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**The Fundamental Rights Agency
Public consultation document**

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1. INTRODUCTION

The representatives of the Member States meeting within the European Council in Brussels on 12 and 13 December 2003 decided to extend the remit of the European Monitoring Centre on Racism and Xenophobia (1)¹ in order to convert it into a Fundamental Rights Agency (2).

That decision ended a long debate in which support for setting up such an Agency was widely expressed (3). In June 1999 the Cologne European Council had suggested examining the need for an Agency for human rights and democracy (4), an idea supported by the European Parliament (5).

The Commission fully supports the decision, which is line with the specific commitments of the Union to respect fundamental rights (6).

Furthermore, accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will strengthen the EU's commitment to protecting human rights by introducing external judicial review of the Union's respect for fundamental rights (7).

The decision to set up a Fundamental Rights Agency clearly continues the policy begun with the objectives entrusted to the Centre, which already has the task of giving the Community institutions the means to fulfil their obligation to respect fundamental rights in drawing up and implementing policies and acts adopted within their fields of competence (8). To that end, the main task of the Centre, which at present has limited staff and resources (9), is to collect and analyse data on racism and xenophobia and study the causes.

At the time the December 2003 decision was adopted, the Commission had presented a proposal to recast the regulation establishing the Centre (10) following an external assessment of the Centre (11). Although the proposal was withdrawn, the conclusions of the assessment remain valid as regards the Centre and will be taken into consideration when the Agency is set up.

The establishment of the Agency raises delicate questions such as the legal basis (the Commission will carefully examine the impact of the Community's limited powers in the area of fundamental rights when drafting its proposal for a regulation setting up the Agency), the financial resources it will be given (12) and the questions linked to the definition of its field of action, its missions and tasks and the relations it might develop with the Council of Europe and other international institutions. It also raises problems concerning the adaptation of the existing structure to ensure that the Agency is effective.

The solutions to these problems should be sought with an eye to the beneficiaries of the Agency's activities: the EU institutions, the Member States and civil society in general. The Agency should be a crossroads facilitating contact between the different players in the field of fundamental rights, allowing synergies and increased dialogue

¹ The annexes are in working paper SEC(2004)2181.

between all concerned. This should benefit the holders of fundamental rights, citizens and all those within the EU.

The national institutions for the protection and promotion of human rights, set up by some Member States on the basis of UN principles (13) (14), can serve as a source of inspiration when establishing the Agency, even though care should be taken to avoid simply transposing these examples, given the specificity of the EU. According to those principles, the institutions must have consultative, informative and monitoring functions and be able in particular to formulate opinions and draw up studies and reports and education and information schemes.

Several national institutions also have quasi-judicial powers (dealing with complaints and petitions). The Agency will not have similar powers as the Treaty has already conferred them on the institutions: the Commission's role of supervising the proper application of Community law must be respected.

The tasks of the Agency, which will be set up by an instrument of secondary legislation, must not encroach on the powers conferred on the EU institutions by the Treaties. Like any other Community agency, it will be a European public-law entity, separate from the Community institutions and possessing its own legal personality. It will carry out highly specific technical, scientific or administrative tasks defined in the instrument setting it up and will have no decision-making powers. Its task will thus be to provide support for the institutions, the Member States, the members of civil society and individuals.

Lastly, as the Agency is to operate up in a global environment, it must ensure that it is receptive to that environment. Dialogue with the different actors in the field of fundamental rights must be encouraged at this level too.

Public consultation

In 2005, the Commission will present a proposal for a regulation relating to the Agency, following in-depth consultations with all those involved in the development of fundamental rights in the EU (15).

To that end, the Commission would like to receive contributions by 17 December 2004, to be sent by e-mail to the following address:

JAI-charte@cec.eu.int

Contributions received will be published on "Your Voice in Europe" with the authors' names, unless they wish to remain anonymous or request that their entire contribution be treated as confidential.

The dialogue on the Agency will end with a hearing, attended by the interested parties, to be held on 30 November 2004.

2. THE AGENCY'S FIELD OF ACTION

Article 6(1) of the Treaty on European Union (TEU) lays down the principles on which the Community is founded. It lists them as the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, and states that these principles are common to the Member States. Article 6(2) states that the Union respects fundamental rights, as guaranteed in the European Convention on Human Rights and as they result from constitutional traditions common to the Member States and the general principles of Community law.

