



*The Fundamental Rights Agency : Towards an Active
Fundamental Rights Policy of the Union*

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The Fundamental Rights Agency : Towards an Active Fundamental Rights Policy of the Union

by
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I. Introduction

Following the decision by the European Council in Brussels on 12 and 13 December 2003 to extend the existing European Monitoring Centre on Racism and Xenophobia (EUMC) in order to convert it into a Fundamental Rights Agency,¹ the European Commission presented a public consultation document on 25 October 2004.² Both the public consultation document and the public hearing that was organised on 25 January 2005 in order to discuss the modalities of the proposed agency, provided to several actors, notably Member States, non-governmental organizations, national human rights institutions, academics and private citizens, an opportunity to express their views about the questions raised by the implementation of the decision of the European Council.³ Six months after the beginning of these consultations, on 30 June 2005, the European Commission finalised proposals for both a Council Regulation establishing a European Union Agency for Fundamental Rights on the basis of Article 308 EC, and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union (i.e., police and judicial co-operation in criminal matters) on the basis of Articles 30, 31 and 34 EU.⁴ According to Article 2 of the draft regulation, the objective of the Agency shall be '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 in order to support them when they take measures or formulate courses of action within their respective spheres

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¹ The expression « Human Rights Agency » instead of « Fundamental Rights Agency » has also been used. The European Council has referred twice to the « Human Rights Agency », once in conclusions from the Brussels European Council of 13 December 2003, and in the Hague Programme on the strengthening of Freedom, Security and Justice in the Union annexed to the conclusions of the European Council of 4-5 November 2004.

² COM(2004) 693 final

A proposal for the establishment of a monitoring centre for human rights within the European Union, which could serve to improve the coordination of the fundamental rights policies pursued by the Member States, had already been made earlier, in particular, in a report prepared for the *Comité des Sages* responsible for drafting *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* : see P. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in P. Alston, with M. Bustelo and J. Heenan (eds.), *The European Union and Human Rights*, Oxford, Oxford University Press, 1999, p. 3.

³ All the contributions to this consultation are available on the following website:

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/news_contributions_fund_rights_agency_en.htm

Most of the contributions addressed the issues of the independency of the future Agency, its geographical scope, the quality of its expertise, its role under Article 7 EU and its complementarity with the already existing monitoring mechanisms in these fields, in particular with the Council of Europe and with the national human rights institutions. In addition, acting upon the request of the European Commission, the European Policy Evaluation Consortium (EPEC) prepared two reports analysing the various responses to the public consultation and presenting the results of the discussions that took place during the public hearing : EPEC, *Preparatory Study for Impact Assessment and Ex-Ante Evaluation of Fundamental Rights Agency Analysis of Responses to Public Consultation*, 19 January 2005 and EPEC, *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency – Public Hearing Report*, February 2005.

These reports are available on the following websites :

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/analysis_written_contributions_en.pdf

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/report_public_hearing_en.pdf

⁴ Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union (COM (2005) 280 final of 30.6.2005).

of competence to fully respect fundamental rights'. When this proposal was made, it was envisaged that the Agency was to be in existence as of January 1st, 2007. At the time of this writing however, these two proposals of the European Commission are still being negotiated within an *Ad hoc* Working Party of the Council, and the European Parliament is consulted on it through an informal dialogue between the three institutions.

Since the Council Regulation establishing the future European Union Agency for Fundamental Rights has not been adopted yet, there is no point in commenting in detail the content of the proposals of 30 June 2005, nor the discussions within the *Ad hoc* Working Party of the Council. This paper proposes instead, on the basis of the experience acquired by the EU Network of Independent Experts in Fundamental Rights, to address the added value an independent and decentralized monitoring of the situation of fundamental rights in the European Union and the Member States would bring to the future Fundamental Rights Agency, in the light of the tasks and missions the Agency is likely to fulfil. The Impact Assessment Report appended to the proposal of 30th June 2005 justifies the establishment of the Agency by the finding that

Although the Member States have developed various strategies, policies and mechanisms to respect and mainstream fundamental rights when implementing Union law and policies, there is a lack of systematic observation of how the Member States do this. Such a lack represents a missed opportunity, as the potential for sharing of experiences and good practices and mutual learning is not met.⁵

It is still unclear whether the forthcoming Fundamental Rights Agency will ensure this systematic observation of the situation of fundamental rights in the European Union and the Member States by itself, or whether its work shall be complemented by a decentralised network of independent experts or 'focal points', allowing the Agency to be provided with information collected impartially and objectively, in addition to any information it may receive from the national administrations. This paper starts by briefly presenting the functions the EU Network of Independent Experts in Fundamental Rights has been performing since its establishment in September 2002. It then explains why its tasks and tools could either inspire, or complement, the work of the future Fundamental Rights Agency, in the broader context of the institutional framework for the monitoring of fundamental rights in the system of the European Union.

II. The EU Network of Independent Experts in Fundamental Rights

II.1. Introduction

In its Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet)⁶, the European Parliament recommended

that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable the Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account developments in national laws, the case-law of the Luxembourg and Strasbourg Courts and any notable case-law of the Member States' national and constitutional courts.

In response to this request of the European Parliament, the EU Network of Independent Experts in Fundamental Rights was set up in September 2002 by the European Commission (former DG Justice and Home Affairs)⁷. The Network is in charge of monitoring the situation of fundamental rights in the

⁵ SEC(2005)849, of 30.6.2005, at p. 8.

⁶ (2000/2231(INI))

⁷ For general information on the Network, see http://ec.europa.eu/justice_home/cfr_cdf/members_en.htm

Member States and in the Union on the basis of the Charter of Fundamental Rights of the European Union⁸. It consists of 26 experts, covering all the Member States, and is headed by a coordinator⁹. These experts are required to have an experience of at least ten years at a high level in the field of fundamental rights, and to present qualities of integrity and independence usually required for such positions¹⁰. In the fulfilment of their mission, they undertake to receive no instruction from any organisation, either public or private.

