

Establishment of a European Agency on Fundamental Rights: Opportunities and Challenges

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Introduction

On 27 October 2004, the European Commission launched a public consultation on the scope, missions and tasks of the future Fundamental Rights Agency of the European Union (EU). [1] This consultation follows the decision of the heads of the states and governments of EU member states, taken in December 2003, to extend the mandate of the Vienna-based European Union Monitoring Centre on Racism and Xenophobia (EUMC) into a Fundamental Rights Agency. [2] The establishment of this Agency nonetheless raises delicate questions about the legal basis [3] of the EU, as well as the Community's limited powers in the field of fundamental rights.

The Commission's communication highlights that the Agency should be a "crossroads", facilitating contacts between the different players in the field of fundamental rights; allowing synergies and increased dialogue between all the stakeholders concerned; and satisfying the needs of, respectively, the EU institutions, the member states and civil society. However, the communication also makes it clear that the Agency will have neither judicial nor decision-making powers. In addition, it emphasises that the tasks of the Agency, which will be set up by an instrument of secondary legislation (regulation), should not encroach on the powers conferred on the EU institutions by the Treaties, and more particularly on the supervisory role of the European Commission as regards the application of the community law. Concisely, the Agency will be entrusted to carry out just specific technical, scientific or administrative tasks limited by Article 308 of the Treaty of the European Union (TEU). [4]

This paper analyses some aspects of the debate about the role of the Agency, focusing on the definition of the Agency's field of action, its remit [5], its tasks and the synergies it might develop with European and International institutions active in the field of human rights.

He analysis opens with examining the different scenarios regarding the field of action of the Agency and more precisely the chance of whether the Agency should be confined to those areas covered by the EU law, or should it be given competence under Article 7. It proceeds then with analysing another scenario of whether the Agency should cover all the chapters of the Charter of the Fundamental Rights or focus only on certain priority thematic areas. It follows a short description of the tasks that could be entrusted to the Agency and the main synergies that it should establish with the existing key players (international and national) in the field of human rights in order to avoid any duplication. Finally, it concludes describing the operating framework of the Agency pointing out the structural limits of its future activities and powers.

1. The Agency's field of action

Given that the Agency will be required to monitor fundamental rights by theme and not to prepare reports by country, the main question which is raised is how the scope of its field of action should be defined. For example, should the Agency be confined to those areas covered by Community or Union law, or should it be given competence under Article 7 of the TEU? Should it cover third countries, including the accession countries to the European Union? Is it feasible to require the Agency to monitor all the fundamental rights protected by Community law included in the Charter? [6]

1.1 Remit confined to the scope of Community law

If the Agency's remit is confined to the scope of Community law, the Agency's main role would be to assist the compliance with fundamental rights of both Community law and policies and implementation of the latter by member states. That means that its role would be more a complementary one assisting the existing system of EU institutions to protect and promote fundamental rights within the European Union. The solution of limited mandate, excluding Article 7, would be the most preferable scenario for those EU member states which try to preserve their sovereignty in situations that have no connection with the Community law and that are extended beyond the fundamental rights field.

1.2 Remit covering Article 7 of the Union Treaty

Apart from the fact that EU policies themselves help to secure respect for, and promotion of, common values, the legal and political framework for the application of Article 7, based on prevention, requires practical operational

measures to ensure a thorough and effective monitoring of respect for and promotion of common values. The existing Network of Independent Experts currently detects fundamental rights anomalies and provides information as regards possible risks of breaches of these values. The European Human Rights Agency could play a *complementary* role here by assisting and consulting with the above mentioned network by finding solutions to remedy confirmed anomalies or to prevent potential breaches.

Article 7 of the TEU, introduced by the Amsterdam Treaty and amended by the Nice Treaty [7] , and Article 309 [8] of the Treaty establishing the European Community, equip the EU institutions with the means of ensuring that all member states respect the common principles listed under Article 6(1) of the TEU. [3] The scope of Article 7 is not confined to areas covered by the Community law. That means that the Union could act not only in the event of a breach of common principles in this limited field but also in the event of a breach in an area where the member states act autonomously. Article 7 thus gives the Union a power of action that is very different from its power to guarantee that a member state respects fundamental rights when implementing Community law.