The Charter of Fundamental Rights reaffirms the rights arising out of the constitutional traditions and the international obligations common to the Member States, the ECHR, the EU and Council of Europe Social Charters and the case law of the Court of Justice and the European Court of Human Rights.

It specifies that these provisions are addressed to the institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (16).

Article 7 TEU (17) requires each Member State to respect the principles set out in Article 6, an obligation backed by a procedure which gives the Union the capacity to act preventively in the event of a clear threat of a serious breach of one of the principles or to determine the existence of a serious and persistent breach of one of these principles. The scope of Article 7 is broad, giving the EU institutions the ability to act not only within the limited framework of the areas covered by EU law but also in the event of a breach in an area where the Member States act autonomously.

Given that the Agency will be required to monitor fundamental rights by area and not to prepare reports by country, how should the scope of its field of action be defined? Should it be confined to the areas covered by Community (or Union) law or should it extend further to cover the scope of Article 7 TEU, setting up a procedure which could be used only exceptionally, according to the gravity of the situations to which it would apply?

It must be ensured that the field of action chosen for the Agency gives real added value to the protection of fundamental rights and does not affect the Agency's efficiency.

2.1. Remit confined to the scope of Community (or Union) law

By confining the Agency's remit to the scope of Community (or Union) law, its role would be to help ensure compliance with fundamental rights of both Community law and policies and implementation of the latter by Member States.

The Agency would thus complement the Community system of protecting and promoting existing fundamental rights, characterised by different elements:

- judicial review by the Court of Justice, which will be reinforced by external review by the European Court of Human Rights following accession to the ECHR;

- monitoring by the European Ombudsman to ensure that EU institutions respect the right to sound administration;
- monitoring by the European Data-protection Supervisor of the protection of the freedoms and fundamental rights of individuals with regard to the processing of personal data by a Community institution or body;
- policy follow-up by the European Parliament, the Council and the Commission, both inside and outside the Union, through the adoption of annual reports with a broader remit than the Community powers relating to fundamental rights;
- setting up, at the request of Community legislation, independent institutions responsible for enforcing compliance with fundamental rights (18) in certain areas such as the fight against discrimination or the protection of personal data;
- the part played by the Centre in combating racism and xenophobia through its research and contacts with civil society.

Confining the Agency's remit strictly to the areas of Community competence would avoid duplicating the work of the other bodies operating at international and national levels. The coordination that should be set up between the activities of the Agency and those of such international organisations as the Council of Europe and of national institutions for protecting and promoting fundamental rights, would thus aim to develop synergies.

The disadvantage of this option would be that the Agency could not be asked to collect and process the information needed to analyse a given situation in which Article 7 TEU proceedings were to be taken, if the situation had no connection with Union law or extended beyond the fundamental rights field.

2.2. Remit covering Article 7 of the Union Treaty

As already stated, this Article gives the Union a different power of intervention from the power it already possesses to ensure that Member States respect fundamental rights when they implement EU law. It allows the Union to act outside the field of EU law, in areas where Member States act autonomously.

Furthermore, the procedure is not confined to failure to respect fundamental rights, as Article 7 refers to all the principles listed in Article 6(1): freedom, democracy, the rule of law and respect for human rights and fundamental freedoms.

If the object of the Agency were to be defined as to act as an early warning instrument for situations covered by Article 7, the Agency should in any event be required only to provide institutions with the expertise that allows them to base their decisions on reliable and objective data.

However, this raises the question whether such an extensive remit, covering every situation in a Member State, can be reconciled with the aim of an effective Agency. Furthermore, this could lead to overlaps with work carried out by the Council of Europe and national human rights bodies at their respective levels. There is a very real risk of duplication and contradiction if proper coordination is not established at

the outset. To avoid such situations, the Agency should engage in continuous dialogue in order to identify the methods of cooperation that would place their expertise at its disposal.

3. RIGHTS AND THEMATIC AREAS TO BE COVERED BY THE ACTIVITIES OF THE AGENCY

The Charter of Fundamental Rights, which was proclaimed in Nice in December 2000, and which forms Part II of the Constitutional Treaty with legally binding effect, brings together a package of rights, freedoms and principles which will, when the Constitutional Treaty enters into force, bind the EU institutions and the Member States when they apply EU law. The Commission considers that, although it is not legally mandatory as matters stand, it already constitutes an authentic expression of the fundamental rights protected by Community law as a set of general principles.

As such, it constitutes an essential reference document in the discussion on the definition of the Agency's areas of intervention.

