet it does not tell us much about the agent's internal organizational structure. The same advantage of descriptive finesse holds, now compared to the 'bureaucratic politics' literature, for the question of how and why information that 'reaches the ear' of formally competent decision-makers may influence the final choice between different alternatives. Although we do share a (social) constructivist epistemology with sociological institutionalism, we disagree with the idea put forward by e.g. March and Olsen (1984) and March (1987) that the rejection of the 'exogenous' character of preferences implies that bureaucratic and political actors have no politically relevant and directing preferences and that analysts should be wary of power and power politics. In this respect our approach shares the assumption with rationalist perceptions of institutional design and bureaucratic agency that political and bureaucratic actors do have politically relevant interest and preferences. Yet we do not assume *a priori* that the interests of agents are always opposed to those of their principals (cf. Waterman and Meier, 1989), and we find the analytically convenient simplification of the principal(s) as a unitary actor (e.g. Tsebelis, 1995; Pollack, 2003: 34 *ff.*) in fact highly *in*convenient when it comes to understanding the historical establishment and development of public organizations.

In a more methodological vein, we deem our information processing approach much more promising when it comes to 'process-validity', than, for example, the theory of 'institutional design' as offered by rational institutionalism (cf. Coulam and Smith, 1985; Mintz, 1997). The presumed importance of process-validity is based on the assumption, inherent in every *process* approach, that the *how* of information processing and decision-making has a substantial impact on the *what*, or the concrete content of decisional outcomes (cf. Sproull and Larkey, 1984). But then, as Alex Mintz (1997) has remarked, some schools of thought may well be much more interested in 'outcome-validity'. For example, from a rationalist perspective, the relevant question is not whether the assumptions which together stand for 'homo economicus' or 'rational man' are plausible descriptions of human beings as they really are, but whether these assumptions enable the formulation of valid predictions/explanations of, in this case, the particular decisions (e.g. on organizational structure) that are eventually made. The interesting thing of probing our information processing approach on the FRA is, however, that a quest for outcome validity does not seem that desperate either. As will be shown below (Section 1.3), studying our case has prompted some ideas concerning how hypotheses may be formulated that transcend the individual case of the FRA.

In what follows, we start with a summary of our information processing framework. Then we will look first at the ('constitutive') politics behind the establishment of the FRA and its outcomes as evidenced by its founding regulation and 'Multi-Annual Framework(s)'; next we will describe how the FRA handles the rather detailed and limiting prescriptions of its tasks and competences as specified by its founding regulation ('operational politics').

These empirical sections are based on document analysis, interviews with key actors during the establishment as well as in the daily operations of the FRA, and on the relevant academic literature. In our conclusion we reflect on our findings and suggest some next steps of research with a view to the further development of an information processing framework.

1. Theoretical framework[3]

1.1. General assumptions

Our information processing perspective on public organizations departs from the general assumption that organizations exist in the form of subsequent (sometimes serially, sometimes parallel progressing) episodes of information processing with explicit decisions as transitional and linking events (cf. Simon, 1997: 240 *ff.*; March and Simon, 1958: 152 *ff.*).[4] Such decisions may concern a selection of fundamental rights topics to be scrutinized for the next five years, the granting of a trademark, the publication of a document comparing practices of vocational training, or the adoption of a list of chemical substances that are of 'Very High Concern'. It should be emphasized that sequences of episodes of information processing do not necessarily (and often not at all) mirror the neat, 'logical' sequence associated with the classical 'policy cycle'. More precise is Paul Anderson's observation that organizational decision-making is sequential and often reiterative in that it is not simply a question of choosing between simultaneously given alternatives with a view to a specific goal, but a process in which goals and alternatives are 'discovered' and perhaps dropped in subsequent steps (Anderson, 1983).[5] Put differently, problem definition, goal-setting, the specification of alternatives and decision-taking are issues that may arise as tasks and problems in every episode of organizational information processing (cf. Weiss, 1989).

As Niklas Luhmann has emphasized, 'reflexive' decision-making is used by organizations as their main device for developing their formal structures (cf. Luhmann, 1985; Luhmann, 2000b). Within the conceptual framework of his theory of self-referential systems, the term 'reflexive' denotes the application of a process to that process itself, e.g. learning to learn, or teaching how to teach. In our context, it refers to the fact that organizations inevitably decide on deciding (including decisions not to decide). Organizations use this second order level of decision-making for example in an attempt to fix their temporal structure: organizations can and do decide *when* decisions have to be made and when information has to be accessed and made available. In a similar way, organizations can decide on their substantive and social

[3] This section is based on the paper *The politics of informing the EU: an organization theoretical perspective,* presented by Tannelie Blom at the Conference on The Politics of Informing the EU, 8/9 December 2011 Maastricht. See also Blom (2014) and Blom, van Suijlekom, Versluis, and Wirtz (2014).

[4] Since decisions also 'inform', and because not all communications that are relevant for the functioning of bureaucratic organizations are explicit 'decisions' the more inclusive term is chosen: organizations are *information processing* systems. (cf. Galbraith (1977); Tushman and Nadler (1978); Huotari and Wilson (2001)).

[5] The empirical basis of this observation is Anderson's (process tracing) analysis of the archival records which contain the transcripts of the meetings of the Executive Committee of the National Security Council during the Cuban missile crisis.

structures. A first substantive order is already given by decisions on the (global and less global) goals of the organization and on what kind of information is relevant and should be accessed. Next, organizations can decide on the rules and routines which prescribe how relevant information should be processed with a view to specific objectives. Finally, organizations can and do decide on how decisions should be made, e.g. which voting rules have to be followed, but also which values/interests have priority or even have to be 'protected'[6] when choices are made. The social dimension is, first of all, presented by the membership rules of an organization – who is entitled to participate in and contribute to the organizational processes and next, by the rules prescribing the distribution of information, i.e. which members have a 'voice' or even a 'say' during which episode, etc.

Surely, formal structures are more often than not 'incomplete': in need, that is, of further specification in view of the concrete situations in which they have to be enacted. Moreover, formal rules can be cumbersome and inefficient, provoking organizational members to circumvent them. All this will contribute to the emergence of informal structures, which in turn may be observed by the upper-stratum of the organization itself and eventually formalized. The overall point to be made, however, and here we paraphrase Robert Stinchcombe (1990: 2) rather closely, is that *the core structures of public organizations consist of the rules and routines that prescribe when, how and by whom information is accessed, processed, distributed, stored, etc. and decisions are made*, irrespective of these structures being formal or informal.

1.2. Post-rationalist decision-making theory

The assumption that decisions are of central importance to administrative processes cannot but stimulate an interest in decision-making processes as such. Already in *Administrative Behavior*, Simon had given in to that argument, yet the public breakthrough of his reflections came with two articles and a book published in the 1950's in which he presented his now famous concept of 'bounded rationality' (Simon 1955; 1956; Simon, Smithburg, and Thompson, 1956). It was explicitly meant as a counterbid to the normative stance of 'classic' – or 'global' as Simon preferred to label it – rationalist theories of choice.[7] 'Bounded rationality' refers to the assumption that, due to time/energy constraints and cognitive limitations, i.e. due to restricted information accessing and processing capacities, individual decision-makers not only have a limited oversight over the choice alternatives, but also a limited knowledge of the future consequences of the alternatives they do perceive.[8] Or as Simon put in the article that earned him the Nobel Prize:

> „Because of the psychological limits of the organism (particularly with respect to

[6] 'Protected values', are "values that resist trade-offs with other values" (Baron and Spranca, 1997: 1; cf. Ritov and Baron, 1999; Tetlock, Kristel, Elson, Green, and Lerner, 2000).

[7] The adjective ´classic´ is used here to distinguish this rationalism from current P/A-modeling and rational institutionalism which (have to) depart from more relaxed assumptions.

[8] As the standard formulation goes, people may intend to act rationally but will only achieve it in a limited way (cf. Weick 1969: 9).

> computational and predictive ability), actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models“ (Simon, 1955: 101).

Since Simon's path breaking publications, decision-making theory has taken a serious flight, especially through the contributions of cognitive psychologists. Two findings are of special importance here: a) human decision-makers are sensitive for 'framing', *and* b) they adapt their mode of decision-making to (perceived) task and task-environment related complexities, which in turn affects decisional outcomes.

