



HOUSE OF LORDS

European Union Committee

---

---

29th Report of Session 2005–06

**Human rights  
protection in  
Europe:  
the Fundamental  
Rights Agency**

Report with Evidence

---

Ordered to be printed 28 March and published 4 April 2006

---

Published by the Authority of the House of Lords  
*London: The Stationery Office Limited*  
£price

HL Paper 155

### *The European Union Committee*

The European Union Committee is appointed by the House of Lords “to consider European Union documents and other matters relating to the European Union”. The Committee has seven Sub-Committees which are:

Economic and Financial Affairs, and International Trade (Sub-Committee A)  
Internal Market (Sub-Committee B)  
Foreign Affairs, Defence and Development Policy (Sub-Committee C)  
Environment and Agriculture (Sub-Committee D)  
Law and Institutions (Sub-Committee E)  
Home Affairs (Sub-Committee F)  
Social and Consumer Affairs (Sub-Committee G)

### *Our Membership*

The Members of the European Union Committee are:

Lord Blackwell	Lord Maclennan of Rogart
Lord Bowness	Lord Marlesford
Lord Brown of Eaton-under-Heywood	Lord Neill of Bladen
Lord Dubs	Lord Radice
Lord Geddes	Lord Renton of Mount Harry
Lord Goodhart	Baroness Thomas of Walliswood
Lord Grenfell (Chairman)	Lord Tomlinson
Lord Hannay of Chiswick	Lord Woolmer of Leeds
Lord Harrison	Lord Wright of Richmond

The Members of the Sub-Committee (Sub-Committee E, Law and Institutions) are:

Lord Borrie	Lord Henley
Lord Brown of Eaton-under-Heywood (Chairman)	Lord Lester of Herne Hill
Lord Clinton-Davis	Lord Lucas of Crudwell and Dingwall
Lord Goodhart	Lord Neill of Bladen
Lord Grabiner	Lord Norton of Louth

### *Information about the Committee*

The reports and evidence of the Committee are published by and available from The Stationery Office. For information freely available on the web, our homepage is:

[http://www.parliament.uk/parliamentary\\_committees/lords\\_eu\\_select\\_committee.cfm](http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm)

There you will find many of our publications, along with press notices, details of membership and forthcoming meetings, and other information about the ongoing work of the Committee and its Sub-Committees, each of which has its own homepage.

### *General Information*

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at

[http://www.parliament.uk/about\\_lords/about\\_lords.cfm](http://www.parliament.uk/about_lords/about_lords.cfm)

### *Contacts for the European Union Committee*

Contact details for individual Sub-Committees are given on the website.

General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London SW1A 0PW

The telephone number for general enquiries is 020 7219 5791.

The Committee’s email address is [euclords@parliament.uk](mailto:euclords@parliament.uk)

## CONTENTS

---

	<i>Paragraph</i>	<i>Page</i>
<b>Abstract</b>		5
<b>Chapter 1: Introduction</b>	1	7
Fundamental rights protection in the European Union	6	8
The Inquiry	12	9
<b>Chapter 2: The Proposal</b>	18	11
The genesis of a Fundamental Rights Agency—the EU Monitoring Centre on Xenophobia and Racism	18	11
The proposal in outline	20	11
Reference to the Charter	21	11
Geographical scope	22	11
Tasks of the Agency	25	12
Article 7 TEU competence	26	13
Legislative scrutiny	27	13
Co-operation with other bodies	28	13
Structure of the Agency	29	13
Independence of the Agency	33	14
Legal base	34	14
Reactions to the proposal	38	15
<b>Chapter 3: Monitoring Human Rights in Europe</b>	46	17
The Council of Europe	47	17
Co-operation between the Council of Europe and the European Union	50	18
The impact of the Agency and the problem of overlap	54	19
Geographical scope	55	19
Monitoring of third countries	56	19
Participation of candidate countries	62	21
Major human rights incidents	64	21
Thematic remit of the Agency	66	22
General tasks	66	22
Legislative scrutiny	71	22
Article 7 TEU remit	74	24
Pillar remit	77	25
Reference to the Charter	81	25
Mechanisms for co-operation	85	26
The Council of Europe	86	27
The Network of Independent Experts of the European Union	94	28
National Human Rights Institutions	96	29
Other bodies	98	29
<b>Chapter 4: One Body or Two?</b>	100	30
The proposal for a European Institute for Gender Equality	100	30
The position in the United Kingdom	102	30
The need for two bodies	105	31

<b>Chapter 5: Independence and Management Structure</b>	114	35
Independence	114	35
Management structure	122	36
<b>Chapter 6: Detailed Recommendations</b>	129	39
The value of the Agency	129	39
Legal base	130	39
Geographic scope	131	39
Thematic remit	136	39
Reference to the Charter	141	40
Mechanisms for co-operation	143	40
The European Institute for Gender Equality	149	41
Independence	153	41
Management structure	157	42
<b>Appendix 1: Sub-Committee E (Law and Institutions)</b>		43
<b>Appendix 2: List of Witnesses</b>		44
<b>Appendix 3: Recent Reports</b>		45
<b>Appendix 4: The Commission Proposals</b>		46
<b>ORAL EVIDENCE</b>		
<i>Mr Alvaro Gil-Robles, Commissioner for Human Rights, Council of Europe</i>		
Oral evidence, 1 February 2006		1
<i>Dr Eric Metcalfe, JUSTICE</i>		
Written evidence		9
Oral evidence, 8 February 2006		11
<i>Mr Fonseca Morillo, Director for Civil Justice, Fundamental Rights and Citizenship, DG Justice, Freedom and Security, European Commission; and Mrs Pavan-Woolfe, Director for Equal Opportunities, DG Employment, Social Affairs and Equal Opportunities, European Commission</i>		
Oral evidence, 15 February 2006		21
<i>Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs</i>		
Oral evidence, 1 March 2006		32
<b>WRITTEN EVIDENCE</b>		
Amnesty International		51
Commission for Racial Equality (CRE)		57
Council of Bars and Law Societies of Europe (CCBE)		58
Dutch Senate		62
Equal Opportunities Commission		63
Registrar of the European Court of Human Rights		64
UK Information Commissioner's Office		65
The Law Society of England and Wales		65
President of the Parliamentary Assembly of the Council of Europe		66
Secretary General of the Council of Europe		70

NOTE: References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of the Report or Appendices, or to a page of evidence

## **ABSTRACT**

---

The Commission's proposal establishing an EU Fundamental Rights Agency illustrates the growing prominence of human rights in the European Union.

The Agency's principal task will be to provide assistance and expertise to EU institutions and Member States when implementing Community and third pillar legislation. While it has been broadly welcomed by Member States, national human rights institutes and non-governmental organisations, there are concerns that the Agency's activities may overlap with those of other bodies in the field and more particularly, with the work of the Council of Europe. The Committee's inquiry sought to establish whether, and how, the Agency might add value to existing protection mechanisms; a strong case would have to be made to justify the need for a new body in this field.

This Report discusses the extent to which duplication might arise following the establishment of the Agency. In Chapter 3 we look in particular at the geographic scope and remit of the Agency and consider the extent to which these will result in overlap with the Council of Europe. The proposal also includes a number of mechanisms for co-operation between the Agency and other bodies and we consider whether these are sufficient to ensure that the Agency develops good and effective relations with other significant players in the field.

Aside from human rights bodies in general, there is the potential for duplication between the Agency and the proposed European Institute for Gender Equality. In Chapter 4 we question whether there is a need for two separate bodies or whether the Fundamental Rights Agency should be responsible for all fundamental rights and discrimination matters, including gender issues.

Linked to the question of overlap and efficient use of resources is the subject of the Agency's management structure and guarantees of independence. Chapter 5 considers whether the Agency will be sufficiently independent from the Commission and the Council and makes recommendations as to the composition of the Agency's management and executive board.



# Human rights protection in Europe: the Fundamental Rights Agency

## CHAPTER 1: INTRODUCTION

---

1. Observance of human rights is a fundamental principle of the European Union. In the latest step to give further prominence to fundamental rights across the Union, the Commission has brought forward a proposal to establish a Fundamental Rights Agency of the European Union.<sup>1</sup> The political will to establish the Agency can be traced back to a European Council meeting in December 2003,<sup>2</sup> when Member States decided that the Agency would take over from the existing EU Monitoring Centre on Racism and Xenophobia but would be given a broader remit to look at all areas of discrimination and human rights.<sup>3</sup>
2. The aim of the Agency would be to provide assistance to Community institutions and Member States in relation to fundamental rights issues when they are implementing Community law. The Agency would be responsible for producing comparative data and information, formulating opinions and promoting the visibility of fundamental rights.
3. Under the proposal put forward by the Commission the Agency would be primarily an organisation which collects and analyses data relating to the performance by Member States and Community institutions of their human rights obligations when implementing Community and third pillar legislation. While considerable support has been expressed in principle by bodies such as Amnesty International, JUSTICE and the Council of Bars and Law Societies of Europe, the details of the model Agency contained in the Commission's blueprint have not escaped criticism. At least one Member State, the Netherlands, has serious difficulties with the current proposal (unanimity is required for the proposal's adoption). Other stern critics of the draft are the European Court of Human Rights, the Council of Europe's Human Rights Commissioner and the European Group of National Human Rights Institutions.
4. Criticisms are directed specifically at:
  - the width of the remit of the Agency;
  - the absence of a strong investigatory or legislative scrutiny role;
  - the overlap with, and possible undermining of, the activities of the Council of Europe; and
  - the Agency's lack of independence.

---

<sup>1</sup> 10774/05 (COM (2005) 280) and 10774/05 ADD 1, the accompanying Impact Assessment Report.

<sup>2</sup> Chapter 2 outlines the background to the proposal in more detail.

<sup>3</sup> It is proposed that gender discrimination, however, be dealt with by a new European Institute for Gender Equality, which is discussed in more detail in Chapter 4.

Questions are also being asked as to whether Article 308 of the Treaty establishing the European Community (TEC) can be properly relied upon as the sole legal base for the proposal.

5. Although the proposal is to be adopted in accordance with the consultation procedure, it has been decided that the European Parliament should participate in its elaboration as though it fell under the co-decision procedure. The proposal is currently being considered by the Civil Liberties, Justice and Home Affairs Committee (LIBE Committee) of the European Parliament which is scheduled to adopt its report shortly.

### Fundamental rights protection in the European Union

6. The Treaty of Rome, signed in 1957, contained no reference to the protection of fundamental rights, apart from the right to equal pay for men and women. However, as early as the late 1960s, in the case of *Internationale Handelsgesellschaft*,<sup>4</sup> the Court of Justice held that “In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to Member States, must be ensured within the framework of the structure and objectives of the Community.”<sup>5</sup>
7. Gradually, provisions aimed at protecting fundamental rights have been incorporated into the Treaties. The most important of these are Articles 6 and 7 of the Treaty on European Union (TEU), which were introduced by the Treaty of Amsterdam in 1997. Article 6(1) TEU declares that,
 

“The Union is founded on the principles of liberty, democracy, respect for fundamental rights and freedoms, and the rule of law, principles which are common to the Member States.”
8. Article 6(2) TEU provides that the Union,
 

“shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”
9. Article 7 TEU provides a mechanism whereby Member States can determine that there is either a threat of a serious breach, or an actual serious and persistent breach, of fundamental rights by one Member State. In such a case, the Council can, acting on a qualified majority, suspend certain Treaty rights in respect of the Member State in question.<sup>6</sup>
10. In 2000, the Member States “solemnly proclaimed” the Charter of Fundamental Rights of the European Union.<sup>7</sup> This Charter drew inspiration

---

<sup>4</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>5</sup> Paragraph 4 of the judgment.

<sup>6</sup> The original Article 7 applied only where a breach existed but this was revised by the Treaty of Nice to cover threatened breaches. This followed the forming of a coalition government in Austria in 2000 between the People’s Party and the far-right Austrian Freedom Party, under Jörg Haider. The coalition caused outrage across the Union and led the other Member States temporarily to cease co-operation with the Austrian Government.

<sup>7</sup> Official Journal C 364/1, 18.12.2000. The Charter, although solemnly proclaimed, has no binding legal effect.



from the European Convention on Human Rights, as well as the jurisprudence of the European Court of Justice and the European Court of Human Rights, the social charters adopted by the Community and the Council of Europe and the secondary legislation of the European Community. As a result, the Charter contains a wide range of political, social, economic and cultural rights. The Constitutional Treaty incorporates the Charter as its Part II, which would give the Charter full legal effect.<sup>8</sup> The ratification of the Constitutional Treaty has now been at the very least delayed by the negative results in the French and Dutch referenda of 2005 and the Charter remains a non-legally binding instrument for the moment. What, if any, steps will be taken to formalise the Charter if the Constitutional Treaty does not come into force are not known.