We strongly believe that, in order to assist the work of the Fundamental Rights Agency, a similar network of independent experts should be established in the future on a permanent basis. The need for maintaining such type of monitoring is implicitly acknowledged in the Communication of the European Commission of 6 April 2005 establishing for the period 2007-2013 a Framework programme on Fundamental Rights and Justice¹¹, in which the Commission proposes the adoption by the Council of a Decision establishing for that period a specific programme 'Fundamental rights and citizenship', as part of the framework programme. Under the proposed decision, the 'Fundamental rights and citizenship' programme would comprise a series of actions, including the support for and management of networks of national experts,¹² with the objective, *inter alia*, of

assess[ing] regularly the situation of fundamental rights in the European Union and its Member States, within the scope of application of Community law, using the Charter of Fundamental Rights as the guiding document and to obtain opinions on specific questions related to fundamental rights within this scope when necessary.¹³

Why should such monitoring continue? One argument would be that the establishment of the EU Fundamental Rights Agency should improve the protection of fundamental rights in the Union, and

⁸ The provisions of the Charter are systematically interpreted by the Network in the light of the international and European human rights law and its related jurisprudence. See also EU Network of Independent Experts in Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, Office for the Official Publications of the European Union (to be published in 2007, but already available, under the heading 'Commentary of the Charter' on the following website: http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm).

⁹ Although the EU Network of Independent Experts has finalized its activities in September 2006, in this paper, the Network is addressed in the present tense.

¹⁰ For instance, Manfred Nowak, Austrian expert of the Network, is currently the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Morten Kjaerum, Danish expert of the Network, has been a member of the UN Committee for the Elimination of Racial Discrimination and the President of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. Martin Scheinin, Finnish expert of the Network is a former member of the UN Human Rights Committee and is currently the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Linos-Alexandre Sicilianos, Greek expert of the Network, has been the Vice-president of the UN Committee for the Elimination of Racial Discrimination and the President of the Experts' Committee of the Council of Europe for the improvement of the mechanisms of protection of human rights (DH-PR).

¹¹ Communication from the Commission to the Council and the European Parliament establishing for 2007-2013 a framework programme on Fundamental Rights and Justice, COM(2005)122 final of 6.4.2005.

¹² Art. 4, a), of the Proposal.

¹³ Art. 3, b), of the Proposal. While the Council has to decide on this proposal of the Commission, it should be noted that the Commission may decide, without having to refer this to the Council, to establish groups of experts with an advisory mandate. In March 2003 for example, the Commission has set up a consultative group called "Experts Group on Trafficking in Human Beings" (Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings", OJ L 79 of 26.3.2003, p. 25), consisting of twenty individuals specially qualified in this field, proposed by the governments of the European Union Member States, as well as by international, inter-governmental and non-governmental organizations active in preventing and combating trafficking in human beings. The mission of this Group is to issue opinions or reports to the Commission at the latter's request or on its own initiative, taking into due consideration the recommendations set out in the Brussels Declaration that was adopted following the "European Conference on Preventing and Combating Trafficking in Human Beings - Global Challenge for the 21st Century", which was held from 18 to 20 September 2002. One of those recommendations was precisely the setting up of such an experts group. One of those recommendations was precisely the setting up of such an experts group. Another example is the "European Group on Ethics in Science and New Technologies", created by a decision of 16 December 1997, which is an independent, pluralist and multidisciplinary body (consisting of fifteen members appointed by the Commission for their expertise in this field) that advises the European Commission on ethical aspects of science and new technologies in connection with the preparation and implementation of Community legislation or policies.

thus build on the existing mechanisms or replace them with other mechanisms performing comparable functions, rather than lead those mechanisms to disappear. By creating the European Union Agency for Fundamental Rights with a mandate centred on improving the coherence and the consistency of the EU's fundamental rights policies or on data collection and analysis but without being endowed with a monitoring function – or, even if endowed with such a function, without the capacity to fulfil it in a credible fashion by being assisted with such a group of independent experts –, while not ensuring that the monitoring function currently performed by the EU Network of Independent Experts in Fundamental Rights can continue on a permanent basis, the Union would be acting (so the argument goes) like the United Nations would have acted if, when establishing the UN High Commissioner for Human Rights, it had decided to suspend the monitoring by the expert bodies created under the UN treaties. Rather than an objective in its own right, the establishment of an Agency should be seen as a tool to achieve the aim of an improved role of fundamental rights in the law- and policy-making of the Union and of its Member States in the implementation of Union law¹⁴: seen in this light, the establishment of the European Union Agency for Fundamental Rights should not lead to weaken the mechanisms which exist currently to monitor fundamental rights within the Union; it should instead strengthen them, especially by improving the follow-up of the findings from such mechanisms, and address in this regard the appropriate recommendations to the Member States and the institutions of the Union. It is in this perspective that the European Parliament, in its Resolution of 26 May 2005 on the role of national and European institutions, including the Fundamental Rights Agency declares¹⁵

the Agency should be designed as a multi-layered structure ("network of networks"), a specialised body with horizontal competences, in which each of the layers must play a role and contribute to the development of a fundamental rights culture in the Union; (...) that the Agency should gather all relevant information, analyses and experience available in European and national institutions, national parliaments, governments and human rights bodies, Supreme/Constitutional Courts, NGOs and existing networks, such as the Network of Independent Experts in Fundamental Rights [and the RAXEN network]; (recital 35)

We do not deny that this argument may have merit. Indeed, Martin Scheinin has described in detail the added value of the Network of independent experts on fundamental rights established by the European Commission, even taking into account the other forms of monitoring to which the Member States were subjected.¹⁶ The Charter of Fundamental Rights contains certain provisions which have no equivalent in other international or European treaties. On the basis of Article 18 of the Charter, the Network monitors compliance with the requirements of the Geneva Convention of 28 July 1951 on the status of refugees, which no other committee of independent experts currently does. Moreover, while the international and European human rights instruments establish a floor of rights which the Member States must respect, the undertakings of the Member States are variable : they are not bound by all the instruments, even among the most important treaties of the Council of Europe such as the Framework Convention for the Protection of National Minorities or the Revised European Social Charter ; they may have made reservations to certain instruments, or they may have accepted only a number of provisions contained in the instruments they have ratified, where such *à la carte* approach is allowed. For all these reasons, if the EU Charter of Fundamental Rights indeed embodies a core set of values

¹⁴ As rightly underlined in the Explanatory statement of the Report of the European Parliament of 11 May 2005 (Committee on Civil Liberties, Justice and Home Affairs, rapp. Kinga Gál), 'in order to understand what the protection of fundamental rights within the European Union involves today, it is necessary to first decide whether a future agency dealing with the issue should be regarded as an aim or a tool in the process' (Report of the European Parliament (Committee on Civil Liberties, Justice and Home Affairs, rapp.: Kinga Gál) of 11 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI)), p. 12).