The term 'framing' was originally coined by the psychologists Daniel Kahneman and Amos Tversky to label a central concept of their 'prospect theory' (e.g. Kahneman and Tversky, 1979; 1984; Tversky and Kahneman, 1981; 1986). The concept of 'framing' as used by prospect theorists clearly comprises connotations of purposive manipulation, suggesting that it can be exploited strategically in interactive settings (cf. Nylander, 2001: 294). As Mintz and Redd (2003: 194) put it: "Framing, as an attempt at political manipulation, occurs when an actor targets a decision maker and attempts to influence attitudes and behavior". However, an actor-oriented, purposive concept of framing may well have a broader scope than the rather limited vista of 'gambling' and 'risky choice' on which prospect theory originally focused. Framing may, for example, be directed to the definition of an assumed problem – e.g. the use of drugs can be depicted as a criminal problem or as a (public) health problem. Alternatively, it may concentrate on possible effects and outcomes of a decision (or non-decision). To borrow from Mintz and Redd (2003), not attacking Iraq is repeating the appeasement scenario of the thirties with all its evil outcomes or attacking Iraq will lead to another Vietnam. In another instance it may emphasize, in a more deontological manner, that a certain decision/policy comes down to an infringement or, conversely, to a firm guarantee of 'protected values', i.e. "values that resist trade-offs with other values" (Baron and Spranca, 1997: 1; cf. Ritov and Baron, 1999; Tetlock, Kristel, Elson, and Green, 2000). All in all, Falk Daviter's concept of "framing as the process of selecting, emphasizing and organizing aspects of complex issues according to an overriding evaluative or analytical criterion" (Daviter, 2007: 654) seems to fit rather well an information processing perspective on bureaucratic organizations.

The concept of framing has acquired a special meaning and has been used in combination with the development of what have been labeled 'heuristic' theories of decision making since the early seventies (cf. Einhorn, 1970; 1971; Payne, 1976). Central to these heuristic theories is the idea of a 'decision strategy'. As Beach and Mitchell put it:

> „A decision strategy consists of: (a) the set of *procedures* that the decision maker engages in when attempting to select among alternative courses of action, and (b) a *decision rule* that dictates how the results of the engaged-in procedures will be used to make the actual decision“ (Beach and Mitchell, 1978: 439/40).

Specific decision strategies may be applied routine and as such form crucial components of what has been identified above as the substantive structure of information processing, prescribing *which* information has to be accessed, *how* it has to be processed and, based on that, *how* decisions should be made.

The term 'heuristic' adds to this notion that most decision strategies, with the exception of those presumably representing full-blooded rational-utilitarian decision models, can be seen as efficient 'short cuts' (Sniderman, Brody, and Tetlock, 1991: 19) and as, given the decisional circumstances, relatively accurate ways of reaching a choice among different alternatives. 'Heuristics', according to Redd (2002: 336), refer "to the cognitive mechanisms decision makers use in attempts to simplify complex decision tasks."

As experimental psychologists like Einhorn and Payne have observed, decision-makers use quite a variety of decision-making strategies, ranging from the 'weighted additive' decision model as the most information intensive strategy (since it considers the (perceived) probability of outcomes on top of the values of all attributes of the alternatives) to the random choice rule – 'flip a coin' – as the most extreme short cut. A central distinction in the identification and classification of decision strategies is that between alternative-based, compensatory decision strategies and dimension-based, non-compensatory ones (cf. Payne, Bettman, and Johnson 1988; 1993: 29 *ff.*). Alternative-based strategies typically assess the values/scores of all relevant attributes/dimensions of each single alternative, and then decide for that alternative which has the highest overall score. Such a decision strategy is exhaustive since all relevant information for all dimensions of all the alternatives is accessed and assessed, and it is called 'compensatory' since a low score on one or more dimensions may be compensated by high scores on other dimensions. In contrast, a dimension-based decision strategy identifies the most important attribute dimension(s) and compares all alternatives simultaneously with regard to their score on that dimension. Now the decision rule may simply prescribe to choose the alternative with the highest score; if two alternatives receive the same score then all other alternatives are excluded and the scores of the two remaining alternatives are compared on the dimension that is of second importance. Another possibility would be to fix a cut-off value for all dimensions and then eliminate, starting with the first dimension, all alternatives that score below the cut-off level of the dimension under inspection. Clearly, a dimension-based strategy does not allow for a compensation of a low score on the first dimensions(s) by high scores on the other dimensions, but it is indeed an efficient mode of decision-making as a relatively small amount of information has to be accessed and processed. It is important to note that "*different decision strategies may well lead to different outcomes in terms of choice*" (Payne, Bettman, and Johnson, 1988: 550, italics added). Below we will demonstrate the empirical-analytical use of the concepts of 'framing' and (heuristic) 'decision strategy'.

However, two reminders are in place. First, in all the experiments that underpin psychological research on decisional heuristics, the alternatives, although they may be presented successively ('dynamic choice set'), are 'given' in the sense that *processes of generating problem definitions and alternatives* are not taken into account. Yet, as pointed out above, the generation of problem definitions and alternatives may well involve choices between decision strategies at stages that proceed, or follow 'official', 'strategic' political decisions (cf. Geva and Mintz, 1997; Mintz, Geva, Redd, and Carnes, 1997).

The political importance thereof is that before political principals/strategically positioned actors take over, problems and alternatives that the principals would have liked to consider

may be excluded. This is of course another way of depicting the problem of 'hidden information' as presented by Arrow (1985).

Moreover, the individualistic perspective that comes quite naturally with cognitive psychology all too easily leads to a presumption that the choice between decision strategies, though perhaps not so rational or conscious, is still the 'independent' choice of an individual decision-maker in the end. It easily overlooks that the choice for certain heuristics may be prescribed/institutionalized and not at the disposal of, for instance, a bureaucratic agency or its units. The political principals of public organizations may well have an interest in enforcing the use of e.g. non-compensatory decision rules (thereby fixing core components of an organization's substantive order) upon their 'agents' in order to guarantee their 'protected values' or interests will indeed be respected during crucial stages of information processing/decision-making. As will become clear below, the way in which the founding regulation of the FRA details the substantive aspects of its operations adds up effectively to the prescription of non-compensatory strategies for deciding on its research projects. Conversely, political principals may well prescribe compensatory decision strategies to serve the (e.g. economic) interests of those (e.g. pharmaceutical industries) who are subject to regulatory policies. For example, the founding regulation of the European Medicines Agency (EMA) requires the EMA "to assess the risk-benefit balance of all medicinal products when they are placed on the market, at the time of the renewal of the authorization and at any other time the competent authority deems appropriate" (Council Regulation 726/2004, Rec. 14). This principle of assessing risk-benefit balances prescribes a compensatory decision strategy since negative scores with respect to the safety of a medicine can be compensated by considerations of efficacy and/or lacking alternatives. All this impacts the level of input-legitimacy a public organization may enjoy in the end, since the prescription of a specific decision strategy results in the inclusion/exclusion of certain categories of information and thus, finally, in the inclusion/exclusion of certain categories of actors.

1.3. Constitutive politics of informing

As has been extensively documented, different modes of information processing may lead to different decisional outcomes (e.g. Beach and Mitchell, 1978; Billings and Scherer, 1988; Payne, Bettman, and Johnson, 1988; 1993; Ford, Schmitt, Schechtman, Hults, and Doherty,

1989). Given the vital role that public organizations play in policy-making and policy implementation, the parallel argument upholds that their specific modes of information processing may have a specific impact on the eventual distribution of the (material, organizational, and political) costs and benefits that policies generate.

Because of that, the political principals of public organizations may well act proactively when designing bureaucratic bodies. Against this background it is useful to distinguish, at least analytically, between two types of 'politics', namely what may be labeled the *constitutive* politics of informing and the *operational* politics of informing. In this section we will concentrate on constitutive politics, in the following on operational politics.Constitutive politics of informing concerns first of all the formal institutionalization of the way in which

policy relevant information is accessed, distributed, and processed, possibly including the standardization of its provision and its statistical quantification. As such constitutive politics of information is about the choices that have to be made in the institutionalization of the provision of information and advice and about the contestability of these choices and the interests involved.