11. In September 2002, a Network of Independent Experts in Fundamental Rights was set up by the Commission to monitor human rights across Europe. The Network is composed of one representative per Member State and produces annual reports on the human rights situation in the European Union and the Member States. It also provides the Commission with information and opinions on specific human rights issues when requested and assists in the development of human rights policy in the EU. We understand that, for technical reasons, the Network will cease to operate in September 2006.<sup>9</sup>

### The Inquiry

12. Our Law and Institutions Sub-Committee (Sub-Committee E) decided to undertake an inquiry into the question of duplication to assess the extent of the concerns, the actors affected and what might be done to minimise overlap between the various bodies and ensure effective monitoring and protection of human rights in Europe. The inquiry focused in particular on the overlap of the proposed Agency with the Council of Europe and the proposed European Institute for Gender Equality.
13. During its inquiry the Committee met with:
  - (i) the Human Rights Commissioner for the Council of Europe;
  - (ii) the Director of Human Rights Policy for JUSTICE;
  - (iii) representatives of DG Justice, Freedom and Security and DG Employment, Social Affairs and Equal Opportunities in the Commission; and
  - (iv) Baroness Ashton of Upholland, Parliamentary Under Secretary of State for the Department of Constitutional Affairs.

---

<sup>8</sup> We have published two reports on the Charter: *EU Charter of Fundamental Rights*, 8th Report of Session 1999–2000, HL Paper 67; and *The Future Status of the EU Charter of Fundamental Rights*, 6th Report of Session 2002–03, HL Paper 48.

<sup>9</sup> Mr Fonseca Morillo, of the Commission, told us that “the Network does not have the capacity to continue to work beyond September 2006 ... [b]ecause in the European Union all the preparatory actions, all the budgetary lines without a legal basis, can only have a life for a maximum of five years, but usually between three and five years” (Q 81).

14. The evidence, written and oral, is printed with this Report.<sup>10</sup> We are grateful to all those who assisted in this inquiry.
15. The Committee was invited to attend a meeting of the LIBE Committee in February 2006. Lord Norton of Louth represented the Committee and presented our preliminary conclusions. We have been invited to present our final report to the LIBE Committee in May 2006.
16. We set out our detailed conclusions and recommendations in Chapter 6.
17. This Report is made for debate.

---

<sup>10</sup> The Committee also engaged in correspondence with the Minister on the proposal for the Agency, to be reproduced in the European Union Committee's forthcoming Report, *Correspondence with Ministers, March-December 2005*.

## CHAPTER 2: THE PROPOSAL

---

### The genesis of a Fundamental Rights Agency—the EU Monitoring Centre on Xenophobia and Racism

18. The idea of forming a European agency for human rights was first discussed at the European Council in Cologne in June 1999. Four years later, at the European Council meeting in December 2003, Member States decided to extend the remit of the European Monitoring Centre on Racism and Xenophobia (EUMC) to create a human rights agency. The Hague Programme, adopted in November 2004, invited the Commission to adopt a proposal to achieve this in 2005.<sup>11</sup>
19. The Commission published a Communication in October 2004 launching a widespread consultation on the nature of the proposed Fundamental Rights Agency. It received a number of submissions from Member States, national parliaments, non-governmental organisations and other European and national bodies.<sup>12</sup> It subsequently adopted a proposal for a Council Regulation establishing the Agency and a Decision empowering it to act in third pillar matters in June 2005. It is intended that the Agency become operational in January 2007.

### The proposal in outline

20. The proposal, if agreed, would establish a fundamental rights agency of the European Union, empowered to act in both first pillar (Community) and third pillar (police and judicial co-operation in criminal matters) areas.

### Reference to the Charter

21. Article 3(2) provides that the Agency is to refer, in carrying out its tasks, to fundamental rights as defined in Article 6(2) TEU and “as set out in particular in the Charter of Fundamental Rights of the European Union”.

### Geographical scope

22. The general principle, set out in Article 3(2), is that the Agency is to concern itself with the situation of fundamental rights in the European Union and its Member States. However, the Agency’s geographical scope may be wider in two cases.
23. First, the Agency is empowered to provide information and analysis on fundamental rights issues in relation to third countries with which the Community has concluded association agreements or agreements containing human rights provisions.<sup>13</sup> It may also provide information where the Community has merely opened negotiations for such agreements, or is planning to do so. This would, in practice, extend to all candidate and potential candidate countries and, for example, to States covered by the

---

<sup>11</sup> For the Committee’s response to the Hague Programme see *The Hague Programme: a five year agenda for EU justice and home affairs*, 10th Report of Session 2004–05, HL Paper 84.

<sup>12</sup> The results of the European Commission’s consultation exercise can be found on their website at [http://www.europa.eu.int/comm/justice\\_home/fsj/rights/fsj\\_rights\\_agency\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/rights/fsj_rights_agency_en.htm).

<sup>13</sup> Article 3(4).

European Neighbourhood Policy<sup>14</sup> and the Cotonou Agreement.<sup>15</sup> The Agency may not, however, act on its own initiative: the Commission must first request information and must specify the matters on which it seeks assistance.

24. Secondly, candidate countries and potential candidate countries may choose to participate in the Agency.<sup>16</sup> Currently, the Copenhagen Criteria for accession to the Union require all applicant countries to be members of the Council of Europe.<sup>17</sup>

### *Tasks of the Agency*

25. The Agency's tasks are listed in Article 4 of the proposal and include:
- Collecting, recording, analysing and disseminating relevant, objective, reliable and comparable information and data. This includes results from research and monitoring of Member States, Union institutions and other bodies.
  - Developing methods to improve comparability, objectivity and reliability of data at European level.
  - Carrying out, co-operating with and encouraging scientific research, surveys and studies. It can act on the request of the Parliament, the Council or the Commission provided that the task is compatible with its annual work programme. The Agency can organise meetings of experts and set up *ad hoc* working groups.
  - Formulating conclusions and opinions on general subjects, for the Union institutions or the Member States when implementing European law. It may do this on its own initiative or on the request of the Parliament, the Council or the Commission.
  - Making its technical expertise available to the Council in an Article 7 TEU situation.
  - Publishing an annual report on the situation of fundamental rights.
  - Publishing a thematic report based on analysis, research and surveys.
  - Publishing an annual report on its activities.

---

<sup>14</sup> The European Neighbourhood Policy (ENP) was developed to avoid the emergence of new dividing lines between the EU and its neighbours in the context of the EU's 2004 enlargement. Originally, the ENP was intended to apply to the EU's immediate neighbours but it has been extended to the countries of the Southern Caucasus with whom the present candidate countries share either a maritime or land border.

<sup>15</sup> The Cotonou Agreement was signed on 23 June 2000 in Cotonou, Benin, between the European Community and the African, Caribbean and Pacific (ACP) countries and is an important aspect of the EU's development co-operation policy. It replaces the Lomé Convention which governed relations between the EC and ACP countries between 1975 and 2000. The Cotonou Agreement will expire in February 2020.

<sup>16</sup> Article 27.

<sup>17</sup> In June 1993, the European Council under the Danish Presidency recognised the right of central and eastern European countries to join the EU, provided that they meet certain conditions which have become known as the Copenhagen criteria. The Copenhagen criteria require stable institutions guaranteeing democracy, the rule of law, human rights and respect for minorities; a functioning market economy; and adherence to the aims of political, economic and monetary union.

- Enhancing co-operation between civil society and other bodies involved in human rights, in particular by networking, promoting dialogue at European level and participating in discussions at national level.
- Organising conferences, campaigns and meetings at European level to promote and disseminate its work.
- Developing a communication strategy to raise awareness, including setting up documentation resources accessible to the general public and preparing educational material.

#### *Article 7 TEU competence*

26. The Agency, as a general rule, has power to act only in relation to the implementation of Community law and, where it concerns the third pillar, Union law. However, it may make its technical expertise available to the Council in the situation envisaged by Article 7 TEU where there is a threatened or actual serious breach of fundamental rights.<sup>18</sup>

#### *Legislative scrutiny*

27. The current proposal does not appear to envisage a legislative scrutiny role for the Agency. Article 4(1)(d) allows the Agency to formulate opinions and conclusions for institutions and Member States “when implementing Community law” but Article 4(2) removes from the Agency’s remit the power to make conclusions which concern the legality of proposals from the Commission or the positions taken by the institutions in the course of legislative procedures.

#### *Co-operation with other bodies*

28. A number of the proposal’s provisions seek to ensure a level of co-operation between the Agency and other human rights bodies. Article 5(1)(e), for example, provides that the Commission is to adopt a Multiannual Framework for the Agency which includes provisions “with a view to avoiding thematic overlap with the remit of other Community bodies, offices and agencies.” Article 6(2) requires the Agency to take account of existing information from whatever source, and in particular of activities carried out by Community and Member States’ institutions and bodies and the Council of Europe and other international organisations, in order to avoid duplication. Articles 7 and 8 deal with co-operation between the Agency and Community bodies and organisations at Member State and European level. Article 9 requires the Agency to co-ordinate its activities with those of the Council of Europe and to enter into an agreement which shall include the obligation of the Council of Europe to appoint an independent person to sit on the Agency’s management board. Directors of relevant Community bodies and agencies are permitted, upon invitation, to attend meetings of the management board as observers under Article 11(8).

#### *Structure of the Agency*

29. The current proposal envisages a management board, an executive board, a director and a forum.

---

<sup>18</sup> Article 4(1)(e).

30. The management board would be composed of one independent person appointed by each Member State, one independent person appointed by each of the European Parliament and the Council of Europe and two representatives of the Commission. With the Union currently comprising 25 Member States, this gives a management board of 29 people. The management board will be responsible for adopting the Agency's Annual Work Programme and the annual reports produced by the Agency, appointing the Director and dealing with other financial and administrative tasks. The representative of the Council of Europe may only vote on the adoption of the Annual Work Programme and the report; the remaining tasks of the management board relate to operational issues and it is considered more appropriate to limit voting rights in these areas. Decisions are to be taken by a simple majority in general, although on some matters (including adoption of the Annual Work Programme) a two thirds majority will be required. The management board will meet once a year.
31. The executive board is composed of the chairperson and vice-chairperson of the management board and two Commission representatives. It takes its decisions by simple majority. The Director, appointed by the management board, will participate in meetings of the executive board but will not have voting rights.
32. The forum is to be composed of representatives of non-governmental organisations, trade unions, employers' organisations, social and professional organisations, churches, universities, qualified experts and European and international bodies. The forum will involve a maximum of 100 people and is to act as a mechanism for the exchange of information and the pooling of knowledge in the human rights field. It will make suggestions for the Annual Work Programme and give feedback and suggest follow up action on the basis of the annual report.

#### *Independence of the Agency*

33. Article 15 declares that the Agency is to "fulfil its tasks in complete independence". Its members are to act in the public interest and must make a statement of commitment. Article 5(1)(c) provides that the Agency's Multiannual Framework is to be "in line with the Union priorities as defined in the Commission's strategic objectives". Article 5(4) requires the Agency's Annual Work Programme to be in line with the Commission's annual work programme.

#### *Legal base*

34. The proposed legal base of the Regulation is Article 308 TEC, which requires unanimity. Article 308 provides,  
"If action by the Community should prove necessary to attain, in the course of the operation of the internal market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."
35. There is a divergence of views as to whether Article 308 TEC can be used to establish the Agency. One of the main arguments of those who do not support the proposed legal base appears to be that Article 308 only permits action to achieve an objective of the Community, and not of the Union;

protection of fundamental rights is a Union objective, and therefore not an objective of the Community as required by Article 308.<sup>19</sup> Baroness Ashton noted that the Court of Justice has confirmed that fundamental rights are part of the general principles of Community law and that compliance with fundamental rights is a condition of legality of Community acts. She concluded that there were “reasonable grounds for arguing that the protection of fundamental rights is a Community objective.”<sup>20</sup>

36. The Decision empowering the Agency to act also in third pillar matters would be based on Articles 30, 31 and 34(2)(c) TEU and therefore also requires unanimity in order to be adopted. The articles cited envisage common action in the fields of police co-operation and judicial co-operation in criminal matters.
37. In light of the statements made by the Minister before we began our inquiry, we did not seek evidence on the question of the legal base. Questions remain as to the adequacy of Article 308. Given the more limited focus of our inquiry, however, we do not reach any conclusion on the issue of the legal base. **We recommend that, when the final role of the Agency is clear, the Government report to Parliament on the question of the legal base. There may be implications for a number of the recommendations we make in this Report.**

### Reactions to the proposal

38. The Commission carried out a wide consultation prior to adopting the present proposal and reported unanimous support from its witnesses for the creation of a fundamental rights agency. It is perhaps not surprising therefore that initial reactions to the legislative proposal have been positive.
39. As to the need for an Agency of the European Union, most of our witnesses felt that such a body could add value to the European human rights framework already in place and operated for the most part by the Council of Europe. Amnesty International said “The establishment of the Agency will mark a highly significant step in the process whereby the EU is shaping its policy with regard to observance and fulfilment of human rights within its own borders” (p 51). The Council of Bars and Law Societies of Europe (CCBE) concluded that “The creation of a human rights Agency would constitute another step forward that could significantly contribute to the development of a more integrated and preventative approach to human rights protection” (p 61).
40. The proposal was also supported by the Commission for Racial Equality (p 57), JUSTICE (p 9), the Law Society of England and Wales (p 65) and the Commissioner for Human Rights for the Council of Europe (the Commissioner). The Commissioner explained that “[t]here is a legal space in the EU which is not accessible to the Council of Europe” (Q 6) while the Registrar of the European Court of Human Rights considered that the

---

<sup>19</sup> See, for example, the Opinion of the Economic and Social Committee SOC/216 of 14.02.2006 at paragraph 3.1.1 for a summary of this argument. The French Assemblée Nationale’s submission to the Commission consultation on the creation of a fundamental rights agency presents a similar argument, page 4.