Activating the Article 7 mechanism would have delicate repercussions for the member state which is being criticised, but also for the European Union as a whole. The gravity of the resulting situation would be such that the need for a *concerted* action will probably be felt, especially with the European Parliament and the country concerned. If the European Commission is to make a proposal that there is a clear risk of a serious breach of fundamental rights it will seek, with due respect of its powers, close contacts with the two other parties involved at the various stages prior to presenting a proposal with a view to identify situations likely to be caught by Article 7. Also, it will seek to analyse these situations and to make initial informal contact with the authorities of the member state concerned. The member state should be contacted for its opinion on the situation.

These ‘informal’ contacts would enable the Commission to present the facts regarding the breach of fundamental rights of which the member state is accused, and would allow the member state to make its views known. At that phase of the “concertation” procedure the Agency could play a key role by providing the Commission with expertise in taking its final decision as to whether or not there is a risk of a serious breach of the principles mentioned under Article 6 (1).

Furthermore, the Agency could play a functional role for the application of Article 7, *providing* the EU institutions *upon request*, and particularly the Council, with “independent persons” expert in the field of human rights. The involvement of “independent persons” who could be invited to present a report on the situation in a relevant member state, which persistently breaches one of the common principles, could provide a full and objective picture of the situation on which the Council of the European Union has to take a decision. [10]

2 Rights and thematic areas to be covered by the Agency

There is a current debate on whether the Agency should cover all the chapters of the Charter of the Fundamental Rights [11] or focus on certain priority thematic areas.

2.1 The Charter of Fundamental Rights

Through its proclamation, at the EU Summit in Nice in December 2000, [12] the Charter has acquired a principal position. Although the Charter is not yet legally binding, citizens are invoking it ever more frequently in letters, appeals and petitions addressed to the EU institutions. The European Commission considers that it is necessary to draw practical lessons from the proclamation of the Charter, and to guide its conduct by the rights contained in it. With this in mind, any proposal for a legislative or regulatory act adopted by the Commission will now be subject to an *a priori* compatibility check with the Charter, attested by the inclusion of a standard recital in proposals which have a connection with fundamental rights. [13]

The Charter of Fundamental Rights has been fully incorporated as Part II into the Constitutional Treaty signed in Rome on 29 October 2004. The future unanimous ratification of the Constitutional Treaty by the member states by November 2006 would render the Charter legally binding. [14]

It is commonly accepted that the Charter should be the principal reference document for the Agency’s work. 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 member states, and this wide field could put the Agency’s efficiency under question. In addition, reference to the Charter could also be considered to be a very delicate issue given the fact that the proposal for the Agency’s regulation will be elaborated at the same time of the ratification procedure of the Constitutional treaty.

2.2 Thematic areas

Taking into account the broad scope of the rights covered by the Charter of Fundamental Rights, another scenario would be to concentrate the Agency's work on certain thematic priorities reflecting the main policy areas of the European Union, such as: migration, asylum, non-discrimination, combating racism and xenophobia, etc. However, setting thematic priorities would mean the establishment *a priori* a hierarchy of rights that would disappoint some stakeholders of civil society. The ideal scenario would be that the Agency should, after it has been set up, be capable of deciding the priorities of its work.

3 Geographical coverage

The geographical coverage of the Agency is also a topic for debate. There is on the table the scenario that the Agency's mandate could be extended to third countries including EU candidate countries. However, this scenario has been criticised by the Commission and the majority of the member states, arguing that the EU already disposes of measures to take human rights issues into account in its bilateral relations with third countries. [15] Besides, limiting the scope of the Agency within the borders of the European Union would put an added emphasis on the importance of fundamental rights in the EU's internal functioning.

