

THE FUNDAMENTAL RIGHTS AGENCY AS THE CONSCIENCE OF THE EU:
IS THERE A ROLE FOR IT IN THE UK-EU POST-BREXIT TRADE NEGOTIATIONS?

On 31 January 2020, one hour before the official exit time of 11 pm, the United Kingdom's Prime Minister, Mr Boris Johnson, announced that Brexit is not an end but it is a beginning.¹ The latter phrase was not merely a reiteration of his electoral campaign's slogan of 'unleashing the UK's potential'. He also sought to familiarise the electorate with the difficult, next phase of Brexit, namely, the negotiations surrounding the UK's 'trade deal' with the EU. Mr Johnson has eleven months to secure such a 'deal'.

As both Downing Street's team and Mr Michel Barnier are ready to commence post-Brexit negotiations during the UK's transitional period and to explore the possibility (or impossibility) of an EU-Canada type of trade agreement, we should not overlook the fact that any type of trade agreement the United Kingdom signs with the EU is bound to include fundamental rights and rule of law conditionalities.²

Many of the EU's trade agreements, be they bilateral or regional, contain a human rights conditionality. Some of them even condition trade concessions and market access on the third country's respect for internationally recognised labour standards as well as international human rights conventions.³ In fact, the EU has begun the mainstreaming of human rights in all aspects of its external relations. Given such realities, the question I wish to raise here is which European Union institution ought to be approached, and listened to, with respect to human rights and rule of law conditionalities in the post-Brexit 'deal-making' negotiations.

At first sight one might think that the Fundamental Rights Agency of the EU (FRA)⁴ has a role to play. Readers are reminded that FRA is the only body of the European Union that was created in order to protect and promote fundamental rights. For this reason, it enjoys complete independence in providing assistance and expertise to the institutions and bodies of the EU and the Member States when they take

¹ 'Britain finally cuts EU ties', FT Weekend, 1 February 2020, p. 1.

² See Articles 3(5) and 21 TEU.

³ See, for example, the Commission's recent decision to limit Cambodia's preferential treatment due to human rights concerns; <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2113>.

⁴ On FRA, see <https://fra.europa.eu>.

action in this field.⁵ The founding regulation endows FRA with the mandate to provide advice to EU institutions and the Member States based on its analysis of empirical evidence on fundamental rights issues across the EU.⁶ This advisory role has been exercised diligently and has been manifested in the provision of an ever increasing number of reports, legal opinions⁷ and other formal or informal input. As the EU's human rights institution, FRA responds swiftly to invitations from the Commission and the European Parliament in addition to enhancing awareness about the importance of fundamental rights compliance among various stakeholders on governmental and non-governmental levels through its Fundamental Rights Platform.

But FRA is not permitted to submit legal opinions on draft EU legislation on its own initiative.⁸ Article 4(2) of the Founding Regulation states that 'the conclusions, opinions, reports referred to in paragraph 1 may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d)'. Since the negotiations will take place in accordance with Article 207 TFEU and the provisions on international agreements (Articles 216-218 TFEU), it can be concluded that FRA is excluded from receiving a request to advise on the fundamental rights clauses of a future EU-UK trade agreement.

Naturally, the agreement will be concluded under the shadow of Article 2 TEU on the values of the EU. The values are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. We should also be reminded that according to Article 3(5) TEU, in its external relations the Union 'shall uphold and promote its values and interests and contribute to the protection of its citizens'. Accordingly, any post-Brexit 'deal' has to contain explicit guarantees about the UK's unflinching commitment to protecting fundamental rights, including the fundamental rights of the EU citizens living and working there, and labour rights conventions and, therefore, the Court of Justice of the EU (CJEU) could be invited to provide a legal

⁵ See Art 16(1) of the Council Regulation No. 168/2007, OJ L 53/1.

⁶ Ibid, Article 4.

⁷ FRA submitted 20 such legal opinions by 2019.

⁸ This would only be possible via an amendment of its founding regulation, a position that was supported by the Management Board's Decision 2017/05 on 14 December 2017.

opinion on them. According to Article 218(11) TFEU, EU institutions ‘may obtain the opinion of the Court of Justice as to whether the agreement envisaged is compatible with the Treaties’. Clearly, the involvement of the Court of Justice has to be activated by the EU institutions – the CJEU cannot act on its own initiative.

One could envisage a possible involvement by FRA if the final trade agreement between the UK and the EU is accompanied by legislative proposals needed to help implement it, which could be adopted by the Council and the European Parliament. In such a scenario, Article 4(2) of FRA’s Founding Regulation could be activated if an institution made a request to FRA for a legal opinion.

As the EU’s only human rights institution and a promoter of the European polity’s Bill of Rights, that is, the Charter of Fundamental Rights, FRA has no role to play in the post-Brexit EU-UK negotiations. This is regrettable from a normative point of view. Throughout its life and work, which includes the annual publication of a report on the state of fundamental rights across the Union, FRA has acted as the conscience of the European Union.⁹ It has sought to ensure that fundamental rights, as enshrined in TEU’s articles, the general principles of the EU law, which include the ECHR, and the EU Charter of Fundamental Rights, are not overlooked by EU institutions and national bodies, including national judiciaries.¹⁰ This is also why the Council of the European Union called on FRA to draft a handbook on promoting legal compliance with the Charter and the relevant case law of the CJEU for legal practitioners in 2018.¹¹

In concluding, the Court of Justice is the only institution which could comment on the fundamental rights’ clauses and the related conditionalities of any future trade agreement between the European Union and the United Kingdom. This institution, too, has defended and promoted human rights as well as EU citizenship rights in the European Union. Its involvement should appease concerns about possible future deficits in fundamental rights protection in post-Brexit United Kingdom.

⁹ See Fundamental Rights Report 2019: FRA Opinions (Luxembourg: Publications Office of the European Union, 2018).

¹⁰ 10 Years of Standing Up for the Rights of Us All: Between Promise and Delivery: 10 Years of Fundamental Rights in the EU (Luxembourg: Publications Office of the European Union, 2017).

¹¹ Handbook on Applying the Charter of Fundamental Rights at the European Union in law and policymaking at national level: Guidance, FRA (Luxembourg: Publications Office of the European Union, 2018).