¹⁵ European Parliament resolution of 26 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI)), P6_TA(2005)0208. See also: Report of the European Parliament (Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Kinga Gál) of 11 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI)).

¹⁶ M. Scheinin, "The Relationship between the Agency and the Network of Independent Experts" in Ph. Alston and O. De Schutter, *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart publ., Oxford, 2005, pp. 73-90.

which the Member States have agreed to, it may be justified to ensure that they comply with the rights, freedoms and principles contained in the Charter, and it should be presumed too easily that the mechanisms established under the human rights treaties of the United Nations or the Council of Europe will necessarily suffice in that respect.

We believe however, that there exist even more powerful arguments in favour of a systematic monitoring of the situation of fundamental rights in the Member States, using as a template the Charter of Fundamental Rights. The following paragraphs describe these arguments in more detail.

II.2. Annual Reports on the situation of fundamental rights in the Union and its Member States

The EU Network of Independent Experts in Fundamental Rights essentially took over from the rapporteur annually appointed within the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament the task of preparing an annual report on the situation of fundamental in the European Union. The Network however still regularly reports to that Committee. Besides its annual report, the Network may also be called on to deliver specific information and opinions regarding the protection of fundamental rights in the European Union and in the Member States.

National Reports – Each expert of the Network prepares a report on each Member State, fully independently, under his/her own responsibility and according to common guidelines which ensure the comparability of the data from the different Member States. Each expert is requested, for each provision of the Charter of Fundamental Rights of the European Union (the Charter), to examine the findings of international jurisdictions and the observations of experts' committees released during the period under scrutiny, as well as the follow-up given to these findings and observations by the State concerned; to report on the developments within the domestic legislation and case law which may affect fundamental rights; and to examine the practices of national authorities. They are encouraged to consult broadly in the preparation of these reports, in particular with national administrations, national and international non-governmental organisations, trade unions, relevant intergovernmental organisations, and national institutions for the promotion and protection of human rights.¹⁷ These national reports do not simply collect data relating to the situation of fundamental rights in the country under scrutiny. They also offer a normative evaluation of that situation : using the rights, freedoms and principles of the Charter as their reference, the independent experts identify for each State 'positive developments', 'good practices', and 'reasons for concern' (see hereunder).

Report on the activities of the Union – The activities of the institutions of the European Union are evaluated in a separated report¹⁸. The Report takes as reference the Charter of Fundamental Rights of the European Union and examines, in the light of the provisions of the Charter, the initiatives taken by the institutions of the Union, or by the Member States acting in common in the framework of the Union. The screening of the Union's laws and policies has represented an important function of the Network of experts (see hereunder point III.4). It may indeed be recalled that, for the moment, there is no external control exercised on the institutions of the Union, comparable to the monitoring exercised on the Member States of the Union by United Nations and Council of Europe bodies, although the institutions of the Union are of course required to act in conformity with the Charter. The European Commission has rightly taken the approach that the obligation for the institutions to act in conformity with the Charter required to preventively anticipate the risk that the Charter might be violated by its proposals. This led in March 2001 the Presidency of the Commission and Commissioner Vitorino to require that the services of the European Commission accompany all their legislative proposals which could have an impact on fundamental rights with an indication that these proposals are compatible with the requirements of the Charter.¹⁹ Furthermore, in April 2005, the Commission has adopted a

¹⁷ The national reports are accessible online at www.cpdr.ucl.ac.be/cridho

¹⁸ For the years 2002 and 2005, the reports on the activities of the European Union were merged with the 'Synthesis Report' containing the conclusions and recommendations of the Network. However the reports on the activities of the European Union for the years 2003 and 2004 were published separately.

See: http://ec.europa.eu/justice_home/cfr_cdf/members_en.htm

¹⁹ Memorandum of M. Vitorino and the Presidency : *Application of the Charter of Fundamental Rights*, SEC(2001) 380/3.

Communication by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter²⁰ and on 15 June 2005, it has adopted a new set of guidelines for the preparation of impact assessments.²¹ Although these new guidelines are still based, as the former impact assessments,²² on a division between economic, social and environmental impacts, the revised set of guidelines pays a much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights.²³ These various initiatives of the Commission are encouraging. However it is essential that this anticipatory approach to the compliance of the activities of the institutions of the Union with the Charter of Fundamental Rights be further developed.

Synthesis Report – On the basis of the 25 national reports and of the Report on the situation of fundamental rights in the activities of the Union, the members of the Network identify the main conclusions and recommendations for the year under scrutiny. These conclusions are collected into a Synthesis Report, which is sent to the European Commission in March of each year. The synthesis Report containing the conclusions and recommendations of the Network serve three distinct purposes:

- *Identification of 'good practices'* – First, on the basis of a comparative reading of the different national reports, the independent experts identify certain 'good practices' in the implementation of fundamental rights by the Member States. These 'good practices' are defined as innovative answers to problems in the implementation of fundamental rights, which are faced by all or most of the Member States. When experimented successfully in one Member State, the 'good practices' could inspire similar answers in other Member States, launching a process of mutual learning which the European Parliament has sought to encourage when it requested the European Commission to set up the EU Network on Independent Experts in Fundamental Rights. Indeed, in the resolution which it adopted based on the Cornillet Report on the situation of fundamental rights in the Union in 2000, the European Parliament recommended to the Council that

a mutual evaluation procedure be set up between the Member States in order to enable respect for fundamental rights to be monitored, innovations incorporated into the Member States' laws to be assessed, sound practices to be identified, a high degree of harmonisation in the protection of fundamental rights in the EU to be achieved and any threatened infringement of those rights to be prevented (para. 14).

- *Situations of concern* – Second, the conclusions of the independent experts may express certain concerns about certain specific situations, which occur in one or more Member States. In exceptional cases, such situations may constitute serious and persistent violations of fundamental rights as expressed in the Charter of Fundamental Rights – which form part of the catalogue of values on which the Union is based, as expressed in Article 6(1) EU – or create a clear risk of a serious breach of such rights. The Network acts here in accordance with the Communication which the Commission presented to the Council and the European Parliament on Article 7 EU 'Respect for and promotion of the values on which the Union is based'.²⁴
- *Identification of issues deserving of attention from the Union institutions* – Third, as emphasized again in the Communication of the Commission on Article 7 EU 'Respect for and promotion of the values on which the Union is based', the monitoring by the Network has an essential preventive role in that it can provide ideas for achieving the area of freedom, security

²⁰ Communication of 15 June 2005 from the Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring*, COM(2005) 172 final of 27.4.2005.