4 Tasks to be entrusted to the Agency

According to the European Commission's communication, the Agency should collect data on fundamental rights, to enable the European Union to take fundamental rights fully into account when drafting and implementing its policies. This data should be "objective, reliable and comparable" at European level. The two main tasks that could be entrusted to the Agency should be: 1) data collection and analysis, and 2) drafting of opinions. [16]

4.1 Data collection and analysis

Data should be collected in cooperation with all the existing stakeholders in the field, meaning the member states and civil society dealing with fundamental rights, notably NGOs, national human rights institutions and the Council of Europe.

There are two approaches as regards data collection. The active approach of data collection is based on the setting up of data collection mechanisms by the Agency itself. The European Monitoring Centre presently collects objective, reliable and comparable data in the field of racism, xenophobia and antisemitism by the use of its RAXEN network (European Information Network on Racism and Xenophobia), which is considered to be a successful model of active data collection. [17] Based on the RAXEN model the Agency could extend its mandate or set up new networks (e.g. a network of National Commissions of Human Rights) entrusted with similar tasks of data collection in the field of fundamental rights. Another option could be the setting up of *thematic networks* covering the six major headings of the Charter: dignity, freedoms, equality, solidarity, citizens' rights and justice.

The second approach is that of passive data collection. That means that the EU institutions and the member states could be required to send data to the Agency in the form of regular reports. In this case the Agency would have difficulties in persuading civil society that the data it collects is objective and reliable, given the fact that its main source of data would be collected passively by the member states. *A combination of active and passive data collection* where regular and mandatory reports would be provided by the civil society and the member states as well would seem ideal and could render the Agency more credible.

4.2 Opinions and views intended for the EU institutions and the member states

Data collection and analysis should be principally targeted on the drafting of opinions for the European institutions and the member states. The Agency should also be entrusted with consultative and advisory powers providing recommendations and advice to the EU institutions and the member states. Taking into account the various existing legislative measures or those under preparation with a view to establish an area of freedom, security and justice throughout the European Union, the Agency could play a functional role in providing independent information about relevant human rights standards to the EU institutions. This task could possibly be extended in future, allowing the Agency to advise the EU institutions when they draft EU law, notably as regards its compatibility with the EU Charter of Fundamental Rights and the European Convention on Human Rights as well as with the Revised European Social Charter. [18] Given the fact that these opinions will not be legally binding, some other institutional mechanisms are needed to be established for guaranteeing the follow-up and the added value of these opinions. One possibility of executing this task could be through published reports or other means of communication and dissemination guaranteeing the highest level of visibility for the European citizen.

5 Dissemination, communication and dialogue with civil society

Dissemination of the work carried out by the Agency and the dialogue with the various members of civil society should be the main priorities of the Agency. The Agency should play a *complementary role* in coordinating fundamental rights awareness and education policy with what is being done at a national level and by the Commissioner of Human Rights of the Council of Europe. [19] The communication strategy would particularly involve the publication of reviews, information bulletins and studies, the organisation of a website and a database. The Agency could play a key role in providing added value by guaranteeing the continuation of EU Human Rights Discussion Forum. [20] Through this Discussion Forum the Agency could strengthen its relations and contacts with NGOs, the social partners, universities and other partners specialised and involved in the area of fundamental rights. These contacts with civil society could take the form of a network set up among the diverse stakeholders. The establishment of a network composed mainly of NGOs active in the field of human rights would enhance the level of transparency of the Agency.

6 Synergies with other bodies

The European Agency of Fundamental Rights should establish synergies with the existing key players (international and national) in the field of human rights in order to avoid duplication and confusion.

6.1 Council of Europe

Protocol 14 of the ECHR which was adopted in May 2004 by the committee of Ministers of the Council of Europe refers to the possibility that the EU may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). [21] 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.

This possible scenario of accession seems to be very promising, recognising the importance of the ECHR as the backbone of the protection of human rights in Europe. Having in mind the above mentioned developments, synergy between the Agency and the Council of Europe is essential. Close cooperation should be established between the Agency and the institutions of the Council of Europe, especially with the Commissioner of Human Rights and the European Commission against Racism and Intolerance (ECRI). A follow-up procedure is urgently needed for the recommendations, opinions and reports that are issued by the European Commissioner of Human Rights. The Commissioner's reports and recommendations as regards EU member states could be a very important source of information for action and investigation for the Agency. In addition, the Commissioner's supervisory role based on his official visits to the EU member states (which at the same time are Contracting Parties of the Council of Europe) could be used as an *early warning system* informing the Agency for any shortcoming of in the law and practice concerning the compliance with human rights.