It might be worth asking the Agency to monitor all the fundamental rights protected by Community law and included in the Charter (19). This would provide an overall view of the rights on which the EU is based, which is essential to the harmonious development of the different categories of fundamental rights. It would also ensure that any hierarchisation of rights does not jeopardise their universal application or prevent their interdependence from being emphasised.

A reference to the Charter would, however, give the Agency an extremely broad field of action, especially if its activities were to include respect for fundamental rights in relations between the individual and the EU institutions or States, but also in all social relations between individuals, as is currently the case in respect of racism and xenophobia.

Another option would be to focus the Agency's work on thematic areas having a special connection with Community policies or the Union (immigration, asylum, non-discrimination, ethical questions, guarantee of criminal proceedings, violence, etc.). Among these, racism and xenophobia would continue to be given priority by the Agency. This stems from the December 2003 decision, which provides for the enlargement of the Centre's remit. In this respect, the definition of the Agency's aims must take account of the recent European Council decision on the creation of a European Gender Institute (20).

Whichever option is chosen, it must ensure a balance between a potentially vast area of intervention and the effectiveness of the Agency. Some flexibility is therefore desirable.

4. GEOGRAPHIC SCOPE

Should the Agency's activities be confined to the Union or should they also cover third countries?

Confining the Agency's scope to the Union would clearly underline the will to emphasise the importance of fundamental rights in the Union and would be an effective means of placing responsibility on its institutions in the field of fundamental rights. It would also help in determining the capacity and the expertise that the Agency will require.

This message might be diluted if the Agency's remit were to be extended to third countries; the Commission rejected this option in its Communication on the EU's role in promoting human rights and democratisation in third countries (21), and the Council shared its approach in its conclusions of 25 June 2001 (22). In addition, respect for human rights in the Union's foreign policy is already taken into account in the context of cooperation with third countries.

5. TASKS TO BE ENTRUSTED TO THE AGENCY

The Agency should collect data on fundamental rights to enable the Union to take fundamental rights fully into account when drafting and implementing its policies.

This would mean focusing the Agency's tasks on two areas: data collection and analysis and the drafting of opinions (23).

These tasks could certainly be supplemented by others, including maintaining regular dialogue with the EU institutions, the Member States and civil society in order to promote fundamental rights.

5.1. Data collection and analysis

The Agency's principal tasks can be defined as the collection and analysis of objective, reliable and comparable data at European level. To that end, it is essential that it play an active part in networking with other bodies.

Data collection is the main objective of the Centre, pursuant to Article 2(1) of the 1997 Regulation.

Data should be collected in cooperation with the Member States and the members of civil society dealing with fundamental rights, notably NGOs, national institutes for fundamental rights and the Council of Europe. The network of independent experts for fundamental rights could also be an important source of information for the Agency.

Several methods could be used to collect good-quality information. Methods should also be found for ensuring that the information is objective, reliable and comparable.

An active approach could be taken by requesting the Agency to set up data collection mechanisms. The Centre takes this approach with the Raxen network (24). The Agency could thus set up one or more networks to help it in this task, in addition to the existing network.

On the other hand, data could be collected passively, with the EU institutions and Member States being required to send data, for example in the form of regular reports. The data could be supplemented by optional reports from NGOs or other

members of civil society. By thus transferring the burden of collection, the question of data quality and comparability is left intact.

The active solution, which leaves the Agency free to seek information from a variety of sources, means it must select it with care to ensure that it is reliable, but the Community and national authorities would be less involved in the process.

The passive solution releases the Agency from the obligation to set up data search machinery and places the responsibility more on the EU institutions and the Member States as regards the transmission and quality of the data. Regular reports would also allow more regular monitoring of the situation as regards fundamental rights.

5.2. Opinions and views intended for the EU institutions and the Member States

Data collection and analysis should be targeted on the drafting of opinions for the institutions and the Member States, in which the Agency would set out its analyses.

Executing this task could take the form of published reports or other means of communication.

5.3. A communications and dialogue strategy

Dissemination of the work carried out by the Agency and the dialogue with the various members of civil society should form part of a clearly defined communications strategy that meets the needs of its customers and thus creates the conditions for coordinating a fundamental rights awareness and education policy with what is being done nationally and by the Council of Europe.

The communications strategy would notably involve the publication of reviews, information bulletins and studies, the organisation of a website and a database. It would be a major tool in the dialogue between the Agency and the different actors in the field of fundamental rights, notably the NGOs (25), and in cooperation with the Council of Europe and the national human rights bodies.