²¹ SEC(2005)791.

²² See Communication of the Commission 5 June 2005 on Impact Assessment, COM(2002)276.

²³ Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium): see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

²⁴ COM (2003) 606 final, of 15.10.2003.

and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded. As performed by the Network, monitoring thus also fulfil another, non-contentious function: it will serve to identify issues on which it would be justified for the Union to exercise its powers to contribute to the promotion and the protection of fundamental rights, because the decentralized action of the Member States, acting individually, appears incapable of attaining that objective, and because that objective could be better fulfilled by an initiative of the Union.

II.3. Thematic Comments and Opinions

Each annual Synthesis Report of the EU Network of Independent Experts in Fundamental Rights also comprises a Thematic Comment, which examines in greater depth one or more issues selected by the Commission together with the European Parliament²⁵. Moreover the Network is also regularly requested by the Commission, sometimes on the request of the European Parliament, to prepare opinions on issues relating to the protection of fundamental rights in the Union²⁶. The opinions of the Network are drafted fully independently and are binding neither on the Commission, nor on the European Parliament. In most cases, they are based on a comparison, as complete as possible, of the situations which exist in the different Member States on a given question. They systematically seek to take into account the state of the international and European law of human rights, rather than only the fundamental rights already explicitly recognized in the legal order of the European Union. By the formulation of these opinions, the Network aims at contributing to a better taking into account of the requirements of fundamental rights from the initial stages of the legislative process.

III. The complementarity of a mechanism of systematic and decentralised monitoring of fundamental rights with the Fundamental Rights Agency of the European Union

III.1. Introduction

This paper argues in favour of the establishment, within or alongside the future Fundamental Rights Agency, of a mechanism ensuring a systematic and decentralised monitoring of the situation of fundamental rights in the European Union and the Member States.

On the basis of the experience of the EU Network of Independent Experts in Fundamental Rights, such a mechanism might consist in the establishment of a decentralised group of independent experts following the situation of fundamental rights in the different Member States and reporting their findings to the institutions of the Union, including the future Fundamental Rights Agency. At a minimum, this group of experts could be one of the ‘information networks’ the Agency will be authorised to set up and to coordinate according to Article 6 (1) of the proposed Council Regulation. According to this provision, these networks ‘shall be designed so as to ensure the provision of objective, reliable and comparable information, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data’²⁷. The interest of having such a monitoring mechanism within or alongside the future Fundamental Rights Agency is underlined in the recent Report of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament of 25 September 2006 (rapp. Kinga Gál), which proposes to explicitly refer to the EU Network of Independent Experts in Fundamental

²⁵ The Thematic Comment appended to the 2003 Synthesis Report (covering the year 2002) relates to ‘The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats’. The Thematic Comment appended to the 2004 Synthesis Report (covering the year 2003) examines ‘Fundamental Rights in the External Activities of the European Union in the Fields of Justice and Asylum and Immigration’. The Thematic Comment appended to the 2005 Synthesis Report (covering the year 2004) relates to the protection of minorities in the Union. Finally the last Thematic Comment, which is appended to the 2006 Synthesis Report (covering the year 2005) relates to the implementation of the rights of the Child in the European Union (all these documents are available on the website of the Network).

²⁶ For the full list of the opinions of the Network, see: http://ec.europa.eu/justice_home/cfr_cdf/list_opinions_en.htm

²⁷ Article 6 (1) of the Proposal.

Rights in the abovementioned provision of the proposed regulation²⁸. This is moreover underlined by the European Commission, in its Impact Assessment Report appended to the proposal of 30 June 2005. When it addresses the work currently performed by the EU Network of Independent Experts in Fundamental Rights, the European Commission notes²⁹ :

(...) In the relatively short time of its operation, the Network has made a valuable contribution in the form of its annual reports on the situation of fundamental rights in the EU and thematic opinions. However, the Network lacks a legal basis, legitimacy and continuity. When establishing an Agency, the existence of a separate Network is difficult to justify, as it would entail the existence of two parallel mechanisms for fundamental rights monitoring within and for the EU. On the other hand, for the Agency to be effective, it must have access to legal expertise in the Member States to get local information and analysis. The expertise of the Network would not be lost, if the Network would be integrated in the work of the Agency. Therefore, one solution could be that the Network of independent experts would be incorporated into the structure of the Agency by becoming one of the networks operated by the Agency.

There are essentially three reasons why this form of decentralised monitoring of the situation of fundamental rights in the European Union and the Member States would be complementary to the work of the Fundamental Rights Agency. First, a monitoring such as the one performed by the EU Network of Independent Experts in Fundamental Rights would complement the work of the Fundamental Rights Agency either for the use of Article 7 EU or in order to facilitate the exercise by the Union of the powers it shares with the Member States (point III.2). Secondly, the monitoring as practiced by the Network of independent experts should not be confused with data collection and analysis as conceived for the Agency, especially if, as decided by the European Council, it builds on the EUMC on Racism and Xenophobia and bases its work on the methodology currently developed by the EUMC (point III.3). Finally, the Network of Experts – or any similar structure which could be set up in the future – constitutes a potentially useful tool in order to contribute to the monitoring of the implementation by the Member States of the instruments adopted for the establishment of an area of freedom, security and justice (point III.4).

III.2. Remit of the Agency: the need for a complementary monitoring mechanism either for the use of Article 7 EU or in order to facilitate the exercise by the Union of the powers it shares with the Member States

a) The procedure under Article 7 EU

Article 3(3) of the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2005 reads

When pursuing its activities, the Agency shall concern itself with the situation of fundamental rights in the European Union and in its Member States when implementing Community law, without prejudice to paragraph 4 [information on request regarding third countries] and to

²⁸ According to this report, Article 6 (1) of the Council Regulation establishing the Agency shall provide that « in order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data, (a) *set up and co-ordinate information networks, such as the network of independent experts on fundamental rights, and use existing networks (...)*» (Report of the European Parliament (Committee on Civil Liberties, Justice and Home Affairs, rapp.: Kinga Gál) of 25 September 2006 on the proposal for a Council regulation establishing a European Union Agency for Fundamental Rights (COM(2005)0280 – C6-0288/2005 – 005/0124(CNS))).