<sup>20</sup> Explanatory Memorandum 10774/05 and 10774/05 ADD1 of July 2005 (not published with this Report). The Minister deals further with this point in her letter to Lord Grenfell of 8 November 2005.

creation of the Agency could have a positive impact on fundamental rights in Europe (p 64).

41. The Secretary General of the Council of Europe was concerned that, as the proposal currently stands, there was a “serious risk of the Agency overlapping Council of Europe activities” (p 70). The President of the Parliamentary Assembly of the Council of Europe was not convinced that there was a need for a fundamental rights agency of the EU, although he did accept that an Agency with the proper mandate could have a role to play (p 67).
42. Only one of our witnesses was unable to support the Agency. The Dutch Senate said that it “does not regard the creation of a European Union [fundamental rights agency as] a useful initiative due to the fact that other international organisations and institutions ... already efficiently fulfil the task of protecting fundamental rights” (p 62).
43. Those of our witnesses who expressed their support for the Agency remained concerned with various aspects of the proposed Regulation. The most significant concern appears to be how the body will interact with, principally, the Council of Europe, but also with other bodies operating in similar fields at national, European and international level.
44. In Chapter 3, we consider the question of overlap between the Agency and existing bodies operating in the human rights field, and in particular the Council of Europe. Chapter 4 looks at the proposal for a European Institute for Gender Equality and asks whether a separate body dealing with gender rights is necessary. In Chapter 5, we examine the structure of the Agency and whether the framework proposal will ensure that it is both independent and effective.
45. **As we explain in more detail below, there is a useful role which the Agency could play in enhancing observance of fundamental rights in the European Union. Indeed this was our preliminary conclusion in 2005 when we considered the Agency in the context of the Hague Programme.<sup>21</sup> However, we also share our witnesses’ concern that a failure to delineate properly the tasks of the Agency could lead to wasteful duplication of the work of other bodies in the field. We consider it important that the Agency is more than just a “postbox” for collecting and sorting data.**

---

<sup>21</sup> 10th Report of Session 2004–05, HL Paper 84.



### CHAPTER 3: MONITORING HUMAN RIGHTS IN EUROPE

---

46. Since the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948, protection of fundamental rights has progressed considerably. Conventions, Charters and national legislation have contributed to a growing “human rights culture”, and the content of rights has been developed by both national and international courts. Numerous bodies have been created to advance the cause of fundamental rights, particularly in Europe where intergovernmental organisations have made the rule of law and protection of human rights the very foundations of co-operation.

#### The Council of Europe

47. Modern-day protection of human rights in Europe began with the establishment of the Council of Europe in 1949, an intergovernmental organisation set up following the atrocities of the Nazi regime before and during World War II. On 4 November 1950, its ten original member States, which included the United Kingdom, signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Convention was inspired by the Universal Declaration of Human Rights and, like the Declaration, listed a number of rights which States guaranteed to protect.
48. The European Court of Human Rights was created within the framework of the Council of Europe in 1959 to ensure that the rights contained in the Convention were observed. The number of applications received by the Court has grown substantially over the years due to the expansion of the Council of Europe<sup>22</sup> and an increasing awareness of human rights. More than 40,000 applications were lodged last year, bringing the total number of applications pending before the Court to over 80,000. This increasing workload is of growing concern to the Court, and threatens to undermine the efficiency and effectiveness of human rights protection in the Council of Europe. A recent report by Lord Woolf proposed changes to the Court’s structure and working methods to deal with this problem, falling short of amending the Convention itself.<sup>23</sup>
49. For many years there have been calls for the European Union to accede to the European Convention on Human Rights, thereby permitting the Council of Europe and its Court to monitor the Union’s compliance with the Convention. However in an opinion of 1994,<sup>24</sup> the European Court of Justice found that the current Treaty structure did not permit the accession of the Union to the ECHR.<sup>25</sup> Article I–9(2) of the Constitutional Treaty for Europe would amend the existing position by expressly providing for the Union to

---

<sup>22</sup> Today the Council of Europe has 46 member States, and encompasses almost the whole of the European continent, or about 800 million Europeans.

<sup>23</sup> Review of the Working Methods of the European Court of Human Rights, December 2005. We consider the potential effect of the Agency on the Council of Europe’s workload below.

<sup>24</sup> Opinion 2/94 of 28 March 1996 of the European Court of Justice on the accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759.

<sup>25</sup> The question of the Union/Community’s accession to the ECHR was considered by the Committee in its Report *The Future Status of the EU Charter of Fundamental Rights*, 6th Report of Session 2002–03, HL Paper 48 at paragraphs 102–138.

accede to the ECHR. However, the Constitutional Treaty's rejection in two Member States has left future accession to the ECHR uncertain.

### Co-operation between the Council of Europe and the European Union

50. There is already a significant degree of co-operation between the Council of Europe and the European Union. Numerous programmes are delivered by these two bodies working together. One current example is the Judicial Modernisation and Prison Reform Project in Turkey. The project, funded by the Commission, aims to support reforms, planned or under implementation, by Turkish authorities on the basis of shared standards of the European Union and the Council of Europe.<sup>26</sup> The success of previous initiatives similar to the Turkish project led to the signing of a Joint Declaration on co-operation and partnership between the Council of Europe and the European Commission in 2001.<sup>27</sup>
51. Our witnesses told us that, at both a formal and informal level, the Council of Europe and the European Union often work together. Mr Alvaro Gil-Robles, the Council of Europe's Commissioner for Human Rights, referred to a joint EU–Council of Europe programme in the Caucasus region (Q 7). He explained that the Council of Europe has a number of agreements with the Union, and that the Union provides subsidies and grants for the work of the Council of Europe (Q 8). He also pointed to examples where the Union sought the assistance of the Council of Europe. In the last wave of enlargement of the Union, the Commission asked Mr Gil-Robles to provide a report on the ten candidate countries.<sup>28</sup> Mr Gil-Robles visited all ten countries and prepared a report which was used by the Union in accession negotiations. He said “I can assure you that there is good co-operation between the Council [of Europe] and the Union, between the Commissioner and the Union. This works perfectly well and this is something that we do on a daily basis” (Q 8). Dr Metcalfe, for JUSTICE, was asked how the Commission presently informed itself as to the state of human rights in candidate countries. He replied, “My understanding is that they rely a great deal upon the work that is done by the Council of Europe” (Q 60).
52. At its Third Summit of Heads of State held in May 2005 in Warsaw, the Council of Europe declared that it was “resolved to create a new framework for enhanced co-operation and interaction between the Council of Europe and the European Union in areas of common concern, in particular human rights, democracy and the rule of law.”<sup>29</sup> It also asked the Prime Minister of Luxembourg, Jean-Claude Juncker, to prepare, in his personal capacity, a report on the relationship between the Council of Europe and the European Union. This report is expected shortly.
53. Following the Warsaw Summit, a draft Memorandum of Understanding between the Council of Europe and the Union was prepared by the UK Presidency and this has been transmitted to the Council of Europe. The Memorandum sees the Agency as an “opportunity to further increase co-operation and synergy” between the European Union and the Council of

---

<sup>26</sup> There is a dedicated website for the joint programmes of the Council of Europe and the European Union which can be found at <http://ip.coe.int/default.asp>.

<sup>27</sup> Signed on 3 April 2001.

<sup>28</sup> Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Malta, Slovakia and Slovenia.

<sup>29</sup> Paragraph 10, Warsaw Declaration.

Europe and its various organs and “contribute to greater coherence and enhanced complementarity in the field of human rights and fundamental freedoms, and in the field of racism and xenophobia”.<sup>30</sup> It also advocates accession of the EU to the ECHR and declares that, “Consideration will be given to how and when this can best be achieved with due regard to the state of development of European Union law”.<sup>31</sup> The Council of Europe is currently considering the draft text, but it seems unlikely that the final text will be adopted before the publication of Mr Juncker’s report. We consider below what should be the content of the Memorandum of Understanding.

### **The impact of the Agency and the problem of overlap**

54. One of the most important considerations underlying the current proposal for a Fundamental Rights Agency was to ensure that it did not undermine human rights protection by the Council of Europe. Mr Fonseca Morillo, Director for Civil Justice, Fundamental Rights and Citizenship in DG Justice, Freedom and Security at the Commission, explained that before presenting the proposal for the Agency, the Commission had had informal discussions with the Council of Europe (Q 85). Despite these efforts, many actors in the human rights field are worried that areas of overlap remain. The main concerns focus on four areas: the geographic remit of the Agency; the thematic remit of the Agency; the reference to the Charter; and the mechanisms for co-operation between the Agency and the Council of Europe.

#### *Geographical scope*

55. When deciding where the Agency’s geographical limits should lie, it is important to recognise that there are two areas of activity for the Agency. The first covers States in respect of which the Agency is permitted to consider the human rights situation and report to participating Member States;<sup>32</sup> the second covers States which are permitted to participate in the Agency and therefore benefit from its assistance and expertise.<sup>33</sup>

#### *Monitoring of third countries*

56. Our witnesses had divergent views regarding whether the Agency should look at fundamental rights protection in third countries. Amnesty International was in favour of a remit which would allow the Agency to provide information and analysis on third countries as envisaged by the Regulation. However, they questioned why only the Commission might request such information, and suggested that the Parliament should also be able to make a request (p 54). This view was echoed by the Law Society (p 66). The CCBE said, “Since the early 1990s the EU has more or less systematically included a human rights clause in its association agreements with third countries and it would be appropriate to allow a body to verify objectively whether these clauses are being executed” (p 60). The Commissioner also saw a role for the Agency in relation to third countries: “In my view the Agency fundamentally

---

<sup>30</sup> Draft memorandum of understanding on the strengthening of co-operation between the Council of Europe and the European Union, CM-SUIVI3 (2006) 4, 18 January 2006, paragraph IV.3(d).

<sup>31</sup> Paragraph IV.2(c).

<sup>32</sup> Article 3(4).

<sup>33</sup> Article 27.

should concentrate on Community law and its enforcement, but the Agency has to be a useful instrument for the Union. If the EU has relationships with accession countries, candidate countries, the Agency should be in a position to provide an opinion to the Union to help define its own position towards those third countries and accession countries” (Q 7).

57. The Commission for Racial Equality, on the other hand, considered that the Agency should be restricted to the EU. It argued that “An extra-EU remit would direct resources away from its primary function: to ensure better fundamental rights in the European Union” and that “there would no doubt be serious duplication should the EU begin to play a human rights function in wider Europe” (p 57). The Dutch Senate was also firmly opposed, saying, “The possibility of an extended mandate for the [Agency] to act outside the EU boundaries should not even be considered” (p 62). The President of the Council of Europe’s Parliamentary Assembly held a similar view (p 67). JUSTICE considered that “extending the mandate of the [Agency] beyond the boundaries of the EU would weaken its coherence as a body concerned with the promotion and protection of fundamental rights under Community law” (p 10). Dr Metcalfe pointed to the number of countries which would be covered by the proposal, concluding that “The kind of expertise involved in monitoring fundamental rights in [areas covered by the Cotonou Agreement and the Neighbourhood Policy] tends to be very different from the fundamental rights issues you find arising within the European Union” (Q 64). He did, however, accept that there might be, “a potential role ... and it would perhaps have to be a very limited advisory role in relation to where the Commission itself seeks information in relation to an accession country” (Q 57).
58. In its Report on the human rights and democracy clause in European Union agreements,<sup>34</sup> the European Parliament stressed the responsibility of the Union to ensure effective application of the human rights clauses in its agreements, proposing that an annual report be drawn up by the Commission on the application of the human rights and democracy clauses in international agreements. This report should include detailed recommendations and an evaluation of action taken.<sup>35</sup> The Parliament called for the human rights clause to be inserted into all international agreements between the Union and third countries, emphasising that it was “no longer prepared to give its assent to new international agreements that do not contain a human rights and democracy clause”.<sup>36</sup>
59. It is clear that by allowing the Agency to provide the Commission with information and analysis on human rights in third countries, the potential scope of the Agency would be widened considerably. However, it is equally clear that the Union has a responsibility to ensure that human rights provisions contained in agreements it concludes are respected. This is principally the task of the Commission and in practice it calls upon the Council of Europe for assistance. This arrangement appears to work well and we encourage the Commission to continue working with the Council of Europe and in particular the Commissioner for Human Rights, whose expertise and experience in the field is beyond question.

---

<sup>34</sup> Report A6-0004/2006 FINAL of 23.01.2006 (Rapporteur: Vittorio Agnoletto).

<sup>35</sup> Paragraph 12(f) of the Report.

<sup>36</sup> Paragraph 10 of the Report.