6. RELATIONS WITH CIVIL SOCIETY

The Agency should establish relations with NGOs, the social partners, universities and other partners involved in fundamental rights, as well as with the specialist bodies dealing with the protection of fundamental rights in the field of personal data and privacy.

It would be important to ask it to maintain regular contact with those parties whose expertise will make a valuable contribution to its work.

The contacts could take the form of a network set up among the partners.

The activities of the Agency must not, however, compromise the independence of the partners.

7. SYNERGIES WITH OTHER BODIES

7.1. With the Council of Europe

Close cooperation must be established, like that between the Centre and the European Commission against Racism and Intolerance (ECRI) (27), which provides for the participation of the Council of Europe (26).

Specific forms of cooperation with the Council of Europe will be defined bilaterally. It would also be desirable for the Agency to develop close relations with, for instance, the Commissioner for Human Rights to ensure that their respective areas of competence complement each other.

7.2. With the national institutions for the promotion and protection of human rights

Special attention should be paid to the links which the Agency could develop with national bodies, notably with a view to determining respective work programmes. A network could be set up between the Agency and the national agencies or equivalent bodies in the Member States.

7.3. With the network of independent experts on fundamental rights

It is necessary to identify the synergies which the Agency could develop with the network of independent experts on fundamental rights, set up by the Commission at the request of the European Parliament, and to determine whether retaining the two structures will give real added value to the promotion and protection of fundamental rights.

8. STRUCTURE OF THE AGENCY

In order to carry out its tasks objectively, the Agency must be independent.

It must be independent of all those with whom it will come into contact: the Commission, European Parliament, Council, Member States and civil society.

In exchange for the independence of the Agency in the pursuit of the tasks it will be given, an appropriate system of responsibility and liability (political, financial, administrative, and legal) will also have to be clearly established.

At the same time, the efficiency of the Agency, which is intended to be a lightweight structure in terms of staff and budget, and its transparency and representativeness must not be compromised.

These points must be considered and conclusions drawn with regard to the structure of the Agency and the composition of the management bodies.

A measure of the importance attributed to the Agency would be if representatives appointed by the Commission, the European Parliament, the Member States and the Council of Europe were to participate in its management bodies.

To ensure that it is effective, the Agency's management bodies must:

- have the necessary expertise to define the Agency’s work programme and also administer it;
- optimise the influence of the Agency on decision-makers in the Member States and the EU institutions. It might be advisable to consider adding a scientific committee to the structures of the Centre (Management Board, Executive Board, Director) (28).

Annex: References

- (1) Created by Council Regulation (EC) n° 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10 June 1997, p. 11. The European Monitoring Centre on Racism and Xenophobia was created in June 1997. The primary role of the Monitoring Centre consists of collecting and analysing data on racism, xenophobia and anti-Semitism, as well as studying the causes of these phenomena, in order to help the Community and the Member States to conceive and to target their policies. The Monitoring Centre, which is based in Vienna, employs approximately 30 people and has an operational budget amounting in 2003 to €6.5 million.
- (2) For the purposes of this text, the expressions “fundamental rights” and “human rights” carry the same meaning.
- (3) In 2000, the wise mens’ report, (report of Messrs Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, analysing “the commitment of the Austrian Government to the common European values, in particular relating to the rights of minorities, refugees and immigrants”, presented on 8 September 2000 in Paris) recommended the creation of an EU Agency on Human Rights in order to contribute to the establishment “of a mechanism within the EU to monitor and evaluate the commitment and performance of individual Member States with respect to common European values”.
- (4) Item 46 of the conclusions.
- (5) See, in particular, the European Parliament resolution on the annual report on respect for human rights in the European Union, of 16 March 2000, § 94 (A5-0050/2000), the European Parliament resolution on International Human Rights and European Union Human Rights Policy, of 16 March 2000, § 10 (A5-0060/2000), the European Parliament resolution on the human rights situation in the European Union, of 15 January 2003, § 8 (A5-0451/2002), and the European Parliament resolution on the Communication from the Commission to the Council and the European parliament on the European Union's role in promoting human rights and democratisation in third countries, of 25 April 2002, §§ 25 – 28 (A5-0084/2002).
- (6) The explicit engagement of the Union to respect fundamental rights results from Article 6 of the Treaty on European Union. The Charter of Fundamental Rights “The Charter”, declared in Nice in December 2000 and published OJ C 364 of 18 December 2000, p. 1, has been included in part II of the Treaty establishing a Constitution for Europe, with binding legal force. It constitutes an authentic expression of the fundamental rights protected by the Community legal framework.
- (7) To date, the European Union is not a member of the ECHR, although the legal and political consequences of such an adhesion have been discussed and examined for years.