The interest of maintaining such a monitoring mechanism has also been highlighted by several non-governmental organisations (see the contributions to the public hearing organised by the European Commission on the Fundamental Rights Agency

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/news_contributions_fund_rights_agency_en.htm)

²⁹ Impact Assessment Report of 30 June 2005, SEC(2005) 849 of 30.06.2005

Articles 4(1)(e) [technical expertise for the use of Article 7 EU], 27 [participation of candidate or potential candidate countries] and 28 [Activities under Title VI of the Treaty on European Union].

According to the proposed Council regulation, the scope of the future Fundamental Rights Agency would thus be, in principle, limited to situations where Member States are implementing Community law or, if conceived more broadly, to situations where Member States act in the scope of application of Community law³⁰. Nevertheless the expertise of the Agency could also, under certain circumstances, be called upon in fields situated outside the scope of application of Community law, notably in the context of the procedure enshrined in Article 7 EU, which since the entry into force of the Nice Treaty on 1st February 2003, gives the Council the possibility to determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based. This preventive mechanism, provided for in Article 7(1) EU, now complements the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) EU.³¹ It is against this background that Article 4 of the proposal of 30 June 2005 establishing a European Union Agency for Fundamental Rights provides that the Council may exploit the expertise of the Agency if it finds it useful during the procedure under Article 7 EU

1. To meet the objective set in Article 2, the Agency shall:

(...)

(e) make its technical expertise available to the Council, where the Council, pursuant to Article 7(1) of the Treaty on European Union, calls on independent persons to submit a report on the situation in a Member State or where it receives a proposal pursuant to Article 7(2), and where the Council, acting in accordance with the procedure set out in these respective paragraphs of Article 7 of the Treaty on European Union, has requested such technical expertise from the Agency;

(...)

However the Explanatory Memorandum to the draft Council Regulation, when commenting upon this provision of the Proposal, specifies that the Agency will not be in charge of carrying out a systematic and permanent monitoring of the Member States for the purposes of Article 7 EU. According to this approach – which is recalled in the Impact Assessment Report appended to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2005, as one of the possible options³² –, the breach of fundamental rights warranting the activation of Article 7 EU would be so serious and extraordinary that it does not require a special mechanism to notice such a breach. Moreover – and this has been remarked, rightly in our view, by institutions of the Council of

³⁰ A number of academic commentators have noted that the notion of ‘scope of application of Union law’ has borders difficult to define, which in certain cases may make it difficult to identify whether or not the European Court of Justice would consider it is competent to ensure the respect of fundamental rights included among the principles of law, where measures adopted by the Member States are concerned. On the precise delineation of the situations in which the Member States are bound by fundamental rights as general principles of EC or EU law, see esp. J. Weiler, “The European Court at a Crossroads: Community Human Rights and Member State Action”, in: *Du droit international au droit de l’intégration. Liber amicorum Pierre Pescatore*, Baden-Baden, Nomos Verlagsgesellschaft, 1987, p. 821; J. Temple Lang, “The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles”, *L.J.E.L.*, 1991/2, p. 23; J. Weiler, “Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights”, in N. Neuwahl et A. Rosas, *The European Union and Human Rights*, Martinus Nijhoff Publ., Kluwer, The Hague-Boston-London, 1995, p. 56 ; and K. Lenaerts, “Le respect des droits fondamentaux en tant que principe constitutionnel de l’Union européenne”, *Mélanges en hommage à Michel Waëlbroeck*, Bruxelles, Bruylant, 1999, p. 423.

³¹ Article 7(2) to (4) EU and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC. This improvement of Article 7 EU was proposed by the *Comité des Sages* which reported in September 2000 to the European Council on the human rights situation in Austria and the means by which the EU could respond to possible human rights problems in an EU Member State (The report was submitted by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, adopted in Paris on 8 September 2000: See <http://www.virtual-institute.de/en/Bericht-EU/report.pdf>).

³² See the Impact Assessment Report appended to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2005 (SEC(2005) 849 of 30.06.2005), pp. 8-9.

Europe in the course of the discussions around the Agency³³ –, the Council of Europe bodies are well equipped to identify the most serious breaches of fundamental rights which could justify using the sanctioning mechanism of Article 7(2) EU, or even the ‘clear risk’ of such breaches which might justify addressing recommendations to the Member State concerned. The draft Council Regulation establishing the EU Fundamental Rights Agency, while providing for a role of the Agency under Article 7 EU therefore does not envisage a systematic and permanent monitoring of the Member States for the purposes of Article 7 EU.

The question whether the remit of the Agency will eventually be confined to the scope of Community (or Union) law or whether it will also cover Article 7 EU is still lively discussed within the *Ad hoc* Working Party of the Council. In our view however, it is clear that, whether the Agency will eventually be in charge of playing a role under Article 7 EU or whether it will not, in order to ensure that the mechanism enshrined in Article 7 EU is used in a non-selective manner, it should proceed on the basis of a systematic monitoring by independent experts, providing comparable data and objective assessments on the situation of fundamental rights in all the Member States of the Union. In other words, there would be a complementarity between the form of monitoring the EU Network of Independent Experts in Fundamental Rights³⁴ – in any revised form it will be given after 2006 – is performing and the functions of the Fundamental Rights Agency, however the tasks of the Agency are defined in the future and, in particular, whether the remit of the Agency is confined to the scope of Community (or Union) law or whether its remit covers Article 7 EU. Indeed, if the Agency is to act as an early warning instrument for situations covered by Article 7 EU, it is essential that the Agency may be provided with reliable and objective information concerning the legal situation of all Member States, in order, if issues of concern appear, to react in a timely manner. In the Communication which the Commission presented to the Council and the European Parliament on Article 7 EU, the Commission notes that, by its reports, the EU Network of Independent Experts in Fundamental Rights may help to ‘detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty’; and that it may ‘help in finding solutions to remedy confirmed anomalies or to prevent potential breaches’. The Working Document of 25 March 2004 on the proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version) prepared with the European Parliament’s Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs (rapp. J. Swiebel) recalled in this respect that³⁵

the regular monitoring of the human rights situation in the Member States by independent experts will be essential in detecting possible problems in time and proposing adequate solutions. It could also contribute to a process of mutual learning by the sharing of experiences.