With the concept of constitutive politics of informing we seek to accommodate Terry Moe's repeated plea for a genuine *political* theory of public bureaucracies (cf. Moe, 1990; 1991). The point to be made is that from the perspective of efficiency and effective performance, public bodies or 'agencies' often "seem to deny all principles of reasoned judgment" (Moe, 1991: 126). Yet, the mystery of such a "structural nightmare" (Idem) disappears if we take bureaucratic design as the outcome of interest driven political struggles, as reflecting complex balances of power involving not only different (coalitions of) legislators, but also all kinds of interest groups and, not in the least, other bureaucratic actors with vested interests in the distribution of competences and financial resources: if we perceive the design and establishment of public agencies through the prism of a political logic that has to take into account the instability of political property rights and the inevitability of compromise.

The constitutive politics of information that becomes tangible in the establishment of EU agencies typically covers through treaties, founding regulations, 'guidance documents', (multi-)annual frameworks, etc., the substantive, temporal, and social structures of information processing. Obviously, agencies differ from each other in terms of their formal structures of information processing. From the perspective of 'constitutive politics of informing' these 'structural configurations' present themselves as the dependent variable. If we take the three dimensions – temporal, substantive, and social – of the core structures of organizations as our dimensions of variation, this dependent variable can be operationalized as follows:

Temporal dimension

'Constitutive decisions' typically determine the sequential order of episodes of information processing/decision-making. They can also fix the real time available for different episodes – e.g. the founding regulation of the European Medicines Agency stipulates that upon receiving the EMA's opinion the Commission has exactly 15 days to prepare a draft proposal on the market authorization of a medicine. We take the strictness of the temporal order to be *low* if only the sequential order is specified. We take the strictness of the temporal order to be *medium* if the real time available for informational/decisional output is also specified, for example by annual or multi-annual working programs. The strictness of the temporal order is assessed as *high* if the real time available for different 'internal' episodes of information processing/decision-making is fixed.

Substantive dimension

Again the detailing of the substantive operations of an organization can be low, medium, and high. We assume as a general rule that the constitutive decisions establishing an organization define the (more or less global) goals of an organization and the type of outputs it must produce. If the task detailing is limited to that, we assess the substantive dimension as *low* in its detailing. If it is also specified which information has to be accessed (and which explicitly not) and how, then task detailing is *medium*. If not only goals and type of output and input are specified, but also the decision strategies that have to be applied during certain episodes of information processing, the level of task detailing is assessed as *high*. This is the case, for example, with the European Chemical Agency as it is obliged to base its proposals for the market authorization of chemicals exclusively on risk assessments, while it is not allowed to take risk-management considerations into account.

Social dimension

In essence, the social dimension concerns the level of inclusiveness/exclusiveness. In the context of public policy-making and implementation, a central question is whether only public actors (legislators, civil servants, etc.) can participate in the decision-making processes or whether private actors (business representations, labor unions, NGOs or whatever other types of stakeholder representatives) can also somehow participate. If only public actors have opportunities to contribute to the decision process and its final outcomes, the inclusiveness of the process is *low*; typically the case in all those informing and decisional processes that belong to the area of security and defense politics. If non-public/private actors have the opportunity to voice their perspectives during some episode(s) of the process, its inclusiveness is assessed as *medium*, as in the case of EMA when this agency invites representatives of pharmaceutical industries, professional organizations and patient organizations to shed their light on the agency's policies. If, on top of that, private actors are allowed a say during some episode(s) of the decision-making process – that is, the right of vote in forums of strategic decision-making – the inclusiveness of the process is *high*, for example in the case of the FRA.

With a view to hypotheses-building, the next obvious step would be the identification of possible independent variables and empirical testing of whether and how they bear on the dependent variable, i.e. on the structural configurations of different agencies. Candidates could be the 'level of contestation' that characterised the constitutive politics behind the establishment of a bureaucratic body; the 'level of salience' regarding the policy area/issue; the 'perceived level of task complexity'; or general and functional task characteristics and competences of the public bodies to be established: is it about informing, policy implementation/monitoring, regulatory, or policy-making tasks?

1.4. Operational politics of informing

The formal structures that are fixed by an agency's founding regulation intend to circumscribe the scope of its legitimate actions, yet they do not and cannot determine the behavior of bureaucratic actors in detail. This is partly due to the intrinsic generality of rules and procedures. Moreover, being typically the compromise outcome of a political contest between multiple principals – Council, Commission and (nowadays) the European Parliament (EP) – the rules, procedures and prohibitions agencies are subject to may well be vague, ambiguous and/or incoherent (at least from the perspective of efficiency and goal oriented rationality), therewith enhancing the room for 'operational politics of informing'. As understood here, the operational politics of informing concerns the exploitation of opportunities for strategic and manipulative acts of 'informing' that present themselves during the 'daily' process of collecting, distributing, synthesizing, etc. of information, thanks to, and in spite of, the formal formats and procedures decided upon in the constitutive process. Usually the objective of operational politics is to influence the content of a certain policy, yet it can also aim at 'constitutive effects'; aim, that is, at changing the rules that direct and regulate the daily operations of a bureaucratic organization or institutional system. This 'constitutive effect' of daily operations may become even more visible when in a later, 'constitutive' phase informal structures are formalized, becoming part of the officially recognized set of organizational rules and procedures. In an almost similar vein, constitutive politics may aim to prepare the ground for operational politics. As we will see below, an example of that is provided by the constitutive politics that resulted in fixing the scope of themes with which the Fundamental Rights Agency (FRA) is tasked to address.

Clearly, the concept of 'operational politics of information' overlaps for a good part with the well-known topic of 'bureaucratic politics', the publications by Allison (1971), Allison and Halperin (1972), Halperin (1974) and Wilson (1989) being the classic references. Information and informational asymmetries have been recognized throughout this literature as potent resources of bureaucratic influence and its tactics.[9]

And certainly none of these authors has assumed that simply 'sitting on a pile of information' suffices for a bureaucratic actor to have influence on the decisions of formally responsible policy-makers. It has been recognized, among other things, that for bureaucratic actors (or units thereof) to be influential, they must be able to control the dispersion of 'their' information, must secure access to decision-makers (must have 'their ears'), must provide their information in a format that is functional for the objectives of a certain stage of decision-making, and, last but not least, have to anticipate, as Dalal and Bonaccio (2010: 21) observed, that "decision makers want their advisors to provide information about the alternatives." Yet, as this section attempts to illustrate, an information processing perspective that is informed by decision-making theory allows for a more fine-grained analysis of how and why information that reaches the ear of formally competent decision-makers may influence the final choice

[9] In his *Bureaucratic Politics and Foreign Policy* Morton Halperin, for example, dedicated a separate chapter to "Maneuvers To Affect Information" (Halperin, 1974: Ch. 9), with recommendations like "report only those facts that support your stand", "do not report facts which show danger" and "request a study form those who will give the desired conclusions".

between different alternatives. The basic assumption is that framing and conscious attempts to influence the choice of decision strategy can affect the outcome of decision-making substantially. Moreover, it is assumed, that framing and provoking particular decision strategies may well occur and have an impact during all the different episodes of bureaucratic-political information processing.

At first glance, framing seems the most straightforward form of influencing choices and, at the same time, hardly avoidable since every classification of a problem as worthy of political consideration and each labeling of policy alternatives seem to have a 'framing' effect. Yet, as pointed out above, the term 'framing' is meant here to refer to purposive acts "of selecting, emphasizing and organizing aspects of complex issues according to an overriding evaluative or analytical criterion" (Daviter, 2007: 654), with a view to influence the outcomes of decision processes.

Framing may be done in different ways and with different objectives, the latter ranging from directly influencing a choice to provoking specific decision strategies, and further, to mobilizing interest groups to support a particular policy paradigm. In preparing decisions bureaucratic staff may try, for example, to present a choice set in terms and wordings that give decision-makers the impression of dealing with problems and alternatives that are familiar or unfamiliar to them in order to provoke a compensatory or, respectively, a non-compensatory decision mode (cf. Beach and Mitchell, 1978). If the findings of Stone and Schkade (1991: 54/55) that "numeric and linguistic presentations of attribute values can lead to quite different choice processes" and that "numeric attribute values le[a]d to less alternative based search" are valid in general, those who prepare decisions may choose between presenting alternatives in words or predominantly in numbers in order to provoke a specific decision strategy.

