

EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU UE D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
CFR-CDF

**PUBLICATION OF THE REPORT ON THE CONCLUSIONS AND RECOMMENDATIONS
FOR THE YEAR 2005**

The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission (DG Justice, Freedom and Security) upon the request of the European Parliament (http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm). Since September 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights of the European Union. Among its tasks, the Network is asked to draft a report examining, on an annual basis, the situation of fundamental rights in the European Union and its Member States. The present report is the fourth report presented by the network of experts. It focuses on the developments of the year 2005. This report will be discussed within the Civil Liberties, Justice and Home Affairs Committee of the European Parliament on the 20th June.

In the general part of the report, the independent experts regret that the Treaty establishing a Constitution for Europe has not been ratified. In addition to the insertion, in part II of the Constitutional Treaty, of the Charter of Fundamental Rights, the Treaty intended to abolish the division in pillars of the European Union and to extend the jurisdiction of the European Court of Justice to the matters of police and judicial criminal cooperation as well as to the Title IV of the EC Treaty regarding visas, asylum, immigration and other policies related to free movement of persons. Moreover the Constitution would have enlarged the possibilities for private individuals to seek the annulment of an act even of a general nature, directly affecting them. And it would have provided for the accession of the European Union to the European Convention on Human Rights of 1950. The independent experts make certain concrete proposals aiming at allowing for some progress in these different fields, in spite of the failure of the process of ratification of the Constitution.

The independent experts note down the progresses achieved in the field of the prevention of fundamental rights violations in the laws and policies of the European Union, through the impact assessments of the legislative proposals of the Commission and the adoption of a methodology for a systematic and rigorous monitoring of their compliance with the Charter of Fundamental Rights. They regret however the absence of a screening mechanism which would allow to identify, in a proactive way, where an intervention of the Union is needed in order to ensure an enhanced protection of fundamental rights within the Union, in the light of the evolution of the laws and policies of the Member States ; such a mechanism would allow for a better informed exercise by the Union of its competences to act in the field of fundamental rights.

The monitoring of the situation of fundamental rights in the Member States has led the independent experts to express a certain number of reasons for concern. The 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which provides for the creation of national institutions for the prevention of torture or cruel, inhuman or degrading treatment or punishment, has been ratified by only 6 Member States ; and in several Member States there is still no external and independent mechanism for the monitoring of the situation of persons deprived of their liberty. Speaking generally, the independent experts note that certain recent developments are likely to impose new threats on the respect of fundamental rights, including absolute rights such as the prohibition of torture or inhuman or degrading treatments or punishments. The use by certain Member States of 'diplomatic assurances' given by States to which persons are removed, constitutes a specific source of concern ; constitutes a similar source of concern the fact that certain States are tempted to put into question the case law of the European Court of Human Rights which prohibits in absolute terms the removal of a person to a State where he or she would be facing a serious risk of torture or of treatment or punishment, including when that person would have

committed serious crimes or would constitute a threat to the national security of the State proceeding to the removal.

In other parts of the report, the Network of independent experts advocates for an extension of the mechanism established under the Directive 2004/81/CE of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. The purpose of the Directive is to allow non-Community nationals who are victims of trafficking in human beings (or – if the Member State concerned chooses to make this extension – who have been the subject of an action to facilitate illegal immigration) to be granted a short-term residence permit in return for their cooperation with the justice in researching and identifying the criminals. Noting that persons illegally residing on the territory may be reluctant to contact the authorities, the experts consider that this mechanism could be extended to victims of family related violence who are illegally residing on the territory ; moreover they recall the recommendation of the European Commission against Racism and Intolerance of the Council of Europe according to which short term residence permits shall be granted to victims of trafficking irrespective of their willingness to co-operate with the authorities.

Recalling the Communication on the European Social Agenda of 9 February 2005, by which the Commission announced its intention to propose an initiative for the protection of personal data of workers, the Network regrets that no proposal has been put forward yet on this issue. The independent experts underline the necessity to adopt a sectorial directive aiming at protecting personal data in the field of employment, especially in view of the different approaches adopted by the Member States in the general framework of Directive 95/46/EC of 24 October 1995 and of the uncertainties which remain as to the implementation of the general requirements of this directive in the field of employment.

Welcoming the extension of the marriage to same-sex persons in Spain, following the examples of the Netherlands and Belgium, the Network notes that several Member States still have not organised, in the framework of an institution such as registered partnerships, the legal consequences of the cohabitation of same-sex couples. Having regard to the case law of the Human Rights Committee instituted within the framework of the International Covenant on Civil and Political Rights, the independent experts underline the risk of discrimination enshrined by such a situation. Agreeing with the concerns expressed by the European Parliament, the Network draws the attention on the reemergence of homophobia in certain Member States, which has also seriously harmed the freedom of peaceful demonstration.

As to the right to education, the independent experts recall their concern with regard to the *de facto* segregation of Roma students in several Member States, where they are placed in ‘special’ classes or institutions actually intended to welcome children with a mental disability. The Network underlines that such a situation may constitute a violation of the requirements of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

In an important chapter on asylum, the independent experts note that during the year 2005, several Member States have adapted their legislation in order to ensure the application of Directive 2003/9/EC of the Council of 27 January 2003 laying down minimum standards for the reception of asylum seekers ; the experts make out the list of problems which remain in the Member States despite the important progresses which have been realised. In their commentary of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, the experts realise a systematic evaluation of the compliance of this instrument with the European Convention on Human Rights and with the Geneva Convention of 28 July 1951 relating to the status of refugees, underlining the statement made by the European Parliament, when it gave a favourable opinion to the text, that it reserved its right to file annulment proceedings against the Directive. Eventually the experts examine the implementation of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless

persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The Report notes down that several States have recognised the fact that gender related violence could constitute a form of persecution justifying the recognition of the status of refugee, this is an encouraging signal.

In the Chapter which their report devotes to the fight against discrimination, the independent experts identify a range of situations where the Member States have gone beyond the minimal requirements of the European directives adopted on the basis of Article 13 EC, in order to promote diversity and to favour an effective integration of certain categories of persons – for instance, through the adoption of national plans or national strategies to fight discrimination – or in order to alleviate the burden of the proof of discrimination by providing statistical data or by using so-called ‘situation tests’. Despite the difficulties faced by the Member States to fully implement the Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, this constitutes an encouraging sign. Recalling that positive action may constitute an indispensable tool for the realisation of a genuine equality of treatment, the experts regret however the obstacles that are set up in certain Member States against the adoption of positive action measures in favour of certain categories of persons.

Brussels, 2 June 2006