Whether in order to address recommendations to the Member State where there exists a clear risk of a serious breach of the values on which the Union is founded, including fundamental rights, or in order to suspend certain rights of that State where it is found to have persistently committed serious breaches

³³ See the statement by Ms de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, made at the Public Hearing on the Agency on Fundamental Rights of 25 January 2005, available on the following website: http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm. See also, in particular, Parliamentary Assembly of the Council of Europe (PACE) Resolution 1427 (2005) adopted on 18 March 2005 (rapp. McNamara), and the answer which the Committee of Ministers of the Council of Europe provided on 13 October 2005 to Recommendation 1696 (2005) of the Parliamentary Assembly (CM/AS(2005)Rec1696 final, adopted at the 939th meeting of the Ministers’ Deputies). A Memorandum was provided by the Secretariat of the Council of Europe to Vice-president F. Frattini on 8 September 2005, summarizing the need to avoid an overlap between the mechanisms of the Council of Europe and those of the Union.

³⁴ While the adoption by the Network of the Charter of Fundamental Rights as the catalogue of rights on which its monitoring should be based was motivated both by the practice inaugurated in 2000 by the annual reports of the European Parliament and by the understanding of the Charter as a codification of the fundamental rights which were considered to be part of the common values on which the Union is based, it is Article 7 EU which explains the reliance on the Charter even with regard to situations which, under Article 51 of the Charter, would in principle not fall under its scope of application.

³⁵ Doc. PE 339.635, at p. 4.

of those values – it will be useful for the European Commission, the European Parliament and the Council, when exercising their constitutional functions under Article 7 EU, to base themselves on assessments made by a body monitoring all the Member States according to the same standards, and whose composition and working methods guarantee the objectivity and impartiality of such an assessment. However whilst, as mentioned above, the European Commission adopted an approach towards Article 7 EU which identified this article as requiring a permanent form of human rights monitoring of the Member States,³⁶ the Parliament responded with a resolution which appears to oppose the idea.³⁷ Despite the presence of some otherwise encouraging language, the resolution ended with the identification of four principles which, in its view, should guide a responsible use of that provision, including the principle of confidence :

The Union looks to its Member States to take active steps to safeguard the Union's shared values and states, on this basis, that as a matter of principle it has confidence in:

- the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles,
- the authority of the European Court of Justice and of the European Court of Human Rights.

Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union.

b) The exercise by the Union of the powers it shares with the Member States

Under the current proposal, both the Fundamental Rights Agency of the Union and the expert networks which it may call upon to provide it with data have a mandate limited to the scope of application of Union law. However a strict division between what is ‘within’ the scope of application of EU law and what is ‘outside’ that scope of application may be tenable where the objective is only to monitor whether the institutions of the Union, or the Member States acting under Union law, comply with fundamental rights ; instead, where the objective is to identify where the Union may need to take action, and thus potentially expand the scope, this separation simply is not workable anymore³⁸. Indeed, because there does not exist a strict division of competences between the Member States and the Union in the implementation of the rights covered by the Charter, it is necessary, in order to identify where the Union (or the Community) should exercise certain powers it has been attributed, to be able to screen the developments within the Member States, which could lead to new barriers being created in the internal market or which could threaten the mutual trust on which the area of freedom, security and justice is premised. The monitoring performed by the EU Network of Independent Experts in Fundamental Rights – or by any other similar structure which could be set up in the future – should identify such situations where divergences occur between the Member States which may justify the exercise by the Union of the competences it has been conferred upon, either by the use of Article 308 EC in combination with the objectives of the European Community which intersect with fundamental rights recognized in the Charter, or on the basis of specific provisions of the treaties which could lead to the adoption of legislative instruments implementing fundamental rights.

³⁶ Communication of the Commission to the Parliament and the Council, ‘Article 7 of the EU : Respect for and promotion of the Values on which the Union is based’, COM(2003)606, of 15.10.2003.

In the Communication which it presented to the Council and the European Parliament on Article 7 EU *Respect for and promotion of the values on which the Union is based*³⁶, the Commission noted that, by its reports, the Network of Independent Experts in Fundamental Rights may help to ‘detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty’; and that it may ‘help in finding solutions to remedy confirmed anomalies or to prevent potential breaches’.

³⁷ Respect for and promotion of the Values on which the Union is based, EP doc. P5_TA(2004)0309.

³⁸ See in this regard the position paper adopted by the EU Network of independent experts on fundamental rights on the Fundamental Rights Agency of the Union, 16 December 2004.

Considering the number of such provisions, which now open up for the possibility of a true fundamental rights policy developed by the Union by the adoption of legislative instruments,³⁹ a systematic and reliable screening of the situation of fundamental rights in the 25 Member States of the Union appears indispensable. Indeed, these clauses may justify the exercise by the Union (or the Community) of its attributed powers, in order to realize fundamental rights, where a comparative overview of the evolution of fundamental rights in the different Member States leads to the conclusion that such an intervention may be required, and would be in conformity with the principles of subsidiarity and proportionality guiding the exercise by the Union of competences it shares with the Member States. It would simply not be credible to set up an Agency entrusted with making recommendations to the EU institutions in the field of fundamental rights, without this agency being provided with an evaluation by a network of legal experts covering all the Member States either with respect to the full Charter of Fundamental Rights or with respect at least to the rights of the Charter the Agency must contribute to fulfilling.

III.3. Missions and tasks of the Agency: the need for a legal monitoring feeding into other forms of data collection and analysis

The proposal of the Commission of 30 June 2005 for the establishment of the Fundamental Rights Agency remains relatively open as to the precise content of the tasks entrusted to the Agency, and as to the working methods which it should use. This is a result, not of the vagueness with which the tasks are described, but on the contrary of the long list of these tasks, which creates many possibilities for the future. As mentioned above, Article 2 of the draft Regulation states that the objective of the Agency ‘shall be 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 in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights’. Much more detailed is Article 4(1) of the draft Regulation, which states that in order to meet the objective set in Article 2, the Agency shall:

- (a) collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data (...);
- (b) develop methods to improve the comparability, objectivity and reliability of data at European level (...);
- (c) carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies (...);
- (d) formulate conclusions and opinions on general subjects, for the Union institutions and the Member States when implementing Community law (...);
- (...)