60. **Notwithstanding the efficacy of existing mechanisms, we consider that where the Agency can add value to this process, for example, through the provision of an analysis of third country data provided by the Council of Europe, then it is important that it should be permitted, although not obliged, to do so.** We do not envisage that the Commission would have recourse to the Agency as a matter of course; the decision to make use of the Agency's resources should only be made after full consideration of the information already available. This is critical not only to prevent an overload of the Agency but also to ensure that the work of the Council of Europe is properly taken into account in the activities of the Agency and the Union in general.
61. **While we support the retention of Article 3(4), which extends the Agency's geographical remit to some third countries, we recommend that it be amended to reflect the more limited use which we advocate above. More detailed provisions for co-operation between the Council of Europe and the Agency in relation to third countries should be set out in the Memorandum of Understanding.** The Memorandum should in particular specify the nature of the Council of Europe's role in assisting the EU in these cases and how the Agency would be involved in the process. As noted above, the Commission is responsible for monitoring the application of human rights clauses, but we do not see why the power to request assistance should be limited to the Commission. **The Parliament should also be able to make a request of the Agency where the Parliament needs to consider the human rights position in third countries.**

*Participation of candidate countries*

62. In terms of participation in the Agency, JUSTICE was against a remit which would allow candidate countries to participate, on the basis that "they would already be members of the Council of Europe in any event" (p 10). However the Law Society had a different view: "In view of the human rights monitoring that is undertaken in the course of accession negotiations, it is logical that candidate countries will be able to participate in the Agency" (p 65). The Government were also in favour of the participation of candidate countries, in order to provide them with the necessary support in preparation for EU membership (QQ 174–175, 177, 179).
63. **We support the possibility of candidate countries participating in the Agency. These countries, although already members of the Council of Europe as required by the Copenhagen Criteria, would potentially derive substantial benefits from the assistance of the Agency as they prepare for Union membership.** In particular, advice regarding the protection of fundamental rights in the implementation of the *acquis communautaire* is likely to be welcomed by candidate countries and it seems probable that this will be more easily provided by the Agency than the Council of Europe.

*Major human rights incidents*

64. Only the CCBE wished to see a remit for the Agency to act in major human rights incidents, saying that it would be "useful if the agency could be invoked to supply information and recommendations on major human rights

concerns which may arise outside Europe, in countries not covered by ... an agreement [containing human rights provisions]” (p 60).

65. **We consider that it would be inappropriate to allow the Agency to be involved in matters of serious human rights concerns outside of the geographical limits already discussed. We can see no added value in granting the Agency a role here. In such cases, we encourage action to be taken through the Council of Europe.**

*Thematic remit of the Agency*

*General tasks*

66. The Agency’s principal tasks involve passive data gathering, analysis and reporting; it is not permitted to carry out its own investigations and the proposal does not envisage any kind of enforcement role for the Agency. Mr Fonseca Morillo, for the Commission, described the Agency as a “network of networks” which would collect, organise and analyse data from all the different networks in the human rights field (QQ 81, 84). He explained that, “The Agency will be a small body of the European Union. They do not have the capacity to be a big war machine”. He also stressed the importance of ensuring that the Agency’s work complemented that of the Council of Europe, which he considered amply carried out any investigations required (Q 103). He agreed that in practice the Council of Europe would remain the big player in human rights inquiries in Europe, with the Agency acting as an assistant (Q 104). Baroness Ashton said, “at present there is not one body where advice, assistance, support and monitoring would be available, and this Agency, in our view, could offer that” (Q 130).
67. The majority of our witnesses appeared to be content with the limited role envisaged for the Agency. Dr Metcalfe, for JUSTICE, said, “If [the Agency’s] recommendations are made and ignored that is obviously something that should be taken up by the European Union institutions themselves ... One would hope that the recommendations that the Agency makes in these areas would not be overlooked lightly, even if they do not have ... binding force.” He did, however, inform us that he would prefer the recommendations of the Agency “ideally to have binding force” (Q 28). The Commission for Racial Equality saw a useful role for the Agency in assisting national bodies to become aware of how their European counterparts dealt with various fundamental rights issues. The Agency could play a “co-ordinating role and collate comparative information about legal and policy developments in European member states and highlight examples of good practice”. It also suggested that the Agency could provide real added value by monitoring integration and cohesion in Member States, a field for which there is little comparative data but which is increasing in political importance (p 58).
68. The Commissioner said, “The Agency will gather information and the necessary elements for policy making and distribute it to the Member States. For me, that is a very important role.” (Q 12). He saw the Agency as a “major information tool for the Commission, for the Council of Ministers, for the Parliament, which would give basic information for the elaboration of European policy in terms of human rights” (Q 10). The Dutch Senate and the President of the Parliamentary Assembly of the Council of Europe considered that the only acceptable role for the Agency would be to gather

and analyse information on fundamental rights, in co-operation with the Council of Europe (pp 62–63, p 67). The President of the Council of Europe’s Parliamentary Assembly was firmly opposed to the Agency having any independent role in co-ordinating and co-operating with the activities of civil society associations in the field of human rights. That, he said, was part of the core business of the Council of Europe, although the Agency could be permitted to co-operate with the Council of Europe in this area (p 69).

69. Only one of our witnesses regretted that the Agency would not have a stronger role to play. The CCBE considered that the Agency required a “sufficiently substantive mandate”, (p 60) which in their view necessitated a provision “obliging Member States to send relevant human rights data to the Agency ... and to ensure explicitly the Agency’s right to hear persons and obtain information necessary to consider the human rights situation in a particular Member State” (p 61). Amnesty International recommended that the Agency should be “open to interaction with individuals, at least to the extent that they should have a right to submit information to the Agency” (p 54).
70. We agree that care must be taken to ensure that the Agency does not undermine the work carried out by the Council of Europe. There is also a need to ensure that the Agency adds value to fundamental rights protection mechanisms in the EU. **The very limited general role envisaged for it by the Commission and accepted by most of our witnesses does not add much, if any, value to existing mechanisms; it serves only to reinforce the views of its critics who argue against the proliferation of useless agencies in the EU.** In our opinion, value could be added in a number of ways, and we consider specific areas below. **As to its general tasks, however, the Agency must have the power to seek specific information from EU institutions and Member States and to probe them should they delay in providing it.** We do not consider that this would lead to duplication of the Council of Europe’s activities. The information requested by the Agency would, like all its tasks, be limited to the implementation of Community or third pillar legislation. **It would be unsatisfactory to deny the Agency the power actively to seek information necessary for it to be able to carry out the tasks entrusted to it.**

#### *Legislative scrutiny*

71. There is no express legislative scrutiny role for the Agency in the current draft of the proposal. Mr Fonseca Morillo, for the Commission, said, “the question of scrutinising the proposals of the European Commission is not a hard-core business action for the future Agency”. This is because the Commission itself should ensure the compliance of proposals with fundamental rights, a process which has become more rigorous since the adoption of the Communication on the compliance of Commission proposals with the Charter of Fundamental Rights (Q 89). He later added that, “the core business of the Agency will be exposed in the implementation of the legislation but paragraph [4(1)](d) does not prevent [the Agency] from intervening before” (Q 96). The Minister advised us that endowing the Agency with a legislative scrutiny role could overload the Agency and prevent it from operating effectively. She seemed nonetheless to envisage some sort of informal scrutiny role being performed by the Agency, in cases where there was a clear fundamental rights issue (QQ 134, 138–141).

72. Our witnesses generally supported a legislative scrutiny role for the Agency. Amnesty International was in favour of the Commission retaining primary responsibility for human rights compliance of legislative proposals, but called for a provision “permitting the Agency to conduct a human rights assessment [of a proposal] where concerns arise in relation to Council redrafting of proposed legislation, or where a Member State puts forward a legislative proposal” (p 54). JUSTICE also appeared to see scope for a legislative scrutiny role for the Agency (QQ 25 & 40). The CCBE went further and said, “the main added value of the Agency would be its advisory capacity at the early stages of decision and policy making in order to assist the EU fully to comply with fundamental rights standards when it develops policies and legislation” (p 61).
73. In our previous report on human rights scrutiny of EU proposals, we examined how European legislation is currently subjected to scrutiny and noted the possible role of a Fundamental Rights Agency in this regard.<sup>37</sup> While we applauded the Commission’s Communication as a useful initiative, we considered that external monitoring of Commission proposals was an important aspect of the scrutiny process.<sup>38</sup> It is our view that the Agency could play a valuable role here; it would be unsatisfactory to have an agency which could intervene only after the adoption of a proposal even where it was evident that the proposal raised serious human rights issues. **Although we agree that a systemic assessment of the human rights implications of every legislative proposal would be too onerous a task, the Agency should be permitted to carry out legislative scrutiny as it sees fit. In order to assist the Agency, EU institutions should be obliged to provide it with information as to whether they consider that their actions are compatible with the protection of fundamental rights and draft legislative proposals which raise obvious human rights concerns should be referred to the Agency for an opinion.**<sup>39</sup>

*Article 7 TEU remit*

74. As currently drafted, the proposal allows the Agency to make its technical expertise available to the Council in an Article 7 TEU situation, i.e. where there is a threatened or actual serious breach of fundamental rights in one of the Member States. The Agency could only act on the Council’s request, and provided that the Agency has no right of initiative, the Government are content with this.<sup>40</sup> Mr Fonseca Morillo, of the Commission, explained that, “The Agency is not there to establish inquiries in the field except in a very, very serious situation ... We believe that Article 7 is like the nuclear weapon; we need to have a nuclear weapon but never use it” (Q 104).
75. Our witnesses were also generally in favour of an Article 7 role for the Agency. The CCBE noted, however, that a “systematic and permanent monitoring of the Member States for the purposes of Article 7 would not be practical as it could overload the Agency with work” (p 60). Amnesty

---

<sup>37</sup> *Human Rights Proofing EU Legislation*, 16th Report of Session 2005–06, HL Paper 67, paragraphs 111–116.

<sup>38</sup> Paragraph 150 of the Report.

<sup>39</sup> An example of such a proposal might be the Proposal for a Directive on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC, COM (2005) 438 FINAL.

<sup>40</sup> Letter from Baroness Ashton to Lord Grenfell of 8 November 2005.



International agreed but was concerned that the Council is under no obligation to have recourse to the Agency and that the Agency has no right of initiative (p 54).

76. **We support an Article 7 remit for the Agency and would be in favour of a right of initiative for the Agency provided that a Memorandum of Understanding with the Council of Europe exists which sets out clearly how far the Agency is permitted to look at the human rights situation outside the implementation of Community law.** We recognise, however, that Member States are likely to be opposed to any expansion of the Agency's powers in this field. Given that Article 7 is rarely invoked in practice, we are satisfied with the current provision.

*Pillar remit*

77. The question of what should be the Agency's remit in terms of the three pillars of the Union is one on which views varied among witnesses. The Government do not support a second pillar or third pillar remit for the Agency, and would prefer instead to see its scope limited to Community law (QQ 200–201).<sup>41</sup> They are concerned that by extending the Agency's remit to cover third pillar issues, the Agency would be overloaded and the risk of duplication with the Council of Europe's activities would be greater.
78. Amnesty International criticised the decision to look only at areas of Union law, arguing that the proposals “do not go far enough” (p 52). The third pillar remit of the Agency, it says, is “crucial to the realisation of a genuine ‘Area of Freedom, Security and Justice’” (p 54). The European Group of National Human Rights Institutions, in a recent joint position paper, expressed the view that “It is indeed necessary that the Agency, in order to be effective, be given a role in the fields of justice and home affairs because of their clear link to human rights.”<sup>42</sup>
79. None of our witnesses expressed a wish for a second pillar remit for the Agency.
80. **While we are satisfied that the Agency is to have no second pillar remit at the present time, it is essential that it be empowered to carry out its activities in third pillar areas. Indeed, in our view it would be anomalous not to give the Agency such a remit, given that proposals in the third pillar regularly engage fundamental rights. The human rights implications of measures such as the European Arrest Warrant, or data protection in criminal matters, illustrate the need for legislative scrutiny in the third pillar.**<sup>43</sup>

*Reference to the Charter*

81. While some witnesses were happy to see the Charter given prominence in the activities of the Agency, others saw the omission of an express reference to

---

<sup>41</sup> Also letter from Baroness Ashton to Lord Grenfell of 8 November 2005.

<sup>42</sup> Common Position of the European Group of National Human Rights Institutions regarding the European Commission's proposals for a Council Regulation establishing a European Union Agency for Fundamental Rights, submitted to the European Parliament and Commission on 17 January 2006, page 2.

<sup>43</sup> Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, Official Journal L 190/1, 18.07.2002 and Proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, COM (2005) 475.

the Convention in Article 3(2) of the proposal as a cause for concern. The Commissioner said, “If the Charter exists, it is because the Convention exists...The Agency must take account of the Convention and all the protocols which are around those organisations” (Q 13). The European Court of Human Rights considered a reference to the Convention in Article 3(2) “a necessary and important signal”. In the view of the Court, the Convention, “represents the foundation stone on which every other set of fundamental rights in Europe is built” (p 64).