Besides provoking decision strategies via framing, bureaucratic actors may use tactics like time management, sequence management and the management of informational load/complexity, tactics that actually mirror the hypotheses of heuristic decision theory concerning the adaptive behavior of decision-makers. Time management refers to the distribution of time over the different episodes of a decision process. Here the basic concern is how much time a formal decision-maker is allowed for digesting the (apparently relevant) information about policy problems and alternatives and for coming up with a decision.

Conversely, it is about the time available to bureaucratic actors for collecting information, preparing proposals, mobilizing constituencies for support, etc. Time management can be consciously exploited to influence the choice of decision strategies. If time pressure is high, for example because a set of alternatives is only offered 'in the last minutes', decision-makers will probably resort to non-compensatory strategies – especially if decision-makers are confronted with an extensive choice set and a rather broad range of categories of relevant information – with informational overload, that is (Ford, Schmitt, Schechtman, Hults, and Doherty, 1989: 105; Payne, Bettman, and Johnson, 1993: 34).

Sequence management refers to the order in which alternatives are presented to (a body of) decision-makers, e.g. all initiatives are given at the outset (static choice set) or emerge sequentially (dynamic choice set). As experiments by Mintz, Geva, Redd, and Carnes (1997)

suggest, decision-makers dealing with dynamic choice sets are inclined to switch to alternative based, compensatory strategies once a new option emerges during a decision process that, in an earlier episode, has already filtered out one or just a few alternatives.

Mixtures of different tactics are of course possible and often used. For example, in his description of 'bureaucratic ploys' Guy Peters (2002: 238 *ff.*) has pointed to 'planning' and 'budgeting' as important weapons in the struggle for bureaucratic influence, weapons which, in fact, use a mixture of framing – planning is 'rational'; budgeting enhances 'responsibility and accountability' – and provision of informational overload. As Peters (Idem: 239) observes with regard to planning:

> „[P]lanning as a means of making long-range policy tends to remove some aspect of public policy from the partisanship and divisiveness of politics, and transport it to the rarefied atmosphere of 'rational' decision making".

[Yet:]

> „Few members of the political community have the skills, or are willing to acquire the skills, to understand fully the reasoning behind these planning methods or the assumptions on which they are built. The politicians are at the mercy of the planners in having the programs and their implications explained to them".

Under such conditions decision-makers will hardly resort to more compensatory decision strategies, but will probably scan the alternatives inherent in the plan on a rather limited range of dimensions that represent their dominant values and interests.

To close this section, it may be remarked that many of the ploys and tricks used in the operational politics of informing can also be used during the constitutive phase. Second order decision-making is, after all, just what it is: decision-making – and typically also subject to formal rules and procedures. Yet, there is one important difference. The constitutive politics of informing is seldom in a hurry and typically takes its time, meaning that all ploys and tricks that are somehow based on the exploitation of time as a scarce resource will be rather blunt and ineffective.

2. The establishment of the Fundamental Rights Agency: Constitutive politics

The European Union Agency for Fundamental Rights was established on March 1, 2007 by means of Council Regulation (EC) No 168/2007 of February 15, 2007, building upon the already existing European Monitoring Centre for Racism and Xenophobia (EUMC). Article 3 of the FRA's founding regulation states "[t]he Agency shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law", making reference to the concept of 'fundamental rights' provided by article 6(2) of the Treaty of Maastricht[10]. The founding regulation adds that among the several European-level instruments dedicated to the protection of human rights, the Charter of Fundamental Rights of

[10] Article 6(2) TEU: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of community law."

the European Union (adopted on 18 December 2000) should be a major point of reference for the Agency's work.

The Fundamental Rights Agency is an advisory body of the European Union in charge of collecting information on the fundamental rights situation across the European Union and providing advice to the Member States and relevant institutions on how the situation can be improved (Council Regulation 168/2007).

In its metamorphosis into the FRA, the EUMC witnessed a large extension of its scope of action from a policy-area point of view. Indeed, while the EUMC was established with the aim of monitoring phenomenons of racism and xenophobia in the Union, the FRA is entitled to gather information on virtually the whole range of existing fundamental rights – albeit with the limitations outlined below. The specific tasks that the FRA shall perform, however, do not appear to have changed much when compared, at least on paper, to those of the EUMC – with the exception of the possibility of publishing thematic reports. (Cf. Council Regulation 1035/1997 and Council Regulation 168/2007). Since the pre-history of the FRA is already extensively documented (Toggenburg, 2007a; Cassese, Lalumière, Leuprecht, and Robinson, 1998; De Schutter, 2009) we take up the thread with the Brussels European Council of December 2003, during which, quite to the surprise of some insiders and member state representatives, the Heads of States and Governments officially asked the European Commission to draft a proposal for the establishment of an European Union Fundamental Rights Agency. In the run up to the 2003 European Council, there had been no discussion on an expanded human rights policy and no impact assessment concerning the added value and effectiveness of such an agency had been prepared (De Schutter, 2009). Surely, as also observed by De Schutter (2009), from the Treaty of Amsterdam onwards a fundamental rights culture was developing within the European institutions, with the Charter of Fundamental Rights of December 2000 giving it a firm boost. Yet the European Commission had clearly expressed its disagreement with the establishment of a Fundamental Rights Agency for the European Union (e.g. European Commission COM(2001) 252 final) and also towards an expansion of the EUMC's mandate as to include a wider portion of the fundamental rights spectrum, arguing "that an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism" (European Commission COM(2003) 483 final). Moreover, as will be shown in more detail below, some member states were highly reluctant to the idea of a Fundamental Rights Agency. The question then is why the Commission still was charged with the preparation of a founding regulation for an agency in the field of human rights.

According to Salla Saastamoinen – the European Commission official in charge of negotiating the founding regulation establishing the FRA between 2003 and 2006 – the Council's decision did not have so much to do with an increasing human rights awareness in the Union – "there was not much policy change as such yet" (Interview 1, 2011) – but it originated from rather mundane political calculations. The agencification wave of the late 1990's saw several large agencies being allotted to different Member States, and Austria, which was supposed to host the European Chemicals Agency (ECHA), had to come to terms with the fact that the ECHA was eventually placed in Finland. This gave the country an

impetus to put forward, once more, the request for a Fundamental Rights Agency in its territory, which was finally granted (Interview 5, 2012).

As Saastamoinen answered the question why a Fundamental Rights Agency was put on the table:

> „If you want a frank reply, it is because in that European Council of 2003 there were ten or twelve agencies distributed among the Member States, and it was part of that package that one of the countries, namely Austria, got something bigger, something more extensive than the existing Monitoring Center. I would say that this is the very down to earth political explanation“ (Interview 1, 2011).

2.1. Supporters and adversaries: A mosaic of oppositions

On 30 June 2005 – two years after being asked – the Commission tabled its proposal for a Council Regulation establishing the European Union Agency for Fundamental Rights (European Commission COM (2005) 280 final). From the Commission proposal to the final Council Regulation almost two years passed, filled by intensive rounds of negotiations among the Member States, and with the involvement of several players who formally had no say but certainly a voice, such as the European Parliament, the Council of Europe (CoE), and civil society organizations like Amnesty International. As Gregor Schusterschitz, the erstwhile chairman of the Council ad hoc Working Group which negotiated the establishment of the FRA during the Austrian EU Presidency of 2006 remembers: “there was not one article that was not extremely controversial. It was an extremely difficult discussion” (Interview 5, 2012).

As already pointed out, the Commission was not very enthusiastic initially, yet in October 2004 it clearly stated its full support to the idea of establishing a Fundamental Rights Agency (see European Commission COM(2004) 693 final). What counted most for the Commission was that the agency to be established should not interfere with policy-making whatsoever. Ideally it should be an agency that concentrates exclusively on the provision of information, and as far as the Commission was concerned, under that condition the FRA could cover the whole scope of possible fundamental rights issues. When we look at the Member States’ concerns, however, things look much more complicated. One block, including Austria, Finland, Italy, Sweden and Slovenia, emerged as a supporter of a strong agency with a wider mandate than just the provision of information. The reasons why these countries were in favor of a strong FRA were twofold.