³⁹ It is for instance on the basis of Article 13 EC that the Council has adopted Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000, p. 22) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16). It is on the basis of Article 18 EC that the European Parliament and the Council adopted Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77). It is on the bases of Articles 63, al. 1 and 2, EC, and 64(2) EC and Article 63, al. 3 and 4, EC that the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3/10/2003, p. 12) and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (OJ L 31 of 6/2/2003, p. 18). It is on the basis of Article 31 EU that the European Commission proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 328 final, 28.4.2004).

- (i) enhance cooperation between civil society, including non-governmental organisations, the social partners, research centres and representatives of competent public authorities and other persons or bodies involved in dealing with fundamental rights (...);
- (j) organise, with relevant stakeholders, conferences, campaigns, round tables (...);
- (...)

Even if the precise tasks of the Agency are still being discussed within the *Ad hoc* Working Party of the Council, it appears that the general approach adopted by the European Commission towards the ‘monitoring’ the Agency is going to perform strongly differs from the monitoring hitherto performed by the EU Network of Independent Experts in Fundamental Rights. Indeed, a distinction should be made between a form of monitoring which examines the *compatibility* of certain developments with the requirements of the rights, freedoms and principles of the Charter of Fundamental Rights and prepares legal opinions on such compatibility, whether they concern developments within the Member States or within the Union, on the one hand, and *data collection and analysis* as performed currently by the EUMC and as shall be performed by the Fundamental Rights Agency, on the other hand⁴⁰.

It is crucial that the former monitoring function, performed on the basis of the EU Charter of Fundamental Rights, be pursued; at the same time, it is highly desirable that such a monitoring be complemented by the setting up of the Fundamental Rights Agency. A group of legal experts entrusted with the independent monitoring of the situation of fundamental rights in the Member States and the Union would provide the Agency with its conclusions, and the Agency would be ideally placed to build upon these conclusions and, on this basis, recommend certain initiatives, commission further thematic studies, or organize fora in which all the stakeholders could take part in order to identify what proposals should be made. In this context ‘monitoring’ would thus not only mean normative evaluation. It would mean identifying trends, convergences or divergences, which may call for a more active exercise by the Union institutions of the competences they have been recognized to contribute to the protection and the promotion of fundamental rights in the Member States. And it would also mean ensuring that, where problems emerge, they are identified at the earliest stage possible, in order to be remedied before the mutual trust between the Member States is threatened⁴¹.

The functions fulfilled by the monitoring of the Member States based on the rights, freedoms and principles of the Charter of Fundamental Rights have already been highlighted above, where the objectives of the preparation of the annual Synthesis Report by the EU Network of Independent Experts in Fundamental Rights were presented : first, such monitoring contributes to the exchange of good practices in the area of fundamental rights and therefore serves mutual learning between the States; second, it provides the institutions, especially the European Parliament and the European Commission, with the objective and reliable information on the situation of fundamental rights in the Member States of the Union which the institutions require to possess in order to fulfil their constitutional functions under Article 7 EU, especially after the revision of this provision which now comprises a preventive dimension ; third, it may serve to alert the institutions about the emergence of diverging standards in the field of fundamental rights, which would risk either to recreate obstacles to the free movement of goods or to the transborder provision of services, thus impeding the correct functioning of the internal market, or imperil the mutual trust on which the cooperation between the

⁴⁰ On this issue see M. Scheinin, “The relationship between the Agency and the Network of independent experts” in Alston Ph. and De Schutter O. (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, cited above. The approach adopted by Martin Scheinin in this chapter is based on a conceptualization of the notion of monitoring in respect of fundamental rights. Although the notion of monitoring is occasionally also used in respect of the mandate of the future Agency, the author emphasises “the legal-normative nature of true monitoring as something quite distinct from the planned profile of the Agency which relates to the collection and analysis of data for the purpose of providing input for policy-making”.

⁴¹ As underlined by Martin Scheinin, « the rationale for the Network is quite different from the one planned for the Agency. The mandate of the Network is typical for a human rights *monitoring* body, adjusted to the role of the EU Charter of Fundamental Rights as the applicable set of standards. (...) Such a monitoring function is primarily one of legal assessment of complex information against the grid of human rights/fundamental rights norms ». (M. Scheinin, “The relationship between the Agency and the Network of independent experts” in Alston Ph. and De Schutter O. (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, cited above, at p. 84)

national authorities responsible for law enforcement is premised.

Whether these functions are integrated within the remit of the Fundamental Rights Agency – for instance on the basis of Article 6(1) of the proposed regulation – or whether they are performed alongside the Agency – for instance on the basis of the 2007-2013 Framework programme on Fundamental Rights and Justice⁴² – but providing it with the analyses it will require to prepare recommendations, they can only be performed by a group of independent experts covering the 25 Member States in a decentralized manner, on a systematic rather than on an *ad hoc* basis. The organisation of such a monitoring under a contractual mode of relationship either with the institutions or with the Fundamental Rights Agency is incompatible, in the long run, with the requirements of independency, as well as with the systematic and non-selective screening which is needed for these functions to be adequately fulfilled.

III.4. Title VI of the Treaty on European Union: the potential contribution of a systematic and decentralised monitoring mechanism to the activities of the Agency in the fields of police and judicial co-operation in criminal matters

The proposal of 30 June 2005 for a Council Regulation establishing the European Union Agency for Fundamental Rights on the basis of Article 308 EC is accompanied by a proposal for a Council Decision empowering the Agency, on the basis of Articles 30, 31 and 34 of the Treaty on the European Union, to pursue its activities in areas referred to in Title VI of the Treaty on European Union (ie. police and judicial co-operation in criminal matters). According to the European Parliament Resolution of 26 May 2005 on the role of national and European institutions, including the Fundamental Rights Agency⁴³

establishing the Agency should make a contribution to further enhancing mutual confidence between Member States and constitute a guarantee of continued observance of the principles set out in Articles 6 and 7 of the Treaty on European Union and considers that the Agency should provide all the information required to develop the Union's legislative activity, monitoring role and policy on awareness raising for fundamental rights (recital 26)

With the exception of its annual reports on the situation of fundamental rights in the European Union, the monitoring by the EU Network of Independent Experts in Fundamental Rights since its creation in September 2002 has too rarely served to verify the implementation of the Union instruments in the creation of the area of freedom, security, and justice⁴⁴. However the practice of evaluating the implementation by the member States of the policies adopted in the field of justice, freedom and security – especially under Title VI EU – should be expanded in the future, and compensate, through its systematic character, the unavailability of infringement proceedings filed by the Commission in the fields of police cooperation and judicial cooperation in criminal affairs.⁴⁵ The expected Framework Decision on certain procedural rights in criminal proceedings throughout the European Union⁴⁶

⁴² Communication from the Commission to the Council and the European Parliament establishing for 2007-2013 a framework programme on Fundamental Rights and Justice, COM(2005)122 final of 6.4.2005.