82. **We do not consider it to be possible to monitor fundamental rights across the EU without reference to the ECHR. This is the seminal instrument in this field and it would be unfortunate if the creation of the Agency gave birth to a competing culture in respect of human rights standards under the Convention and the Charter.** Article 2 of the proposal refers to fundamental rights as defined in Article 6(2) of the Treaty on European Union and as set out in the Charter; Article 6(2) refers in turn to the Convention. Accordingly, in our view the Agency will have regard to fundamental rights as set out in the Convention. **We would, however, be in favour of an amendment to Article 3(2) to refer explicitly to the ECHR in recognition of its special position in the European human rights framework. We also consider that it is preferable to avoid referencing by association wherever possible.**<sup>44</sup>
83. Given that the rights in the Charter are very broad in scope, there is some concern regarding how the Agency will focus its work and how it will monitor rights which are currently very vague, such as the right in Article 13 of the Charter to freedom of the arts and sciences. Baroness Ashton referred to the Charter as a “backdrop” to provide a broad spectrum within which the Agency’s priorities would be set (QQ 142, 169). JUSTICE took the view that “monitoring of Charter rights by the [Agency] would complement the monitoring of Convention rights carried out by the Council of Europe” (p 9). Amnesty International, however, regretted that the Agency’s activities are to be based on the Charter, as some of its provisions are merely “principles” and not “rights” which can be relied upon by individuals (p 53).
84. **We agree that the Agency should use the Charter as its principal point of reference. We recognise that civil and political rights and economic and social rights are interdependent. The distinction between them is not clear cut and even the exercise of the four freedoms of the Treaty can have a human rights dimension. We would not expect the Agency to become involved in the monitoring of the Treaties generally; this should remain the job of the Commission.**

#### *Mechanisms for co-operation*

85. The proposal contains a number of provisions designed to limit overlap between the work of the new Agency and the work of the other actors in the human rights field.

---

<sup>44</sup> Referencing by association is where a document refers in its text to the content of a second document but instead of rehearsing the content for the assistance of the reader it simply refers to the second document by number or document reference. The reader is then obliged to look to the second document to understand fully the provisions of the first document.

*The Council of Europe*

86. Article 6 of the proposal instructs the Agency to take account of existing information and activities carried out by the Council of Europe “in order to avoid duplication and guarantee the best possible use of resources”. A specific obligation to co-operate with the Council of Europe is contained in Article 9, which provides that the Agency is to “co-ordinate its activities with those of the Council of Europe, particularly with regard to its Annual Work Programme.” To that end, the Agency is to enter into an agreement with the Council of Europe for the purposes of establishing close co-operation between the two bodies, which is to include the obligation of the Council of Europe to appoint an independent person to sit on the Agency’s management board. The right of the Council of Europe to be represented on the Agency’s management board is re-iterated in Article 11.
87. The Commission for Racial Equality did not consider that there would be an automatic overlap between the Council of Europe and the EU. It pointed out that the Council of Europe’s expertise in human rights is not necessarily as extensive in fields which fall within the competence of the Union. The Council of Europe would, for example, have little knowledge about the EU’s Race and Employment Directives (p 58). While this is undoubtedly true, there will be areas where the distinction between the competence of the Council of Europe and the EU is less clear. The President of the Parliamentary Assembly of the Council of Europe warns that failure to manage the relationship between the Agency and the Council of Europe could lead to inconsistency, contradiction and could “undermine the credibility of the overall system of human rights protection” (p 69).
88. Our witnesses strongly supported the conclusion of a Memorandum of Understanding between the Council of Europe and the European Union. Amnesty International said that this should be concluded “immediately upon the creation of the Agency” (p 55). The Dutch Senate called for a “constructive co-operation agreement” to be concluded before the establishment of the Agency (p 63). The Law Society welcomed the intention that the Council of Europe and the EU should sign a bilateral agreement, saying, “The EU and the Council of Europe must continue to strive to interpret fundamental rights guarantees in the same way”. It considered that the Agency could provide “an invaluable channel” to this end (p 66).
89. JUSTICE considered that the possibility of duplication could be averted through “rigorous adherence by the [Agency] to its mandate for protecting rights under Community law”. Where provisions under Community law cover the same as Council of Europe measures, the Agency should “respect the superior institutional competence of the Council of Europe” (p 10).
90. Given that the Agency will take over from the existing EU Monitoring Centre on Racism and Xenophobia (EUMC) it is instructive to look at the EUMC’s relationship with the Council of Europe. Within the Council of Europe structure, the European Commission against Racism and Intolerance (ECRI) does similar work to the EUMC. The Commissioner told us that, “ECRI has never been in conflict with the [EUMC]. I organise conferences in Albania and other countries on issues of racism and xenophobia. I have invited the [EUMC]. We co-operate and work together very well ... and, to my knowledge, there has not been any negative influence or conflict between [ECRI] and the [EUMC]. There is a perfect synergy between the two”

(Q 17). However, the Commissioner considered that matters would be more complicated with the Agency because it has a far wider remit than the EUMC. He recognised that the EU is a major player in the fight for human rights and said that it must, “use the Council of Europe, its expertise, its history and its competence, in order to do the work”. This is where he saw a lack of clear definition as to the respective roles of the two bodies (Q 18).

91. The Registrar of the European Court of Human Rights saw real benefits in the potential of the Agency to reduce the increasing workload of the Court and of the Council of Europe generally. In the view of the Registrar, an Agency which could improve compliance by the EU and its Member States with fundamental rights would add value to the existing framework. However, this added value would only be achieved by avoiding overlap with the Council of Europe’s activities. Any duplication would be a waste of resources and “it seems doubtful whether it is appropriate to spend large sums duplicating activities which—with fewer financial means, though, but with the benefit of more than half a century’s experience—are already carried out by the Council of Europe” (p 64).
92. **Properly managing the relationship between the Council of Europe and the Agency is critical to the latter’s success. We welcome the existing provisions in the proposal which seek to enhance co-operation between the two bodies. While these go some way to reducing the risk of conflict, we are of the view that a comprehensive and clearly drafted Memorandum of Understanding is vital to ensure that there is no duplication of work and that there is efficient use of the resources of both bodies. The negotiation of the Memorandum should be a priority for Member States and the creation of the Agency should be conditional upon its conclusion and its agreement by the Council of Europe. We expect the Government to give Parliament the opportunity to examine and comment on the Memorandum of Understanding.**
93. **If the Agency could, by carrying out the tasks within its remit, contribute to alleviating the caseload of the European Court of Human Rights through ensuring better compliance with fundamental rights, this would in our view constitute one of its greatest benefits. There is a valuable role for the Agency to play here and we trust that the Agency will work closely with the Court to identify the nature and content of that role. In particular, the relationship between the Court and the Agency should be clarified in the Memorandum of Understanding.**

*The Network of Independent Experts of the European Union*

94. Mr Fonseca Morillo, of the Commission, advised us that the EU Network of Independent Experts would cease to exist in September 2006. His proposal was that the Agency would take over the work which the Network previously carried out (QQ 81–83). Some of our witnesses saw a continuing role for the Network, notwithstanding the creation of the Agency. Amnesty International said that incorporating the Network into the Agency “would result in the Network losing its broad mandate to review and comment upon human rights generally in the Member States” (p 55). It considered that the retention of the Network’s current remit was “crucial”. The Law Society also

referred to the valuable work carried out by the Network and expressed concern regarding the uncertainty surrounding the Network's future (p 66).

95. The proposal must be clear as to what bodies will be subsumed into the Agency. It is our understanding that the intention is for the EUMC and the Network to be replaced by the new Agency. We agree with Amnesty International that this will have implications for the monitoring of human rights generally across the Member States. **Consideration should be given to how this function performed by the Network can continue to be carried out once the Agency is established.**

#### *National Human Rights Institutions*

96. Amnesty International hoped that the creation of the Agency would “give an impetus to the establishment of a national human rights institute ... in each Member State”. These institutes could then serve as members of the Agency's network (p 55). The Law Society considered that “The knowledge and experience held by the national human rights institutions will be instrumental to the success of the Agency” (p 66). It, too, suggested that the Agency might have a role in assisting Member States to develop their national institutions.
97. **We consider that the Agency should develop close relations with national human rights institutions. The proposal envisages that such institutions may benefit from the expertise of the Agency and we would encourage them to call on the Agency for assistance where necessary.**

#### *Other bodies*

98. The obligation in Article 6 for the Agency to take account of existing information applies not only to the Council of Europe but also to “Community institutions, bodies, offices and agencies”, “institutions, bodies, offices and agencies of the Member States” and “other internal institutions”. Article 7 requires the Agency to ensure appropriate co-ordination with relevant Community bodies, offices and agencies and to conclude relevant memoranda of co-operation where appropriate. Article 8 sets out a broad obligation on the Agency to co-operate with governmental and non-governmental organisations and bodies competent in the field of fundamental rights at Member State or European level.
99. **While there is a risk of overlap between the work of the Agency and other bodies in the field,<sup>45</sup> we are satisfied that the proposal takes adequate measures to prevent this. We trust that memoranda of understanding will be concluded when necessary and that the Agency will make full use of the facilities for co-operation afforded to it.**

---

<sup>45</sup> We consider the possible overlap of the Agency with the Gender Institute separately in Chapter 4, below.

## CHAPTER 4: ONE BODY OR TWO?

---

### The proposal for a European Institute for Gender Equality

100. In addition to its recent proposal regarding the establishment of a Fundamental Rights Agency, the Commission has also recently brought forward a proposal for the creation of a European Institute for Gender Equality.<sup>46</sup> The Institute would assist in the fight against discrimination based on sex, promote gender equality and raise the profile of these issues among EU citizens. Its principal tasks would be to collect, record, analyse and disseminate information including results from research conducted by Member States and non-governmental organisations, and improve the comparability, objectivity and reliability of data.
101. The Committee has previously carried out a detailed inquiry into the Institute and found that there may be a need for a body responsible for collating and interpreting existing data, commissioning new studies and promoting exchanges of information and good practice.<sup>47</sup> However, we concluded that the case for a separate European Institute for Gender Equality has not been demonstrated and that further consideration should be given to the alternative of incorporating gender equality work into the activities of the proposed Fundamental Rights Agency.<sup>48</sup> This Chapter considers this question in more detail.

### The position in the United Kingdom

102. Although traditionally the preference in the United Kingdom had been for specific bodies to deal with each of the different strands of equality, there has been a trend to move towards integration. In Northern Ireland, the Belfast Agreement<sup>49</sup> envisaged the creation of two bodies: a Human Rights Commission<sup>50</sup> and an Equality Commission. Legislation was duly passed in 1998 and both bodies are now operational. The Equality Commission for Northern Ireland took over the functions previously exercised by the Commission for Racial Equality for Northern Ireland, the Equal Opportunities Commission for Northern Ireland, the Fair Employment Commission and the Northern Ireland Disability Council.
103. A bill recently introduced into the Scottish Parliament in October 2005 proposes the establishment of a Scottish Human Rights Commissioner.<sup>51</sup> The position in Scotland is, however, noteworthy in that although human rights are a devolved issue, equality legislation is reserved to Westminster. As a result, the new Commissioner would only be able to look at human rights.

---

<sup>46</sup> 7244/05 (COM (2005) 81 FINAL) and 7244/05 ADD 1, the accompanying impact assessment report.

<sup>47</sup> *Proposed Institute for Gender Equality*, 24th Report of Session 2005–06, HL Paper 119 at paragraph 44.

<sup>48</sup> Paragraph 46 of the Report.

<sup>49</sup> The Belfast Agreement was signed by the British and Irish Governments on 10 April 1998. It enshrined the commitment to peace and established the Northern Ireland Assembly.

<sup>50</sup> The objective of the Northern Ireland Human Rights Commission is to further the protection of human rights in Ireland.

<sup>51</sup> Information regarding the Bill's progress can be found at:  
<http://www.scottish.parliament.uk/business/bills/48-scottishCommissioner/index.htm>.

104. At UK level, a fully integrated approach which sees human rights and equality issues being dealt with by one body has recently been achieved with the creation of a Commission for Equality and Human Rights (CEHR).<sup>52</sup> The new body will incorporate the existing Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission, as well as tackling religious, sexual orientation and age discrimination. The reason for favouring an integrated approach was succinctly set out by Patricia Hewitt, then Secretary of State for Trade and Industry, upon the publication of the White Paper: “As individuals our identities are diverse and complex. People don’t define themselves as just a woman, or black or gay and neither should our equality organisations. People and their problems should not be put in boxes.”<sup>53</sup>

### The need for two bodies

105. Mrs Pavan-Woolfe, the Director for Equal Opportunities in DG Employment, Social Affairs and Equal Opportunities in the European Commission, explained the backdrop to the Commission’s Gender Equality Institute proposal. She outlined the EU’s role in promoting gender equality, emphasising the importance, maturity and concrete impact of the Union’s policy in this area. She said, “Gender equality is a lot more than the observance of a fundamental right to non-discrimination; it is a specific comprehensive policy which is based on a variety of instruments of which legislation is only one” (Q 107). She considered that there was a need for a separate Institute for several reasons, but chiefly because gender equality was a very specific policy and because the future Institute would not be limited to questions of anti-discrimination. She pointed out that a similar approach is adopted in the United Nations, where there is a Human Rights Commission and a Commission on the Status of Women.<sup>54</sup> She concluded, “we felt that the possible advantages of merging the Institute for Gender Equality with the future Agency on Fundamental Rights would be outweighed by the possible disadvantages of not giving enough visibility and enough weight to a policy which is partly encompassed by the fundamental rights question but is not only about fundamental rights” (Q 108). For these reasons, she did not consider that the approach taken in respect of the Union’s policy on Racism and Xenophobia—to identify it as a principal theme of the new Agency—would work in relation to gender rights (Q 109).
106. Baroness Ashton agreed with Mrs Pavan-Woolfe that a separate Institute was necessary. To merge the Institute with the Agency “would marginalise gender equality issues within the wider context of fundamental rights”.<sup>55</sup> She explained the contrast between the Government’s support of the CEHR in the United Kingdom with their opposition to an integrated Fundamental Rights Agency in the EU: “When we merged the organisations ... in this country ... we were fundamentally looking at organisations that had a huge overlap in terms of the way in which they worked, and the difficulty we identified was that if you had more than one characteristic of the

---

<sup>52</sup> Equality Act 2006.