First of all, considering that the EU was becoming increasingly involved in fundamental rights issues – for instance through initiatives in the area of Justice and Home Affairs (JHA) such as the Tampere or the Stockholm program – there was an urgent need of a monitoring mechanism covering the whole spectrum of fundamental rights. The EUMC, with its narrow focus on racism and xenophobia, was no longer adequate. Secondly, and perhaps more importantly, was a framing of the need for a strong Fundamental Rights Agency in terms of ‘external credibility’. As Schusterschitz points out:

> “the European Union is very adamant in exporting human rights worldwide, and we include human rights clauses in treaties with third states, we issue guidelines

> on the treatment of human rights issues […] and you can only be credible to the outside world when you show that inside you have an independent authority helping you in protecting fundamental rights on the internal level" (Interview 2, 2011).

A Fundamental Rights Agency, so went the argument, could fill this vacuum by providing the Member States with an independent mechanism for monitoring European Union institutions (Interview 6, 2012).

While the Agency's supporters were acting in accordance with a common quest, the reasons for some Member States – in particular the Slovak Republic, Ireland, the United Kingdom, Germany and the Netherlands – to resist the establishment of a Fundamental Rights Agency were less uniform. Depending on the issue under negotiation, different coalitions developed – creating opportunities for a '*divide et impera'* tactic by the proponents. Germany and the United Kingdom, for instance, were reportedly concerned about an ongoing bureaucratization of the European project boosted by the new wave of Union agencies. As such, their hostility was against agencies in general and not against a FRA in particular (Interview 1, 2011). It should be noted moreover that during the debates on the Commission proposal for a Fundamental Rights Agency, the 2007-2013 Multi-Annual Financial Perspective for the European Union was also being fiercely negotiated and a number of Member States were ill disposed to investing public funds in additional agencies (Interview 1, 2011; Interview 3, 2011). Surely some of the opposition against the Commission proposal, including also France, simply stemmed from the reluctance to transfer additional competences from the national to the European level, especially when such competences are delegated to really independent bodies. These sovereignty concerns had acquired a specific edge with, on the one hand, the development of the EU's third pillar since the Treaty of Amsterdam and, more particularly, the Tampere Council and, on the other hand, the post-9/11 national counter-terrorism policies – and it was difficult to imagine how a Fundamental Rights Agency could be kept at a distance from this highly salient policy area.

Another reason why some Member States opposed the establishment of a strong Fundamental Rights Agency was related to the fear of a possible duplication of tasks with the Council of Europe. If an EU agency for human rights had to be established at all, it was essential that it could bring an added value to the CoE's activities. Were the Agency to conduct its own evaluations on the human rights performances of EU members, then, in the best-case scenario, this would be a simple repetition of the CoE's work; in case, however, the FRA and the Council of Europe reached different conclusions on the same subject, it could be detrimental to both institutions' credibility and authority. As to be expected, when it became known that the European Union was about to establish a Fundamental Rights Agency, the first reaction of the CoE was skeptical and defensive. Especially the Parliamentary Assembly of the Council of Europe (PACE) was highly critical and unsympathetic towards the Fundamental Rights Agency, opposing it until the very end. The Chairman of the PACE happened to be the Dutch Parliamentarian René Van der Linden[11] and although generally regarded as a human rights

[11] For more information, see the PACE official website: http://assembly.coe.int/Main.asp?Link=/President/vanderLinden/PACEPresidentE.asp. Last accessed: 29 January 2014.

champion, the Netherlands adopted a harsh stance towards a potential FRA under the influence of Van der Linden (Interview 1, 2011; Interview 5, 2012; Council of Europe official website[12]).

In the end the European Parliament was the sole authentic institutional supporter of the Agency (Nowak, 2005), yet as the Commission's proposal was based on article 308 TEC the EP was only in a consulting function. Still, during the negotiations on the FRA the opinions of the EP, like those of civil society organizations, were voiced via the chair of the Council ad hoc Working Group on fundamental rights and citizenship, especially their 'strong' opinions concerning what is utterly unacceptable (Interview 2, 2011).

2.2. From the proposal to the regulation

When Austria took over the EU Presidency from the UK, the only progress that had been made on the FRA dossier was a consensus on the aptness of the legal base (art. 308 TEC) the Commission had proposed. Schusterschitz remembers "When we took over in January 2006 everything was unclear, only emotions were running high" (Interview 2, 2011). His approach then was to start with the less controversial issues, find a consensus on them, and gradually turn to the more contested topics (Interview 5, 2012). For reasons of space we do not follow that specific sequence of information processing episodes. Instead we will compare the most debated substantive and social components of the Commission proposal (European Commission COM(2005) 280 final) with the eventual Council Regulation in order to get a clear picture of the core issues of the constitutive politics behind the establishment of the FRA. Surely, via stipulations concerning annual and multi-annual working programs, the proposal as well as the founding regulation also touched upon the temporal order of the FRA's operations. Yet in this respect the story is not very telling and the so-called Multi-Annual Framework(s), which we will address in a separate paragraph, are primarily interesting with a view of the substantive order of the FRA and its operational politics.

To start with the substantive order, the Commission proposal emphasized time and again that the agency should only concern itself with fundamental rights in as far as these may be an issue when *implementing* Community law. Clearly, the Commission did not want the FRA to have any say when it comes to policy-making as that was regarded and defended as its own prerogative.

This was indigestible for those Member States that supported a strong Fundamental Rights Agency and also for the EP. The compromise that eventually materialized in the form of article 4.2 of the Council Regulation was the stipulation that the FRA may express its opinion on policy proposals of the Commission and on political and policy positions endorsed by the EP or the Council if, and only if such an opinion is requested by the responsible and competent Institution. *Inter alia* this means the EP, for example, cannot ask the FRA to give an opinion on a Council position. A second bone of contention was the Commission's suggestion (European Commission COM(2011b) 880 final, art. 4.e) that the FRA could

[12] See http://hub.coe.int/en/. Last accessed: 5 February 2014.

"make its technical expertise available to the Council, where the Council, pursuant to article 7.1 TEU calls on independent persons to submit a report on the situation in a Member State." This was unacceptable not only to the Member States that feared sovereignty losses, but also to the Council of Europe.

Since the monitoring mechanism established by article 7 TEU extends beyond the area of application of EU law, the Commission proposal "could be interpreted as entrusting [the FRA] with permanent normative monitoring of the Member States' fundamental rights performance outside the scope of EU law" (Toggenburg, 2008: 389). This provision would not only lead to a remarkable overlap between the competences of the FRA and the Council of Europe, but it was also looked upon with hostility by several Member States for reasons of national sovereignty (Interview 2, 2011). As a consequence, the CoE "aligned with many Member States in opposing a formal Agency role in the context of article 7 TEU" (Toggenburg, 2008: 389). That alliance was successful: the Council Regulation makes no mention whatsoever of the article 7 TEU's monitoring mechanism.

Moreover, whereas point 11 of the preamble to the Commission proposal states the FRA "should have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law" (European Commission COM(2005) 280 final: art. 11), this is effectively curbed in the founding regulation by stipulating that the Agency should stick to thematic areas with a trans-European scope. In other words, the regulation forbids the FRA to embark on assessments of the fundamental rights situations within individual Member States.

The most controversial single item during the negotiations and one that was only solved in the final stage was the Commission's proposal to include the area of Police and Judicial Cooperation in Criminal Matters in the Agency's mandate. A group of seven Member States including Germany, the United Kingdom, the Netherlands, Ireland and the Slovak Republic, supported by the Council Secretariat, declared to be utterly against the inclusion of third pillar matters in the Agency's scope. On the other hand, Austria, Italy and the Scandinavian countries, together with the European Commission, the European Parliament, the European

Economic and Social Committee (EESC), and several civil society organizations, were strongly in favor (EESC, 2006; Interview 5, 2012). The eventual compromise was (again) that the FRA would have no official competences in the area of Police and Judicial Cooperation in Criminal Matters, but that the EU institutions could ask the Agency for its opinion on such issues at any moment.

Apart from issues related to the (highly detailed) substantive order of the Agency's operations, components of its proposed social order were also contested, in particular with respect to the Agency's governance structure. The Commission, following the Paris Principles to a large extent, opted for a 'light' management structure that guaranteed the independence of the FRA vis-à-vis the Member States (Interview 1, 2011). Yet a group of Member States, led by France, was not pleased with that and asked for a Management Board dominated by Member States' representatives, acting as diplomats receiving instructions from their capitals. For other Member States at the negotiating table, however, as well as for the European Parliament and civil society, this was absolutely unacceptable (Interview 5, 2012).