⁴³ European Parliament resolution of 26 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI)), P6_TA(2005)0208.

See also: Report of the European Parliament (Committee on Civil Liberties, Justice and Home Affairs, rapp.: Kinga Gál) of 11 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI))

⁴⁴ However the role of the EU Network of Independent Experts in Fundamental Rights in this field has been highlighted by the European Commission, notably in its Communication to the Council and the European Parliament regarding the *Evaluation of EU Policies on Freedom, Security and Justice* (COM(2006) 332 final, of 28.6.2006), where the Commission identifies the existing mechanisms for evaluating respect of fundamental rights with regard to EU policies on freedom, security and justice (p. 97).

⁴⁵ See A. Weyembergh and S. de Biolley (eds), *Comment évaluer le droit pénal européen ?*, Institut d'études européennes de l'ULB, Bruxelles, 2006 ; and the Communication to the Council and the European Parliament regarding the *Evaluation of EU Policies on Freedom, Security and Justice* (COM(2006) 332 final, of 28.6.2006).

⁴⁶ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004)328 final of 28.4.2004.

already signals the beginning of a systematization of this form of monitoring. In the extended Impact Assessment of the proposal of the Commission on this instrument, the Commission calls for

a regular monitoring exercise on compliance. This should be on the basis of Member States themselves submitting data or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could use the services of independent experts to analyse the data and assist with the drawing up of reports. One possible team of independent experts is the EU Network of Independent Experts in Fundamental Rights.⁴⁷

The proposal of the Commission for a Council Framework decision in this area contains a specific clause on evaluating and monitoring the effectiveness of the Framework Decision (Article 15), with one possibility being to be assisted in this by an independent monitoring by the EU Network of Independent Experts in Fundamental Rights.⁴⁸ There are in fact three functions which a systematic monitoring of the situation of fundamental rights in the Member States could fulfil, in relation to improving the contribution of Union law to the promotion and protection of fundamental rights⁴⁹: such monitoring could (1) prepare the ground for the exercise by the institutions of the Union of their competences in this field ; (2) it could avoid a situation where, because Union laws would not protect fundamental rights at a sufficiently high level, the Member States may actually be under an incentive to lower the level of protection they afford to fundamental rights to the minimum level obligatory under Union law ; (3) finally, it could ensure that the Member States would not be allowed to invoke the doubts they may entertain about the situation of fundamental rights in another EU Member State in order to refuse to cooperate where, in principle, such an obligation of cooperation is imposed. In our view, such a monitoring aiming at ensuring an impartial and objective character of the evaluation of the implementation of the Union policies must operate preventively, before the mutual trust is disrupted, rather than reactively. It must be regular and systematic, rather than *ad hoc*. And it must not only lead to the adoption of safeguard measures where required, but also to the formulation of legislative proposals at the level of the Union where such initiatives appear to be required. In other words, insofar as possible, it should present the following features:

- *non-selectivity*: all the Member States should be treated equally, judged on the basis of the same criteria and according to the same procedures ;
- *proactivity*: any situation which could threaten the mutual confidence on which mutual recognition is premised should be identified at an early stage, because the mutual confidence is broken; this suggests that monitoring should be permanent or at least performed on a regular basis, rather than performed on an *ad hoc* basis after a phenomenon has developed which could threaten mutual confidence;
- *independence*: although evaluation by peer review mechanisms presents its own value and, indeed, could constitute the second stage of any evaluation mechanism designed to facilitate the full application of the principle of mutual recognition by reinforcing mutual confidence, it may be useful, at least at a preliminary stage, to benefit from the findings of an independent body, in order to ensure that the exercise of scrutiny on any particular Member State shall not be seen as motivated by hostility calling for diplomatic retaliation ;
- *decentralization*: a credible monitoring of the situation of the Member States should be based on information collected in those States, rather than in a centralized fashion, on the basis of what will necessarily be secondary sources selectively treated.

⁴⁷ SEC(2004) 491, of 28.4.2004, p. 22.

⁴⁸ See para. 83 and 84 of the Explanatory Memorandum, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final of 28.4.2004.

⁴⁹ On this issue, see : O. De Schutter and V. Van Goethem, « The added value of a systematic and regular monitoring of the situation of fundamental rights in the Member States for the evaluation of the implementation of Union laws and policies », in A. Weyembergh et S. De Biolley, *Comment évaluer le droit pénal européen ?*, cited above, at pp. 125-146.

IV. Conclusion

Discussing the relationship between the EU Network of Independent Experts on Fundamental Rights and the forthcoming Fundamental Rights Agency, the Working Document of 25 March 2004 on the proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version) prepared with the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (rapp. J. Swiebel) concluded

It is important to stress that the analytical, evaluative and advisory functions of the Experts' Network continue to be fulfilled in an independent way. This should not prevent close links between the Human Rights Agency and the Experts' Network being established.⁵⁰

The ad hoc creation of expert networks on a contractual basis, following a public call for tenders, is not in the long term a sustainable solution for the satisfactory fulfilment of the monitoring function currently entrusted to the EU Network of Independent Experts in Fundamental Rights. Valid reasons may be put forward for the integration of a group of independent experts in fundamental rights within the broad structure of the Agency, provided the functions of such a group and the mode of appointment of its members are explicitly defined in the future Regulation on the Fundamental Rights Agency and provided, therefore, the form of monitoring performed by the EU Network of Independent Experts in fundamental rights continues in this revised form. No less valid reasons plead in favour of the maintenance of a separate group of independent experts, created under a decision of the European Commission, and entrusted with the preparation of regular reports on the situation of fundamental rights in the European Union and its Member States. Indeed, this latter solution – the establishment by a decision of the Commission of a group of independent experts in fundamental rights as a consultative body – may be required if, due either to the difficulty of identifying an adequate legal basis in the Treaties or due to considerations of opportunity, the remit of the Agency is confined to the legal order of the European Union, and does not extend to the Member States and to the monitoring of the situation of fundamental rights in situations presenting no relationship to Union law, as would contribute to the mechanism of Article 7 EU.

⁵⁰ Doc. PE 339.635, at p. 6.