<sup>53</sup> Department of Trade and Industry Press Release of 12 May 2004, P/2004/187.

<sup>54</sup> UN Resolution A/RES/60/251 of 15 March 2006 will create a Human Rights Council in place of the existing Human Rights Commission. The Council will incorporate a number of human rights treaty bodies, including the Committee on the Elimination of Discrimination Against Women.

<sup>55</sup> Letter from Baroness Ashton to Lord Grenfell of 15 February 2005.

discrimination that you suffered then you were dealing with more than one organisation and we did not get the potential of bringing them all together even in terms of the economies of scale that that would imply, but also the opportunity to thematically think differently about issues of discrimination. If we had in Europe a series of organisations or institutions similar to those which we have in the UK I would be arguing on exactly the same basis that they should be brought together, but we are not at all in that position and therefore I argue at the moment that there is a particular piece of work to be done around gender which is different from the role of the Fundamental Rights Agency” (Q 186). She considered that “the Gender Institute is a body that will have a very clear remit to look at a particular issue right across the European Union ... and what we have on the other hand is a body that is inevitably going to take some time to find its feet but is seeking to do something that is of a different order”. She expressed concern that there might be a loss of momentum on gender issues were these to be dealt with by the Fundamental Rights Agency (Q 184).

107. All other witnesses who expressed a view on the need for a separate Institute were in favour of a single, integrated fundamental rights agency which would deal with gender issues. The Equal Opportunities Commission (EOC), which is currently responsible for promoting gender rights in the United Kingdom, said, “Our experience as an equal opportunities body working on equality between women and men is that it is vital not to disassociate gender from the rest of the equality strands” (p 63). The Commission for Racial Equality applauded the Fundamental Rights Agency proposal for securing a more integrated approach to the Union’s work on anti-discrimination but noted that, “the creation of a separate EU institute for gender equality undermines this overall aim” (p 57). In a Report on the promotion and protection of fundamental rights,<sup>56</sup> the European Parliament insisted that, “the future Gender Institute should be part of the Agency on Fundamental Rights, seen as a “network of networks”.<sup>57</sup> JUSTICE said, “we do not believe that separating protection of gender rights from other fundamental rights is either appropriate or necessary. It is unhelpful—both conceptually and in practice—to separate out a particular ground of discrimination from the right to equality in general, and similarly unhelpful to treat a specific right differently from other fundamental rights.” (p 10). A Report prepared by the Migration Policy Group observed a trend in States with long-standing single agencies to establish an integrated body to deal with equality issues.<sup>58</sup>
108. **We note concerns that gender rights might be “marginalised” were they to be dealt with by a general fundamental rights agency. However, we do not agree that this would be the case.** The Government did not accept similar arguments in the domestic context and supported the

---

<sup>56</sup> Report on the promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency, Report A6-0144/2005 FINAL of 11.05.2005 (Rapporteur: Kinga Gál).

<sup>57</sup> Paragraph 38 of the Report. The Parliament’s Report on the Institute (adopted on 14.03.2006), however, approves the Commission proposal and does not address the issue of whether there should be a single body—Report on the proposal for a regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality, A6-0043/2006 FINAL of 27.02.2006 (Rapporteurs: Lissy Gröner and Amalia Sartori). It is not known whether the European Parliament’s report on the Fundamental Rights Agency proposal will deal with this matter.

<sup>58</sup> Considerations for establishing single equality bodies and integrated equality legislation, Report of the seventh expert’s meeting, 17–18 June 2004.



establishment of the CEHR. It is important to note that the Agency will take over from the EU Monitoring Centre for Racism and Xenophobia and will therefore absorb matters of race discrimination. **As JUSTICE pointed out (p 10), it would be inconsistent to absorb the work of the EUMC within the Agency and at the same time seek to establish a separate body to look at gender equality. The Government do not appear to be concerned that issues of race may be marginalised within the EU; the proposal that gender issues should be singled out in this way suggests that discrimination on the basis of gender is considered to be more important than racial discrimination.**

109. Although both Mrs Pavan-Woolfe and Baroness Ashton suggested that the nature of the tasks to be carried out by the Institute would be very different from those envisaged for the Agency, the Law Society considered that, “The proposed tasks of the Institute for Gender Equality are essentially among those proposed for the Fundamental Rights Agency” (p 66). **We agree. The arguments advanced by the Commission and the Government in favour of establishing two separate bodies are unconvincing; we do not see any fundamental difference between the tasks to be carried out by the two bodies and in our view the Agency could effectively carry out the work envisaged for the Institute.**
110. **Contrary to the position of the Commission and the Government, we see positive advantages in having a single body to cover human rights and all equality strands.** The Joint Committee on Human Rights (JCHR), in a report on the case for a human rights commission,<sup>59</sup> considered that, “a powerful argument for bringing all strands of the human rights agenda into a single body is that this would strengthen the ability to promote a culture that respects the dignity, human rights and worth of everyone”.<sup>60</sup> We are persuaded by this approach and consider that the creation of a single body would be beneficial not only from the conceptual point of view outlined by the JCHR but also from a practical one: it would, we believe, deliver some economies of scale and address to some extent concerns regarding the proliferation of EU agencies. **We are disappointed that the Government have chosen not to take a consistent approach to this matter and, despite having championed integrated human rights protection in the United Kingdom, support the two separate proposals.**
111. Baroness Ashton did not rule out a merger between the Fundamental Rights Agency and the European Institute for Gender Equality at a later date (QQ 184, 188). **Although we accept that there may be some scope for the bodies to be merged at a future date, we do not consider this to be an attractive alternative.**
112. **If the Council does proceed to establish two separate agencies, we recommend that the Institute be established in Vienna to maximise co-operation and facilitate merging the two bodies at a later date.**<sup>61</sup> Should the two agencies be established in different Member States, politics within the Council would in all likelihood render any future merger impossible. Aside from the inevitable opposition of Member States to the

<sup>59</sup> *The Case for a Human Rights Commission*, 6th Report of Session 2002–03, HL Paper 67–I, HC 489–I.

<sup>60</sup> Paragraph 203 of the Report.

<sup>61</sup> We understand that Lithuania, Slovenia and Slovakia are currently bidding to host the Institute – *European Voice*, 16–22 March 2006, page 6.

closing down of an EU agency located within their territory, the practicalities and costs of moving operations across borders could be a significant deterrent.

113. **The Agency and the Institute, if separately established, would need to co-operate closely with one another on a regular basis.** Mrs Pavan-Woolfe considered the mechanisms for co-operation in the Fundamental Rights Agency proposal to be sufficient and **we encourage the Institute to make full use of its powers to attend the management board meetings of the Agency as an observer.** As regards preparation of the Agency's Annual Work Programme and the Institute's annual programme of activities, we note that consultation with the Commission prior to the preparation of these programmes is expected to assist in co-ordinating the activities of the two bodies. **We would, however, be in favour of a more direct consultation between the Agency and the Institute and suggest that the Directors of the two bodies could play a role in achieving this.**

## **CHAPTER 5: INDEPENDENCE AND MANAGEMENT STRUCTURE**

### **Independence**

114. Under Article 15 of the proposal, the Agency is to fulfil its tasks in complete independence. However, a number of the proposal's provisions could potentially compromise the Agency's independence by allowing external actors, principally the Commission, to interfere in the activities of the Agency. The proposal gives responsibility for adopting the Agency's Multiannual Framework to the Commission, and the Framework itself must be in line with Union priorities "as defined in the Commission's strategic objectives."<sup>62</sup> The Annual Work Programme of the Agency, to be prepared by the Director after the Commission has delivered an opinion, is to be in line with the Commission's annual work programme. The presence of two members of the Commission on the Agency's executive board effectively gives the Commission a veto in respect of decisions made by that board.
115. Baroness Ashton appeared to suggest that discussions in the Council are tending towards greater Council involvement in the running of the Agency. She indicated that the Member States are in favour of the Annual Work Programme being approved by the Council, which in her view would achieve two things: "One is that it is absolutely clear that the Agency has a strong relationship to the Council which is separate to that of the Commission, and, secondly, in a way it binds the Council in to the work of the Agency, because, after all, if the Council approves the work of the Agency then in a sense it is accepting that the Agency will be looking at particular areas" (Q 143). She made it clear that the Government support the view that the Agency should be ultimately accountable to the Council, rather than the Commission (Q 146).
116. Some of our witnesses were concerned that the proposal did not grant the Agency sufficient independence to carry out its tasks. Amnesty International was in favour of the Agency's management being "in some form answerable to the European Parliament"; the latter institution should have a right to review the composition of the Agency's management board, for example (p 55). JUSTICE saw the requirement that the Agency's Multiannual Framework be in line with the Commission's strategic objectives as a potential problem, although Dr Metcalfe doubted that any conflict would arise in practice (QQ 75–76). Mr Fonseca Morillo, for the Commission, did not believe that the Commission's role in setting the Multiannual Framework would interfere with the independence of the Agency because, "it is the Agency which will, in the Annual Work Programme, respecting the general Framework, decide in which field of fundamental rights they are going to focus their annual programme". He saw this structure as achieving a balance between absolute independence and the need to avoid the possibility of "unguided missiles" from the Agency (Q 97).
117. In 1993 the United Nations endorsed a series of recommendations, known as the Paris Principles, on the status and functioning of national institutions for

---

<sup>62</sup> Article 5(1)(c).

the protection and promotion of human rights.<sup>63</sup> The principles are intended to ensure that national human rights institutions are independent from national government and are granted as much autonomy as possible. Although they make recommendations for national institutions and are therefore not specifically directed at the European context, they nonetheless highlight the importance of the independence of human rights institutions in general.

118. **We consider it imperative that there be no unnecessary interference in the running of the Fundamental Rights Agency and we recommend that an express provision to this effect be included in the Regulation.**<sup>64</sup>
119. Although there may be possible tensions between the stipulation in Article 15 that the Agency is to perform its tasks in complete independence and the role of the Commission in elaborating the Agency's work programme under Article 5, **we are not persuaded that these will have an impact on the Agency's independence in practice and are satisfied that the Commission should adopt the Agency's Multiannual Framework provided that the European Parliament is consulted prior to the adoption of the Framework. Should there be any indication once the Agency is in operation that the Commission is abusing its role, we would expect the European Parliament to step in.**
120. **We do not consider it prudent to increase the role of the Council in the running of the Agency. In particular, the Council should not have the power to approve the Agency's Annual Work Programme.** In its report on the EU Monitoring Centre, the European Economic and Social Committee concluded that it "shared the concerns ... about the need to strengthen the Centre's independence, not only with respect to the EU institutions but also to the Member States which sometimes, disturbed by the Centre's work, sought to increase their influence over the Management of the Centre".<sup>65</sup> It appears that there are lessons to be learnt from the Monitoring Centre.
121. **The Agency should be accountable to the European Parliament. Should the management board be composed of Member States' representatives, its members should be subject to the approval of the European Parliament. The appointment of its Director should likewise be subject to the European Parliament's approval, as should his dismissal.** We consider the question of the management structure below.

### Management structure

122. It is proposed that the Agency should have a management board composed of one independent person appointed by each of the Member States,

---

<sup>63</sup> These recommendations were endorsed by the United Nations Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.

<sup>64</sup> Paragraph 43 of Schedule 1 of the Equality Act 2006 provides an example of how this might be done.

<sup>65</sup> Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97; Proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version), SOC/149 – CESE 1615/2003 of 10.12.2003.

together with two Commission representatives, one independent person appointed by the European Parliament and one independent person appointed by the Council of Europe. The executive board is composed of the chairperson and vice-chairperson of the management board and two Commission representatives.