Eventually, after three months of discussions, a final agreement was reached, revealing a high degree of compromise between the two opposing camps. First it was decided that every Member State indeed had the right to appoint a member of the Management Board, yet not as a representative of the respective governments, but as an independent person "having high level responsibilities in an independent national human rights institution or other public or private sector organization" (Council Regulation 168/2007, art. 12.1a).

In this respect the formal structures of the FRA exhibit a high level of inclusiveness. Moreover, the Commission was granted two representatives on the Management Board and the Council of Europe one (the final Regulation, however, left out the Commission's proposal that the EP also had the right to appoint one person on the Board).[13] Next, an independent Scientific Committee was added to the Agency in order to accommodate France.

Finally it was decided that the Agency would operate on the basis of a five-year Multi-Annual Framework (MAF) specifying the thematic areas on which the FRA should focus. Such a MAF was also proposed by the Commission, yet according to the regulation, it now had to be approved by the Council of the European Union instead of by the Commission as stipulated in article 5 of its proposal. Thus while the Agency's supporters got the guarantee that the FRA could carry out its information-related functions with a certain degree of independence, opponents were satisfied with the idea that the Agency's substantive scope would be restricted to the topics and themes listed in the Council-approved MAF.

2.3. The first and second Multi-Annual Framework

An objective arbiter would probably have given the first round of the constitutive battle to the opponents of the FRA. Though the FRA was finally established, it seemed effectively put in shackles. Yet another round still was to come, and the supporters of the FRA recovered some ground in that one, albeit in a rather stealthy manner and with the silent support of the Commission (Interview 5, 2012). This time it concerned the specification of the MAF. As mentioned above, the MAF has to be decided upon by the Council but as article 5 of the regulation also states, the Council will act on a proposal of the Commission. The proposal for

the first MAF was tabled by the Commission in September 2007. In the ensuing Council negotiations on the proposal, the proponents of a strong FRA first managed to delete every reference to the EU's 'pillars'. Therewith the tricky problem of the FRA's relation to Justice and Home Affairs was circumvented. Second, they succeeded in the goal of keeping the formulation of the themes as open as possible. As Schusterschitz points out:

> „We knew that it is sometimes difficult to differentiate between first and third pillar, and we said that if it's openly formulated it is ok because then the agency can decide for herself. […] Of course the countries that were a bit more skeptical towards the agency would like to have: 'no, you work on this, this and that, and

[13] The ordinary decision procedure of the Management Board is simple majority voting. This changes into qualified majority voting when it comes to suggesting topics for the Multi-Annual Framework, and into unanimity voting when it concerns language arrangements.

> you don't do anything else', whereas we wanted to have very broad general topics, and there it was fine that the Commission had the same idea anyway" (Interview 5, 2012).

Clearly, this was a case of constitutive politics preparing the ground for operational politics. If we look at the MAF for the period 2007 – 2012, then the nine thematic areas within which the FRA can operate are indeed formulated in such a way that it is hard to conceive of any human rights topic that is not directly *or indirectly* covered[14]. As we will see below, this 'structural incoherency' – high level of task detailing by the founding regulation, low level of detailing in the MAF – provides the FRA with ample opportunities for operational politics that compensate for its formal shackles.

According to the FRA's founding regulation the first Multi-Annual Framework was to expire by the end of 2012. After consulting the Management Board of the FRA during the spring of 2011, the Commission presented its proposal for a new MAF on 13 December 2011 (European Commission COM (2011b) 880 final). One of the major changes between the first MAF and the new Commission proposal is the inclusion of police and judicial cooperation in criminal matters. Since during the establishment of the FRA the inclusion of third pillar issues in the Agency's mandate was severely – and rather successfully – contested, the new Commission proposal again provoked, as was to be expected, substantial resistance. The legal service of the Council and a number of Member States maintained that, before the Agency could work on third pillar matters, the founding regulation should be amended by explicitly extending the Agency's competences from Community to Union matters. The Commission official in charge of negotiating the MAF, however, was of the opinion that the inclusion of police cooperation and judicial cooperation in criminal matters is a natural consequence of the entry into force of the Lisbon Treaty and the disappearance of the pillar structure: "It is absurd to open a regulation just to replace the word Community by the word Union [...]. The will of the legislator of the Lisbon Treaty implies that the activities of the Agency should now take place within the competences of the Union, and the Union now includes those areas" (Interview 4, 2011).

The controversy was complicated by the fact that the legal basis to be employed for the MAF had changed; while the first MAF was based on article 5(1) of the founding regulation, the new Commission proposal was based on article 352 TFEU, which requires the consent of the EP and the approval of the Czech, the British and the German national parliaments (Interview 5, 2012; Interview 4, 2011).

A second remarkable difference between the Commission proposal and the first MAF is the exclusion of gender-related forms of discrimination from the FRA's legitimate concerns. The motivation brought forward by the Commission for this exclusion was to avoid duplication

[14] The thematic areas are: "a) racism, xenophobia and related intolerance; b) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination); c) compensation of victims; d) the rights of the child, including the protection of children; e) asylum, migration and integration of migrants; f) visa and border control; g) participation of the citizens of the union in the union's democratic functioning; h) information society and, in particular, respect for private life and protection of personal data; i) access to efficient and independent justice" (Council Decision 2008/203/EC, art. 2).

with the tasks performed by the Vilnius-based European Institute for Gender Equality (EIGE) which, at the time the first MAF was drafted, was not entirely operational (European Commission COM (2011b) 880 final; Interview 4, 2011).

In fact, the cabinet of Viviane Reding, the Commissioner responsible for justice, fundamental rights and citizenship, gave specific instructions to Commission officials that EIGE should take the lead on issues related to gender-based discrimination and the FRA should not develop research exclusively based on sex (Interview 4, 2011).

While acknowledging the necessity to avoid a duplication of tasks, the staff of the FRA holds that the Commission's argument "doesn't really stand since the approaches [employed by the FRA and EIGE] are of course very different, and the fundamental rights perspective to discrimination based on gender is a different one than the perspective of EIGE" (Interview 6, 2012).

Finally, it can be noticed that the Commission proposal, as compared to the 2007-2012 MAF, lists a much larger number of EU agencies with which the FRA is to ensure and maintain cooperation, including the European Asylum Support Office (EASO), the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), as well as three "third pillar" agencies – the European Union's Judicial Cooperation Unit (EUROJUST), the European Police Office (EUROPOL), and the European Police College (CEPOL). As explained by a Commission official, this was done in most cases to acknowledge an already existing cooperation among agencies; in other instances this happened as a consequence of "a request of other services of the Commission, that their agencies are mentioned there" (Interview 4, 2011). The inclusion of the newly-established EASO was reportedly "a way to assure our colleagues in DG HOME that they will cooperate, and that each agency will work within its respective mandate" (Interview 4, 2011).On 8 June 2012 the Council, after having discussed and examined the Commission proposal[15], approved an amended draft of the MAF to be submitted to the EP (cf. Council Press release 10760/2012b and Council Proposal 10615/2012a).

Considering that already in the first meeting of the Council *ad hoc* working group the Czech Republic declared itself against the inclusion of the provision concerning third pillar topics if the Regulation would not be amended (Interview 4, 2011), it is not surprising that the Council requested the Agency's involvement in former third-pillar issues to be scaled down to "judicial cooperation, except in criminal matters" (cf. Council Press release 10760/2012b). In addition, the Commission's concern for a possible duplication of tasks with EIGE was apparently not taken into consideration by the Council, as 'sex' was reinstated as one of the grounds of discrimination on which the Agency should focus[16].

On 8 November 2012 rapporteur Tatjana Zdanoka of the LIBE committee of the European Parliament tabled a draft legislative resolution on the Council's decision. In the 'Explanatory

[15] The Council Working Group on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) examined the proposal on 20 January, 15 February, 20 March and 11 April 2012. Coreper discussed the proposal on 3 May and 30 May 2012.

[16] The text endorsed by the Council now reads: "discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" (Council Decision 252/2013, art. 2).

Statement' the rapporteur "deeply regrets the lack of agreement in the Council as regards the inclusion of the proposed new thematic areas of police cooperation and judicial cooperation in criminal matters" (European Parliament, 2012: 9/11). However, Zdanoka recommended that the EP consent to the Council's proposal of a new MAF, considering that without a new MAF the FRA could simply close its doors on 1 January 2013 – "Unless there is a new Multi-Annual Framework in place by the beginning of 2013, the Agency can only work if there is a specific request from an institution […] and not on its own initiative" (Idem). On 13 December the EP consented to the draft Council decision establishing the new Multi-Annual Framework.