6.2 Network of independent experts on fundamental rights

The EU network of independent experts on fundamental rights, which was set up by the European Commission, upon request of the European Parliament, [22] it has been presently monitoring the situation of fundamental rights in the member states and in the Union, on the basis of the Charter of Fundamental Rights since 2002. The possibility of ascribing to the Agency the task of monitoring and assessing the implementation of each of the rights listed in the Charter indirectly calls into question the "raison d'être" of the already existent network of independent experts. The Agency could take over and investigate the follow-up of the recommendations and the opinions that were expressed by the network. *Synergy and cooperation* between the two interdependent institutions are *essential*. The network currently composed of academics with significant experience and high expertise in the field, could be incorporated into the new structure of the Agency providing a legal expertise network of excellence. Both the European Commission and the Parliament have already expressed very positive on the continuation of the independent monitoring performed by the network. [23]

6.3 National institutions for the promotion and protection of human rights

Special importance should be given to the contacts that the Agency should establish with the national bodies (commissions or institutes) that are actively involved in the area of protection and promotion of human rights. Several EU member states have already established human rights institutes as well as human rights commissions since 1993, based on the Paris principles. [24]

The relationship and cooperation between the Agency and the existing national institutions of human rights should be reinforced. The best way to reinforce this cooperation in promoting and protecting human rights at a national level within the EU would be by setting up a network where these national bodies could be actively represented.

7. Operating framework of the Agency

The Fundamental Rights Agency will be a Community Agency. It should operate principally with a degree of independence and within a clear framework established by the legislature. Its establishing regulation should set out the limits of its activities and powers, as well as its responsibilities and requirements for openness. The main challenging questions for the legislator as regards the future powers entrusted to the Agency are as follows:

First, whether the new Agency may be entrusted only with tasks which involve only assistance: for example, drawing up opinions or studies so that the Commission can prepare legislative proposals or take specific decisions, carrying out or coordinating checks and inspections at certain operators so that the Commission can fulfil its role as the “guardian” of Community law, or any other tasks to assist the institutions which may be necessary to carry forward various Community policies.

Second, whether the legislator is willing and ready to establish a decision-making Agency empowered, *inter alia*, to enact legal instruments binding on third parties, or an executive agency which has no independent power of decision *vis-à-vis* third parties.

Conclusion

As the European Union continues to expand its areas of competence, mainly in its third pillar and its impact on the daily life of its citizens and its residents, the requirement for monitoring the state of human rights within the EU becomes more and more pressing, if it is to guarantee the high standards proclaimed in the EU treaties.

The Agency of Fundamental Rights could give added value in the sphere of Union law, by identifying areas where EU policy could be developed to improve the protection of human rights or trends in policy which may have an adverse impact on human rights. The proposed Agency provides an opportunity to put the protection and promotion of human rights in Europe at the core of EU policy. For the Commission, the creation of the Agency is also a constructive way of ensuring that it focuses resources on core tasks, such as fundamental rights.

At the public hearing on the issues raised by the creation of an EU Fundamental Rights Agency, that took place in Brussels on 25 January 2005, member states, the European institutions and representatives of civil society largely welcomed the establishment of the Agency. However, this general agreement conceals basic differences over specific structural choices concerning the powers that will be entrusted to the Agency. In summary, it is up to the political will of the EU and the member states’ decision-makers to what extent the Agency of Fundamental Rights will be strong and independent enough to carry out effective monitoring of the human rights situation within the Union. The independence of the new Agency’s technical and/or scientific assessments is, in fact, its real *raison d’être*.