123. The proposal for the Institute originally stipulated a management board of fifteen, consisting of six representatives appointed by the Council, six representatives appointed by the Commission as well as three non-voting representatives appointed by the Commission representing a gender equality NGO, an employers' organisation and a workers organisation. Discussions in the Council quickly substituted a "one Member State, one representative" composition similar to that contained in the proposal for the Fundamental Rights Agency. The European Parliament recently adopted a report on the Institute which would fix the management board at thirteen, comprising nine nominees of the Council, in consultation with the European Parliament, drawn from a list prepared by the Commission, plus one representative of the Commission and three representatives appointed by the Commission representing a gender equality NGO, an employers' organisation and a workers organisation.<sup>66</sup> The report relies for support on the fact that a similar solution was adopted for the management board of the European Food Safety Authority in 2002.<sup>67</sup>
124. Dr Metcalfe, for JUSTICE, agreed that a management board for the Agency comprising a representative of each Member State would be a bit "top-heavy" and pointed to the waste of resources given that a similar structure was being proposed by Member States for the Institute (Q 71). However, Baroness Ashton did not feel that a smaller management board was a realistic possibility, saying, "the difficulty with the management board ... is that there is a very strong desire from all parties to participate in some form and it is always extremely difficult, when one can see the logic of slimming it down, to ask people not to be on it." Trying to reach agreement on this matter, with the relatively short timetable, would, she said, be at the expense of getting the Agency into "the right shape" (Q 195).
125. We recognise the desire of Member States to participate in the new Agency and accept that there will be difficulties in negotiating a slimmed-down structure for the management board. However, as we have said in the past in the context of the European Court of Auditors and the European Central Bank,<sup>68</sup> it seems to us unacceptable that almost every new body set up by the EU has a management board on which each Member State is represented. While this may have been a viable mechanism when there were fewer Member States, in an enlarged Union of 25 States an alternative solution must be found. Not only are the financial implications of this practice

---

<sup>66</sup> Report on the proposal for a regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality, A6-0043/2006 FINAL of 27.02.2006, adopted on 14.03.2006, (Rapporteurs: Lissy Gröner and Amalia Sartori).

<sup>67</sup> Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Official Journal L 31/1, 01.02.2002.

<sup>68</sup> *The European Court of Auditors: the case for reform*, 12th Report of Session 2000–01, HL Paper 63 at paragraph 6; *Is the European Central Bank working properly?* 42nd Report of Session 2002–03, HL Paper 170 at paragraph 157; and *Proposed European Institute for Gender Equality*, 24th Report of Session 2005–06, HL Paper 119 at paragraphs 64 and 67.

considerable but establishing such large boards is not conducive to efficient decision-making.

126. **We recommend that the management board of the Fundamental Rights Agency should comprise a maximum of eleven members. It should be composed of:**
  - **Representatives of the Council;**
  - **Representatives of the European Parliament;**
  - **Representatives of the Commission; and**
  - **Representatives of the Council of Europe.**
127. **While we make no stipulations as to the numbers, we would expect the Parliament and the Council to be equally represented and we would welcome the inclusion of two representatives of the Council of Europe, which we envisage would be filled by the Human Rights Commissioner and the Secretary General (or their representatives).** This would ensure that no one institution had control of the management board and would enhance the Agency's independence and co-operation with the Council of Europe.
128. **The composition of the executive board of the Agency should also be altered to ensure fairer representation. We recommend that it be composed of one representative from each of the Council, the European Parliament, the Commission and the Council of Europe, plus the chairperson of the management board.**

## CHAPTER 6: DETAILED RECOMMENDATIONS

---

### The value of the Agency

129. The Agency could play a useful role in enhancing observance of fundamental rights in the European Union. However, we share concerns that a failure to delineate properly the tasks of the Agency could lead to wasteful duplication of the work of other bodies in the field. We consider it important that the Agency is more than just a “postbox” for collecting and sorting data (para 45).

### Legal base

130. When the final role of the Agency is clear, the Government should report to Parliament on the question of the legal base (para 37).

### Geographic scope

131. Where the Agency can add value to the Commission’s role in monitoring accession countries it should be permitted, although not obliged, to do so. The decision to make use of the Agency’s resources should only be made after full consideration of the information already available. Accordingly we support the retention of Article 3(4), which extends the Agency’s geographical remit to some third countries. However, the article should be amended to add protections against over-use of this power (paras 60–61).
132. More detailed provisions for co-operation between the Council of Europe and the Agency in relation to third countries should be set out in the Memorandum of Understanding. The Memorandum should in particular specify the nature of the Council of Europe’s role in assisting the EU in these cases and how the Agency would be involved in the process (para 61).
133. The power to consult the Agency in relation to third countries should not be reserved to the Commission. The Parliament should also be able to make a request for the assistance of the Agency where the Parliament needs to consider the human rights position in third countries (para 61).
134. Candidate countries should be able to participate in the Agency. These countries, although already members of the Council of Europe as required by the Copenhagen Criteria, would potentially derive substantial benefits from the assistance of the Agency as they prepare for Union membership (para 63).
135. It would be inappropriate to allow the Agency to be involved in matters of serious human rights concerns outside of the geographical limits already discussed. We can see no added value in granting the Agency a role here (para 65).

### Thematic remit

136. The very limited general role envisaged for the Agency by the Commission does not add much, if any, value to existing mechanisms; it only serves to reinforce the views of its critics who argue against the proliferation of useless agencies in the EU. The Agency must have the power to seek specific information from EU institutions and Member States and to probe them should they delay in providing it (para 70).

137. The Agency could play a valuable role in providing external monitoring of Commission proposals. Although we agree that a systemic assessment of the human rights implications of every legislative proposal would be too onerous a task, the Agency should be permitted to carry out legislative scrutiny as it sees fit (para 73).
138. In order to assist the Agency with this task, EU institutions should be obliged to provide it with information as to whether they consider that their actions are compatible with the protection of fundamental rights and draft legislative proposals which raise obvious human rights concerns should be referred to the Agency for an opinion (para 73).
139. The Agency should have an Article 7 TEU remit. We would be in favour of a right of initiative for the Agency in this area provided that the necessary Memorandum of Understanding with the Council of Europe is in place. However, given that Article 7 is rarely invoked in practice, we are satisfied with the current provision (para 76).
140. It is essential that the Agency be empowered to carry out its activities in third pillar areas given that proposals in the third pillar regularly engage fundamental rights. We are, however, satisfied that the Agency is to have no second pillar remit at the present time (para 80).

#### **Reference to the Charter**

141. We do not consider it to be possible to monitor fundamental rights across the EU without reference to the European Convention on Human Rights as this is the seminal instrument in this field. Although the Agency would almost certainly have regard to the Convention in practice, Article 3(2) should refer explicitly to the ECHR in recognition of its special position in the European human rights framework (para 82).
142. We agree that the Agency should use the Charter as its principal point of reference. We would not, however, expect the Agency to become involved in the monitoring of the Treaties generally; this should remain the job of the Commission (para 84).

#### **Mechanisms for co-operation**

143. We welcome the existing provisions in the proposal which seek to enhance co-operation between the two bodies. While these go some way to reducing the risk of conflict, a comprehensive and clearly drafted Memorandum of Understanding is vital to ensure that there is no duplication of work and that there is efficient use of the resources of both bodies (para 92).
144. The negotiation of the Memorandum should be a priority for Member States and the creation of the Agency should be conditional upon its conclusion and its agreement by the Council of Europe (para 92).
145. The Agency could play a valuable role in helping to alleviate the caseload of the European Court of Human Rights through ensuring better compliance with fundamental rights. We trust that the Agency will work closely with the Court to identify the nature and content of that role. In particular, the relationship between the Court and the Agency should be clarified in the Memorandum of Understanding to be agreed (para 93).
146. Consideration should be given to how general human rights monitoring in Member States, currently performed by the EU Network of Independent



Experts on Fundamental Rights, can continue to be carried out once the Agency is established (para 95).

147. The Agency should develop close relations with national human rights institutions. We encourage such institutions to call on the Agency for assistance where necessary (para 97).
148. We are satisfied that, subject to our specific comments regarding the Council of Europe and the Gender Equality Institute, the proposal takes adequate measures to prevent overlap between the work of the Agency and other national, European and international bodies in the field. We trust that memoranda of understanding will be concluded when necessary and that the Agency will make full use of the facilities for co-operation afforded to it (para 99).

### **The European Institute for Gender Equality**

149. We do not agree that gender rights would be “marginalised” were they to be dealt with by a general fundamental rights agency. It would be somewhat inconsistent to absorb the work of the EU Monitoring Centre for Racism and Xenophobia within the Agency and at the same time seek to establish a separate body to look at gender equality. The Agency could effectively carry out the work envisaged for the Institute (paras 108–109).
150. We see positive advantages in having a single body to cover human rights and all equality strands. This would strengthen the ability to promote a culture that respects the dignity, human rights and worth of everyone and deliver some economies of scale (para 110).
151. We do not consider the possible future merging of the Institute and the Agency to be an attractive alternative to the establishment of a single body from the outset. If the Council does proceed to establish two separate agencies, we recommend that the Institute be established in Vienna to maximise co-operation and facilitate merging the two bodies at a later date (paras 111–112).
152. The Agency and the Institute should co-operate closely with one another on a regular basis. The Institute should make full use of its powers to attend the management board meetings of the Agency as an observer. We would be in favour of a more direct consultation between the Agency and the Institute in the preparation of the Agency’s Annual Work Programme and the Institute’s annual programme of activities and suggest that the Directors of the two bodies could play a role in achieving this (para 113).

### **Independence**

153. It is imperative that there be no unnecessary interference in the running of the Fundamental Rights Agency and an express provision to this effect should be included in the Regulation (para 118).
154. Although there may be possible tensions between the stipulation in Article 15 that the Agency is to perform its tasks in complete independence and the role of the Commission in elaborating the Agency’s work programme under Article 5, we are not persuaded that these will have an impact on the Agency’s independence in practice and are satisfied that the Commission should adopt the Agency’s Multiannual Framework provided that the

European Parliament is consulted prior to the adoption of the Framework (para 119).

155. It would not be prudent to increase the role of the Council in the running of the Agency. In particular, the Council should not have the power to approve the Agency's Annual Work Programme (para 120).
156. The Agency should be accountable to the European Parliament. Should the management board be composed of Member States' representatives, its members should be subject to the approval of the European Parliament. The appointment of its Director should likewise be subject to the European Parliament's approval, as should his dismissal (para 121).

### **Management structure**

157. The management board of the Agency should comprise a maximum of eleven members. It should be composed of representatives of the Council, representatives of the European Parliament, representatives of the Commission and representatives of the Council of Europe (para 126).
158. We would expect the Parliament and the Council to be equally represented on the management board and would welcome the inclusion of two representatives of the Council of Europe, which we envisage would be filled by the Human Rights Commissioner and the Secretary General (or their representatives). This would ensure that no one institution had control of the management board and enhance the Agency's independence and co-operation with the Council of Europe (para 127).
159. The composition of the executive board of the Agency should also be altered to ensure fairer representation. It should be composed of one representative from each of the Council, the European Parliament, the Commission and the Council of Europe, plus the chairperson of the management board (para 128).

## **APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)**

---

The members of the Sub-Committee which conducted this inquiry were:

Lord Borrie  
Lord Brown of Eaton-under-Heywood (Chairman)  
Lord Clinton-Davis  
Lord Goodhart  
Lord Grabiner  
Lord Henley  
Lord Lester of Herne Hill  
Lord Lucas of Crudwell and Dingwall  
Lord Neill of Bladen  
Lord Norton of Louth

### **Declaration of Interest**

Lord Lester of Herne Hill  
*Member, Council of JUSTICE*

## APPENDIX 2: LIST OF WITNESSES

---

The following witnesses gave evidence. Those marked \* gave oral evidence.

- Amnesty International
- \* Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs
- Commission for Racial Equality (CRE)
- \* Mr Alvaro Gil-Robles, Commissioner for Human Rights, Council of Europe
- Council of Bars and Law Societies of Europe (CCBE)
- Dutch Senate
- Equal Opportunities Commission
- \* Mr Fonseca Morillo, Director for Civil Justice, Fundamental Rights and Citizenship, DG Justice, Freedom and Security, European Commission
- \* Mrs Pavan-Woolfe, Director for Equal Opportunities, DG Employment, Social Affairs and Equal Opportunities, European Commission
- Registrar of the European Court of Human Rights
- UK Information Commissioner's Office
- \* JUSTICE
- The Law Society of England and Wales
- President of the Parliamentary Assembly of the Council of Europe
- Secretary General of the Council of Europe

## APPENDIX 3: RECENT REPORTS

---

### Recent Reports from the Select Committee

Annual Report 2005 (25th Report of Session 2005–06, HL Paper 123)

The Work of the European Ombudsman (22nd Report of Session 2005–06, HL Paper 117)

### Recent Reports from Sub-Committee E (Law and Institutions)

European Arrest Warrant—Recent Developments (30th Report of Session 2005–06, HL Paper 156)

Human Rights Proofing EU Legislation (16th Report of Session 2005–06, HL Paper 67)

The Hague Programme: a five year agenda for EU justice and home affairs (10th Report of Session 2004–05, HL Paper 84)—*Joint Report with Sub-Committee F (Home Affairs)*

The Future Status of the EU Charter of Fundamental Rights (6th Report of Session 2002–03, HL Paper 48)

EU Charter of Fundamental Rights (8th Report of Session 1999–2000, HL Paper 67)

### Recent Report from Sub-Committee G (Social Policy and Consumer Affairs)

Proposed European Institute for Gender Equality (24th Report of Session 2005–06, HL Paper 119)

### Recent Reports from the Joint Committee on Human Rights

Commission for Equality and Human Rights: The Government's White Paper (16th Report of Session 2003–04, HL Paper 156, HC Paper 998)