3. The operational politics of the Fundamental Rights Agency

Even though the tasks of the FRA are more extensive than those of the now extinct EUMC, in terms of its formal political, administrative, and judicial competences, the FRA is a 'weak' agency. From a human rights perspective the task of the FRA seems moreover unduly restricted. Against this background and given the fact that the staff and supporters of the FRA truly believe in the fundamental/human rights quest, it can be expected (and indeed observed) that the operational politics of the FRA will be driven by what Guy Peters has labeled 'hard' policy intentions. While 'soft' intentions simply express the routines and embedded values of an organization, hard policy intentions go beyond the wish to preserve the status quo and the policies the organization is familiar with, and express instead an interest "in imposing a new set of policy priorities" (Peters, 2002: 222).

With a view to its overarching strategy the FRA nicely exemplifies Terry Moe's more general dictum that, faced with uncertainty about the political future, "bureaucrats cannot afford to concern themselves solely with technical matters" (Moe, 1995: 144). They have to find political or societal allies to secure future support, if only for the survival of their organization.

To start with, the FRA has persistently attempted to appease its original opponents and to create a sympathetic institutional environment – and this based on the rationale that "if you have an inter-institutional climate of trust and of cooperation, then legal limitations play an entirely different role compared to a situation where the inter-institutional cooperation and trust is less developed" (Interview 6, 2012).

This appeasement strategy had already been launched during the negotiations on the founding regulation when the Chair of the ad hoc Council Working Group travelled to Strasbourg three times to discuss its concerns with the Council of Europe and to assure the Council of its competences and leading position in the field of human rights (Interview 2, 2011). During these missions the CoE was offered a seat in the Management Board and in the Executive Board of the FRA, something that was eventually enshrined in the final regulation. Nowadays the FRA and the CoE cooperate intensively, including exchange of staff. In March 2011 the FRA and the CoE's European Court of Human Rights published the *Handbook on European non-discrimination law*, a guide for judges and legal practitioners on anti-discrimination law and its application.

The EP has always been the most important political supporter of the FRA compared to the other EU institutions and it has used the option offered by article 4.2 of the Council Regulation to request an opinion of the FRA more often than the other institutions, including requests for opinions on issues that belong to the former third pillar. Yet with its recent Roma Strategy, the Commission is becoming a competitor in this respect. In May 2011 the Council of the European Union endorsed the Commission's European Roma Strategy, which asks the FRA to "collect data on the situation of Roma with respect to access to employment, education, healthcare and housing" (European Commission COM(2011a) 173 final: 13) and additionally stipulates that "the Fundamental Rights Agency should work with Member States to develop monitoring methods which can provide a comparative analysis of the situation of Roma across Europe." (Idem: 14). This is a multi-annual activity that comes on top of the Multi-Annual Program and shows the Commission's appreciation of the FRA's work. Concerning cooperation with other European agencies, it is quite interesting to see that the FRA has successfully targeted FRONTEX and EUROPOL, two agencies in the 'forbidden zone' of former third pillar policies.

All in all, the strategic rationale behind the FRA's working towards a sympathetic institutional environment is quite explicit and is based on the idea that hostile actors will monitor the FRA's daily operations much more tightly and critically than actors/institutions with which the Agency has a cooperative relationship. The *tactics* used by the FRA to circumvent the limitations it has been subjected to by its founding regulation come down to the exploitation of framing opportunities that result from the constitutive politics behind the Multi-Annual Framework. As already pointed out, the thematic areas identified by the Multi-Annual Framework are so broad that it is difficult to see which fundamental rights related topics are not (directly or indirectly) covered by it (cf. Toggenburg, 2008: 397). Moreover, when publishing on trans-EU topics related to fundamental human rights, the FRA can hardly avoid mentioning individual Member States and their dealing with fundamental rights. Though as Bogdandy and Bernstorff (2009: 1054) put it, "[w]hat is not authorized is drawing an outright conclusion of a violation of a fundamental right", the FRA's findings sometimes come close to that, occasionally provoking a public outcry. An example of the latter is the information provided by the FRA concerning the use of phallometric tests by the Czech Republic when deciding on the admission of persons who seek asylum because of (alleged) sexual discrimination. In the wording of the FRA, phallometric tests consist "in testing the physical reaction to heterosexual pornographic material of gay men" (FRA, 2010: 62) and were proposed by Czech authorities when a male asylum-seeker's claims of homosexuality did not appear convincing. The refusal to undergo such an examination could result in doubts concerning the alleged homosexuality of the individual and, therefore, whether he could be granted asylum in the country. Such practices became known to the European institutions and the wider public following the FRA's publication of the report *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 update*, which questioned the admissibility of phallometric testing from a fundamental rights perspective. This report did not only raise the issue in public debates, but, more importantly, it also resulted in the initiation of an infringement procedure by the European Commission against the Czech Republic (FRA, 2010; Interview 4, 2011; Interview 6, 2012).

Furthermore, the FRA publishes several country reports on a number of fundamental rights-related themes on its website, circumventing the limitations imposed by the Founding Regulation by specifying that

> „[t]hese studies have been commissioned as background material for reports by the European Union Agency for Fundamental Rights (FRA). The views expressed here do not necessarily reflect the views or the official position of the FRA. These studies are made publicly available for information purposes only and do not constitute legal advice or legal opinion".[17]

In some instances these reports are highly critical towards a Member State. To name just one example, Austria's situation concerning the rights of LGBT persons is strongly criticized in the report by Nowak (2010) available on the Agency's website.

The stipulation that the FRA should confine its work to the 'first pillar' and stay out of 'justice and home affairs' issues is also not that watertight. An issue the FRA is dealing with may formally be covered by the Framework while, at the same time, it is quite naturally related to former third pillar issues. For example, children rights belong to the scope of the FRA, yet can hardly be disentangled from issues of human trafficking and via that from criminal law. As a staff member of the FRA sums it up:

> "In daily practice the limits of the MAF areas are of course slightly less than crystal-clear. This is also due to the fact that the wording of the MAF oscillates between rights based language and a mere enumeration of policy areas. In any event I would argue – similarly as the Court did with regard to first pillar EU competences in the area of criminal law – that the MAF areas may enshrine also third pillar elements where these are necessary in order to sensibly deal with the concrete question at stake" (Interview 6, 2012).

Using the same framing tactics, the limitation that seems to frustrate the FRA the most – it should not meddle with EU-level policy *making* – is dodged. The FRA cannot be prevented from reporting on topics within its MAF which simultaneously 'happen to be' related to issues that form the core of current policy development and legislation.

As Toggenburg (2007a: 613) remarks:

> "[I]n many cases it will be difficult to assess whether an agency opinion or report *concerns* a proposal or position from an EU institution or rather only deals with a legal issue that is *of immediate interest to* the latter. In ambiguous matter such as this, the profile of the agency will essentially be shaped by the agency's leadership, i.e. its director."

The same holds for limitations that originate from the stipulation (Council Regulation 168/2007, Rec. 9) that the FRA should base its work on the Charter of Fundamental Rights of the European Union. The Charter does not explicitly include social and economic rights and as a consequence the FRA is not mandated to collect information on them. Moreover, the Commission wants to avoid an overlap with the work of Eurofound in the field of social rights

[17] See http://fra.europa.eu/en/publications-and-resources/country-data. Last accessed: 29 January 2014.

(Interview 4, 2011). Yet social and economic rights *are* related to issues of discrimination, racism, asylum and migration, and the protection of children. As a staff member of FRA frankly states:

> „I think that through these [i.e. the issues just mentioned] we are addressing the social and economic rights of vulnerable population groups, such as Roma or irregular migrants, that are more likely to be affected by violations of these rights. So, although we are not focusing on social and economic rights as such, we are addressing them from a perspective, which is particularly significant" (Interview 7, 2012).