The question was in particular raised with respect to the Charter of Fundamental Rights. The importance of keeping a balance between this document and the ECHR led to the insertion of a provision in Article 52 (3) of the Charter, stating that “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the

meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection”.

Article I-9 (2) of the Treaty establishing a Constitution for Europe stipulates that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

- (8) See recital 2 of regulation 1035/97.
- (9) Currently, thirty people work at the Monitoring Centre; in 2003 the budget was €6.5 million.
- (10) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, on the activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97, a proposal for a Council regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version) COM (2003) 483 final version.
- (11) The integral report submitted by the assessors may be consulted on the Internet at the following address:

http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_fr.pdf
- (12) The Commission commits to go ahead with its regulation proposal after an ex-ante evaluation so as to ensure the principle of sound financial management.
- (13) In the annex, an opinion has been drawn up by the Network of independent experts on fundamental rights concerning the role of national institutions for the protection of human rights in the member states of the European Union.
- (14) The Council of Europe also formulated principles on the establishment of independent national human rights institutions for the promotion and protection of human rights (Recommendation No. R (97) 14 of 30 September 1997).
- (15) The debate has already been complemented by a working paper of the European Parliament presented by Mrs Swiebel (EP <NoPE>339.635) and by contributions of Amnesty International, Social Platform and of the European Association for the Protection of Human Rights (FIDH-AE).
- (16) Article 51 of the Charter stipulates that it neither extends the scope of the law of the Union beyond the competences of the Union, nor creates any new competence or task for the Union.
- (17) This article was the subject of a Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM (2003) 606 final of 15.10.2003.

- (18) In particular the case of Directive 46/95 on data protection which envisages the creation by the Member States of supervisory authorities, and of Directive 2000/43/EC on equal treatment between persons, irrespective of racial or ethnic origin, which provides for the designation by the Member States of bodies responsible for upholding this equality.
- (19) The provisions of the Charter have a clear basis for interpretation in the "Explanations relating to the complete text of the Charter", a document drawn up under the responsibility of the Praesidium of the Convention which drafted the Charter, not having any legal effect and intended simply for clarifying the provisions of this document. Although these explanations do not have in itself any legal effect, they constitute a valuable interpretation tool intended to clarify the provisions of the Charter.
- (20) The conclusion 43 of the presidency of the European Council of Brussels (17 and 18 June 2004) pointing out the aims of equality stated in the Lisbon programme and in the light of the political agreement reached within the Council, expresses its support for the creation of a European Institute for equality between men and women and calls on the Commission to submit it a proposal in this direction.
- (21) COM (2001) 252 final of 8 May 2001, item 5. Indeed, the Commission considered itself to have complete sources of information and advice on the matter and did not consider it convenient to create an implementation agency for the development of the projects with regard to the third countries.
- (22) "The Council underlines the importance of enhancing co-ordination and co-operation between Community actions and the CFSP in the promotion and protection of human rights and efforts to strengthen democracy. Hence, the Council recalls that the Community's actions should be consistent with the European Union's action as a whole, including the CFSP. The Council shares the Commission's opinion that these objectives should be achieved without establishing new structures", 2362nd session of the Council on – general Affairs.
- (23) Opinions restrict themselves to expressing the opinion of the entity that it emits and are not binding opposite the entity to which they address themselves.
- (24) See Article 2 (2) point h) of the regulation n° 1035/97.
- (25) Strengthening the dialogue with the civil society, in particular with the NGOs, is an objective that the Commission stated on several occasions, in particular, in the Communication on Article 7 EUT, already mentioned (cf. its item 2.4).
- (26) The Council of Europe has several instruments and mechanisms as regards protection of human rights, the principal of which are: the European Convention of Human rights, the European social Charter, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Convention on Human rights and biomedicine, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages and the European Commission against Racism and Intolerance.

- (27) Council decision of 21 December 1998 relating to the conclusion of an Agreement between the European Community and the Council of Europe for the purpose of establishing, in accordance with Article 7(3) of Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, close cooperation between the Centre and the Council of Europe, OJ L 44 of the 18. 2.1999, p. 33.
- (28) See Article 10 of the Council Regulation (EEC) No 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, OJ L 36, 12.02.1993, p. 1