Footnotes

[1] Communication of the *Commission of the European Communities, The Fundamental Rights Agency Public Consultation Document, COM (2004) 693 final.*

[2] Council of the Council of the European Union, *Presidency Conclusions*, Brussels European Council Meeting, 12 and 13 December 2003, Brussels, 5 February 2004, 5381/04.

[3] *Legal basis — Since the regulatory agency is an instrument of implementation of a specific Community policy, it follows that the legal instrument creating it must be based on the provision of the Treaty which constitutes the specific legal basis for that policy. In the current institutional framework, when the legal basis for a specific action is Article 308 itself, the instrument setting up the agency must also be based on this provision.*

[4] Article 308 reads as follows:

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

[5] The term “Remit” in this paper means the area of authority or responsibility.

[6] “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”, see Communication of the Commission of the European Communities, The Fundamental Rights Agency Public Consultation Document, COM (2004) 693 final, p. 5.

[8] *Article 309 of the Treaty establishing the European Community reads:*

“1. Where a decision has been taken to suspend the voting rights of the representative of the government of a Member State in accordance with Article 7(3) of the Treaty on European Union, these voting rights shall also be suspended with regard to this Treaty.

2. Moreover, where the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1) of the Treaty on European Union has been determined in accordance with Article 7(2) of that Treaty, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons”.

[9] *Common principles: liberty, democracy, human rights, fundamental freedoms and the rule of law.*

[10] *See Commission of the European Communities, Communication from the Commission to the Council and the European Parliament: on article 7 of the Treaty on European Union. Respect for the promotion of the values on which the Union is based, Brussels, 15 October 2003, COM (2003) 606 final.*

[11] *Hereafter referred to as the ‘Charter’.*

[12] *European Council, Presidency conclusions, Nice European Council Meeting 7, 8 and 9 December 2000.*

[13] *Commission of the European Communities, Communication on the Charter of Fundamental Rights of the European Union, Brussels, 13 September 2000, COM(2000) 559 final.*

[14] *Conference of the Representatives of the Governments of the Member States, Treaty establishing a Constitution for Europe, Brussels, 29 October 2004.*

[15] *See Communication from the Commission to the Council and the European Parliament, “The European Union’s role in promoting human rights and democratisation in third countries”, 8 May 2001, COM (2001) 252 final.*

[16] *Communication of the Commission of the European Communities, The Fundamental Rights Agency Public Consultation Document, COM (2004) 693 final.*

[17] *The Netherlands Presidency of the European Union, Intervention par la Belgique au nom de L’Union européenne Session de travail 12: Promotion de la tolérance et de la non discrimination (Intervention of Belgium on behalf of the European Union, Work session 12: Promotion of tolerance and nondiscrimination), OSCE Human Dimension Implementation Meeting, Warsaw, 12 October 2004.*

[18] *See Council of Europe, “The Fundamental Rights Agency of the European Union – A council of Europe Perspective”, Contribution by the Secretary General of the Council of Europe, SG/Inf (2004)34, 16 December 2004.*

[19] *One of the main tasks of the High Commissioner of Human Rights, is to promote education in and awareness of human rights in the member States of the Council of Europe.*

[20] *The European Council established the annual Forums on 10 December 1998 on the occasion of the 50th anniversary of the Universal Declaration on Human Rights. The overall purpose of the Forums is to strengthen the dialogue between the EU and civil society, including NGOs, in the field of human rights.*

[21] *Protocol No. 14 to the Convention for protection of human rights and fundamental freedoms, amending the control system of the Convention, Article 17, reads: “The European Union may accede to this Convention. Adopted on 13 May 2004, at the 114th Session of the Committee of Ministers”.*

[22] *European Parliament, Report on the situation as regards fundamental rights in the European Union (2000), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur: Thierry Cornillet, 21 June 2001 (2000/2231(INI)).*

[23] *European Parliament, Report on the situation as regards fundamental rights in the European Union (2003), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur: Alima Boumediene-Thiery, 22 March 2004 (2003/2006(INI)).*

[24] *United Nations, General Assembly: National institutions for the promotion and protection of human rights, A/RES/48/134, 85th plenary 20 December 1993, see Annex 3, Paris Principles.*