In its 2013 Focus[18] *The European Union as a Community of Values: safeguarding fundamental rights in times of crisis*, the FRA argues, moreover, that "the exact scope of the application of fundamental rights obligations under EU law remains open to interpretation and discussion" (FRA, 2013: 9). It is indeed possible to discern two bundles of rights in the Charter of Fundamental Rights of the European Union – civil and political rights on the one hand, and social, economic and cultural rights/principles on the other – with different juridical connotations. Nevertheless, the FRA (Idem) assumes that "the charter provides these two groups of rights […] with the same standing." And although paragraph 1 of article 51 of the Charter states that "[t]he provisions of this Charter are addressed […] to the Member States only when they are implementing Union law", there are hardly any EU social laws to implement, and the FRA (FRA, 2013: 8) still argues that ECJ case law warrants an interpretation of the 'implementation clause' as simply meaning 'covered by EU law'.

The Commission is, of course, aware of the FRA's uneasiness with the restrictions as detailed by its founding regulation and of the FRA's disposition to interpret its mandate broader than intended by its Principals. As a former Commission representative in the Management Board of the FRA recalls, there were sometimes conflicts within the meetings of the Management Board, with the Agency attempting to enlarge the scope of its mandate as much as possible and the Commission insisting on the original intentions of the regulation.

Such conflicts concerned not only the interpretation of the MAF, but also the competences and functions of the FRA:

> „[T]hey are not supposed to assess the compliance of national law with EU law, or of EU law with the European Convention on human rights […] and especially at the beginning they had this tendency. Either they did not understand what we were telling them, or they did not want to understand" (Interview 4, 2011).

The addition "especially in the beginning" is interesting as it may indicate that the FRA and the Commission have meanwhile reached a mutual understanding on the practices of monitoring and promoting fundamental rights within the EU.

The account of the FRA's operational politics given above shows that, at least occasionally, the FRA has been able to circumvent the formal limitations it is subject to. It is still difficult to ascertain how this will bear on its future and where it is heading. It is, after all, a rather young agency. However, the discussion about the *finalité* of the FRA within the FRA itself is

[18] This Focus was originally published as part of the FRA's 2013 Annual Report.

interesting. It revolves around two models: should the FRA develop a long-term research program and stick to that as the basis for in-depth high quality studies, or should it be more flexible and sensitive for events in, and requests from, its environment? As a staff member of the FRA nicely puts it:

> „There are two readings of our mandate. You have persons who say that the agency should see itself as a heavy vessel, like an oil tanker, that produces solid research data, a bit like a university-type of institution, and that plans in the long term. The other model I would label the model of a small power boat that very quickly reacts in short term on policy requests and provides evidence-based advice“ (Interview 6, 2012).

Obviously, the "small power boat" image of the FRA connotes a more activist stance.

Conclusion

In this article we have tried to show that the synthesis of political, sociological, organization theoretical and psychological insights that makes up the hardcore of our information processing approach to public organizations provides a conceptual framework that enables a fine-grained descriptive analysis of bureaucratic processes and their essential structures. Clearly, our information processing approach is much more sensitive for the phenomena of bureaucratic politics and struggles over influence and power than the (sociological) neo-institutionalism originally put on the academic agenda by March and Olsen. Compared to rationalist institutionalism, especially in its currently popular form of Principal/Agent-modeling, attention for the temporal, substantive and social dimensions of information processing not only leads to a much deeper 'scanning' of the inner structures of administrative organizations, but also opens the door for a more refined analysis of the ways in which 'Principals' may try to secure their interests or 'protected values'.

Compared to rationalist analyses of *agency* and its scope conditions, an information processing approach is also much more promising when it comes to the analysis and explanation of the *process* (the 'how') of informing and decision-making. As pointed out in the introduction, the importance of this comes with the assumption that process validity is a valuable asset since the 'how' of decision-making has a substantial impact on the 'what', i.e. the content of the eventual decisions. For example, the specific features of the substantive and social dimensions of the FRA's formal structure are only intelligible as the compromised outcomes of intensive rounds of negotiations chaired by a fierce supporter of a FRA-to-be who was able to lure the different participants into a final compromise, therewith establishing the FRA.

To return to the first sentence of the introduction to this article, we believe that our 'plausibility probe' does indeed warrant more intensive and laborious testing of the information processing approach as sketched in this article. Although this article has not been an attempt to test one or more empirical hypotheses, we have indicated how hypotheses may be formulated that transcend the individual case of the FRA.

Just to give one example, we go back to Section 1.3 and its identification of 'structural configurations' as the dependent variable of the constitutive politics of information. Moreover, we take 'level of contestation' as a plausible candidate for the function of independent variable.

A policy proposal concerning the establishment of a political body can be controversial with regard to different aspects. The most far-reaching controversy would concern the very placement of the proposal on the decisional agenda. For example: why is there a need to discuss the establishment of a European Fundamental Rights Agency?

Why do we need such an agency at all? If (as documented viewpoints, minutes, interviews etc. show) the political struggle during the constitutive phase is indeed about the whole idea and objective of the item on the agenda, and if the opponents come close to, or even form a blocking minority, then the level of contestation can be assessed as *high*. On this reading we can formulate the following hypothesis:

> H: If the *level of contestation* is *high*, this will lead to: a low level of strictness in the temporal dimension of a public organization, as the opposition is not interested in, or even fears, output; to medium or high outcomes on the substantive dimension (low level of task discretion) as all parties to the conflict want to secure their preferences/interests ex ante even at the price of inflexibility and ineffectiveness; and to a medium or high level of inclusiveness as all participants want to secure monitoring opportunities for their own constituencies even at the price of inefficiency.

Obviously a next step would be to undertake a comparative study of different European agencies and to test whether 'level of contestation' does indeed bear significantly on structural variation, and how this independent variable compares to other possible candidates such as 'level of saliency' (cf. Ringquist, Worsham, and Eisner, 2003; Koop, 2011) or 'level of task complexity' (cf. Ito and Peterson, 1988; Byström and Järvelin, 1995; Vakkari, 1999).

Another way forward would be to investigate how far and in which sense specific structural configurations have a systematic impact on the operational politics of European agencies. Whether all this may lead to the development of a more general theory of public organizations is to be seen. For the moment it seems already ambitious enough to aim for an extensive comparison of EU agencies from an information processing perspective.

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Appendix: Interview references

Interview 1

With Mrs. Salla Saastamoinen. Head of Civil Justice Policy Unit in the Directorate-General for Justice, Freedom and Security of the European Commission.

Date of the interview: 16 May 2011.

Place of the interview: Directorate-General for Justice, Freedom and Security of the European Commission, Brussels, Belgium.

Interviewed by Valentina Carraro.

Interview 2

With Mr. Gregor Schusterschitz. Head of the Public International Law Department of the Austrian Federal Ministry for European and International Affairs.

Date of the interview: 19 May 2011.

Place of the interview: Federal Ministry for European and International Affairs, Vienna, Austria.

Interviewed by Valentina Carraro.

Interview 3

With Dr. Gabriel Toggenburg. Program Manager at the European Union Agency for Fundamental Rights.

Date of the interview: 20 May 2011.

Place of the interview: European Union Agency for Fundamental Rights, Vienna, Austria.

Interviewed by Valentina Carraro.

Interview 4

With Ms. María Fernández Molinero, European Commission official in the Fundamental Rights Unit of DG Justice.

Date of the interview: 9 February 2012.

Place of the interview: Directorate-General for Justice, Freedom and Security of the European Commission, Brussels, Belgium.

Interviewed by Valentina Carraro.

Ms. Fernández Molinero's views are expressed in a personal capacity and may not in any circumstances be regarded as stating an official position of the European Commission.

Interview 5

With Mr. Gregor Schusterschitz. Head of the Public International Law Department of the Austrian Federal Ministry for European and International Affairs.

Date of the interviews: 24 February 2012.

Place of the interviews: Federal Ministry for European and International Affairs, Vienna, Austria.

Interviewed by Valentina Carraro.

Interview 6

With Dr. Gabriel Toggenburg. Program Manager at the European Union Agency for Fundamental Rights.

Date of the interview: 24 February 2012.

Place of the interview: European Union Agency for Fundamental Rights, Vienna, Austria.

Interviewed by Valentina Carraro.

Interview 7

With Mr. Ioannis Dimitrakopoulos. Head of Department Equality and Citizens' Rights at the EU Agency for Fundamental Rights.

Date of the interview: 24 February 2012.

Place of the interview: European Union Agency for Fundamental Rights, Vienna, Austria.

Interviewed by Valentina Carraro.