Commission for Equality and Human Rights: Structure, Functions and Powers (11th Report of Session 2003–04, HL Paper 78, HC Paper 536)

The case for a human rights commission (6th Report of Session 2002–03, HL Paper 67–I and II, HC Paper 489–I and II)

## APPENDIX 4: THE COMMISSION PROPOSALS

### BOX 1

#### A summary of the main provisions

	Fundamental Rights Agency proposal	Gender Equality Institute proposal
<b>Legal base</b>	Article 308 EC  Articles 30, 31 and 34(2)(c) TEU	Articles 13(2) and 141(3) EC Treaty.
<b>Legislative procedure</b>	Consultation and unanimity	Co-decision and qualified majority voting.
<b>Objective</b>	<u>In relation to the implementation of EU law:</u>  To provide the Union institutions and relevant authorities of the Member States with assistance and expertise relating to fundamental rights in order to support them when they take measures to respect fully fundamental rights.	To assist in the fight against discrimination based on sex, to promote gender equality and to raise the profile of these issues among EU citizens.
<b>Main tasks</b>	To produce the necessary objective and reliable data and information, comparable at European level, as well as methodological tools.  To formulate assessed opinions and the basis of the data.  To promote the visibility of fundamental rights through the development of awareness raising and dissemination of information activities, including the creation of a documentation centre.	To collect, record, analyse and disseminate information including results from research conducted by Member States, NGOs etc.  To improve comparability, objectivity and reliability of data.  To develop tools to support better monitoring of the integration of gender equality in all EU policies.  To carry out surveys.  To organise conferences etc and set up documentation resources accessible to the public.
<b>Remit</b>	To look at fundamental rights in the EU and the Member States when they are implementing Community law.	To carry out its tasks within the competencies of the Community.  Participation will be open to

	<p>Extends to candidate and potential candidate countries which choose to participate in the FRA.</p> <p>Commission may ask FRA to submit information and analysis on third countries with which the Community has concluded, or opened or plans to open negotiations for, association agreements/agreements containing human rights clauses.</p> <p>Article 7 procedure involvement but only on request by the Council.</p>	<p>countries which have concluded agreements with the EC by virtue of which they have adopted and applied Community legislation in the gender equality field.</p>
<p><b>Management structure</b></p>	<p><i>Management Board</i></p> <p>One independent expert appointed by each Member State, by the Council of Europe and by the European Parliament and two representatives of the Commission (29 in total).</p> <p>Voting rights of Council of Europe are limited; cannot vote on institutional matters.</p> <p>Director of the European Institute for Gender Equality may attend Management Board meetings as an observer.</p> <p><i>Executive Board</i></p> <p>Chairperson and Vice Chairperson of the Management Board and two Commission representatives.</p> <p>Director to take part without voting rights.</p> <p><i>Director</i></p> <p><i>Fundamental Rights Forum</i></p>	<p><u>Commission proposal</u></p> <p><i>Management Board</i></p> <p>Six representatives appointed by the Commission, six representatives appointed by the Council and a further three representatives appointed by the Commission (with no voting rights) representing appropriate NGOs, employers' organisations and workers' organisations respectively (15 in total).</p> <p>Director of the Fundamental Rights Agency (and some other bodies) may attend as observers.</p> <p><i>Director</i></p> <p><i>Advisory Forum</i></p> <p><u>Council proposal</u></p> <p><i>Management Board</i></p> <p>One representative per Member State (25 in total)</p> <p><i>Executive Bureau</i></p> <p>Smaller than management board but composition not specified.</p>

		<p><i>Director</i></p> <p><u>Parliament proposal</u></p> <p><i>Management Board</i></p> <p>Nine representatives appointed by the Council (from a list prepared by the Commission) after consultation with the Parliament, one representative of the Commission and a further three representatives appointed by the Commission (with no voting rights) representing appropriate NGOs, employers' organisations and workers' organisations respectively (13 in total).</p> <p><i>Advisory Forum</i></p> <p><i>Director</i></p>
<b>Budget</b>	<p>2007–2013: growing budget from 16M euro to 29M euro.</p> <p>Funded by Commission subsidy, payment for services rendered and voluntary contributions.</p>	<p>2007–2013: growing budget from 6.5M euro to 8.5M euro.</p> <p>Budget neutral.</p>
<b>Staffing</b>	<p>From 52 in 2007 to 100 in 2013.</p>	<p>From 15 to 30.</p>
<b>Miscellaneous</b>	<p>Has legal personality.</p> <p>Will legally succeed the EUMC.</p> <p>Will have its seat in Vienna.</p>	<p>Has legal personality.</p> <p>Seat to be decided.</p>



# Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE E)

WEDNESDAY 1 FEBRUARY 2006

---

Present	Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L	Lucas, L Neill of Bladen, L Norton of Louth, L
---------	---	--

---

## Examination of Witnesses

Witnesses: MR ALVARO GIL-ROBLES, Commissioner for Human Rights, Council of Europe, and MR JOHN DALHUISEN, Special Adviser, examined.

---

**Q1 Chairman:** Commissioner, can I start by welcoming you formally on behalf of the Committee. We are enormously grateful to you for coming all the way from Strasbourg. We know how busy a schedule you have. We also know you have a deadline for your flight home and you have to leave at 5.20. We are live and there will be a transcript which will be sent to you. You have already had a list of the areas of questioning that we want to put to you. We know that you are the Commissioner for Human Rights of the Council of Europe. You are the first Commissioner, appointed in 1999 and therefore have been there for some six or seven years. Can we first ask you to tell us what you consider the Council of Europe's main function is in the field of human rights and your own role as Commissioner as part of that?

*Mr Gil-Robles:* (Through an interpreter) First of all, I would like to thank you for the invitation to join you here today. It is a great honour for me. I am very happy to be here with you to answer your questions. Secondly, I would like to apologise for my very poor English. I would not want to destroy Shakespeare's language. I therefore apologise for not speaking English today. I am guilty on this matter. I have been Commissioner for six and a half years. In two months my mandate will come to an end and I have a certain vision about past experience. To me, the Council of Europe should fulfil three main functions. The first one is the creation of what I call the international legal framework in terms of human rights. This is absolutely essential. It is the main, large organisation specialising in this matter, being able to discuss in great detail the framework, treaties and international provisions in terms of human rights. Secondly, to me, it is the guardian of treaties in terms of human rights. Not only does it create the provisions but it makes sure that these provisions are complied with, through the Parliamentary Assembly, the Committee of Ministers, ECRI, the CPT, the various Commissions and the Court, of

course, which is the main element and very essential in terms of respecting our treaties and, more recently, the Commissioner who is doing work on the ground. The third essential function would be maybe to help countries to make sure that this legal framework becomes a reality in every single country in their legislation and in the path towards democracy. I have seen a huge amount of work carried out by the Council of Europe in eastern countries, transforming an authoritarian mentality into a more democratic way of doing things, changing the judiciary, the police and the army. This is hugely important. It is very technical work which is carried out by the Council of Europe. It is not visible very often but it is essential. Those are the three main functions which justify the existence of the Council of Europe and its future work. Given the real democratic deficit that we are facing in many countries and the nature of many of the decisions taken in Europe, I think there is a huge amount that still needs to be done within the Council of Europe in this field. I hope that this has answered the first part of your question. Regarding the Commissioner's role it is difficult because it is always difficult to speak about yourself. The Commissioner has three main functions too. On the one hand, the Commissioner has to promote human rights in Europe, which is something that the Council of Europe has done in the past. It is nothing new. We work with NGOs, Ombudsmen and various organisations defending human rights. For example, in two weeks, in Russia I will be holding a final meeting with religious leaders. Discussions throughout a series of meetings have dealt with religion and human rights, with a main, fundamental discussion to try and create a training institution for teachers dealing with religious education in Europe. It is the cultural basis of religions that we will be looking at. The churches have accepted this principle with the Commissioner in the past when discussing this. The second field of action is visits to countries to make sure that the

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

Council of Europe's Conventions are applied because in my mandate it is said that the Commissioner has to monitor the effective respect for human rights. This is very important legally. It is not just theory; it is very practical. Our duty therefore consists of visiting countries, looking at the work of the police, for example, and the governments have to assist us in this. I decided personally that it was very important to work on the ground and also go out and consult with authorities and look at what they are doing. The third area is the opinions and recommendations in cases where there are serious problems in countries that do not comply with international treaties, the Convention or one of the protocols, which is a request that we see frequently. There is a fourth aspect that, to be frank, I had not really planned to discuss here but it just occurred to me. It is dealing with crises where the Commissioner has to step in in a major crisis such as Georgia. For example, in the crisis in Ajaria, I spent 11 hours negotiating with Mr Abashidze to convince him to step down from power before the arrival of Georgian troops. When the dictator shut down schools we managed to persuade him not to. With Spain, we had the problem of the Basques. We had Chechnya also. The Commissioner does additional work in relation to that of the Council of Europe. The Commissioner is independently elected and has a direct dialogue with governments. The opinions are those of the Commissioner, not the Council of Europe, before the Council of Ministers, before each individual country's government and before the general public. This is the Commissioner's responsibility, his strength, because the Commissioner can negotiate directly with governments.

**Q2 Chairman:** How large a staff have you as the Commissioner, roughly?

*Mr Gil-Robles:* I am very happy to be able to inform you that the Commissioner's office includes exactly 10 people. Only four belong to the Council of Europe staff. The other people are sent by various Member States negotiated with Finland, Spain and the UK, which has made it possible for John to be with me today.

**Q3 Chairman:** I only ask that because I had the advantage of reading your very full report of June of last year on the situation in the United Kingdom following your visit here for something under a week in November 2004. I wondered how many Member States in the Council of Europe you are able to visit in a year and produce such comprehensive reports indicating how matters stand across a wide spectrum of institutions, criminal law, the police, prisons and so forth. How many such visits roughly can you make a year?

*Mr Gil-Robles:* A total of 34 countries by the end of my mandate. The last report will be the French one in two weeks. It is not an easy report on France. You will hear about it a great deal, I think. To draft the report in Russia I had to travel for 25 days from the Pacific to Moscow, from Siberia to the Volga. The principle that we apply is that I never speak about something that I have not seen with my own eyes. When I say to a government, "This is the situation" it is because I have seen it myself and I have talked to various people. I always say that the Commissioner's reports do not cover all issues in a particular country. I mention the most important issues with a strictly professional approach, which is the Commissioner and his teams working together. We never talk about something that is not absolutely certain or established as a certainty. I might feel like saying certain things at times but I cannot put them on paper because I do not have any evidence to support my opinions. I think it is very important to only say what you are certain about. Thousands of kilometres are covered on these visits. That is the only way of working, as far as I am concerned.

**Q4 Chairman:** It seemed to me to some extent it might help us see to what extent there may or may not be an overlap between the work that you undertake and that which it is proposed this new Agency will undertake. Can we move on to the network of independent experts on fundamental rights which, as I understand it, came into being in about 2002? To what extent does their work overlap with yours or with the Council of Europe's more generally?

*Mr Gil-Robles:* Frankly, I do not think there is an overlap between the two. It is a job that is very good technically, very well done by real experts, but it is not something that overlaps with our work. It is complementary. It is a very interesting task but it does not get in the way of what we are doing or what the Council of Europe is doing. If in the future the Agency was created I think the group of experts, however, should be working with the Agency and within the Agency. That would be logical but, to me, so far this has not been a problem.

**Q5 Chairman:** They should be incorporated into any new Fundamental Rights Agency, do you think?

*Mr Gil-Robles:* I think they should be. It would make sense. You cannot do technical work with this network of experts and have the same thing done within the Agency. These things should be done jointly.

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

**Q6 Chairman:** Do you support the proposal to bring into being this new Fundamental Rights Agency and do you think it will usefully complement the existing protections of human rights within the European Union?

*Mr Gil-Robles:* In all honesty, I have certain doubts on the mission of this Agency, or I did initially. Today, with my experience and my perspective, I think the idea of such an Agency is not a bad thing for the European Union. There is a legal space in the EU which is not accessible to the Council of Europe. If we manage to create a useful instrument to give the EU the tools for dealing with human rights with objective parameters, this will be very useful. Unfortunately today, the Constitution has not been approved and the relations between the Union and the Council of Europe remain unclear. If there is such a vacuum, the Agency would indeed carry out a very important task. We have to be in favour of this and support its creation. What is important however is that this Agency brings something new and useful to the work of the Union, something effective without being a competitor of the Council of Europe. That would be a mistake. The various functions have to be very well coordinated and complement each other without competition. That is very important. If we manage to do it properly, I think the Agency has a role because ensuring the human rights compatibility of the Union's legal provisions is not something that we can control. Sometimes human rights and democratic values fall into oblivion. We can see that in Europe and in Brussels. If we were able to include those aspects in our work, this would be very useful as long as it dovetails effectively with the functions and competencies of the Council of Europe to avoid overlaps. It is also to do with the confidence that we have in the institutions. In my experience, working with the Union was very useful. I never had any problems working with the various Commissioners. Every time I wished to discuss a report of mine, or some other issue, there was never a problem. We can talk about it later if you wish.

**Q7 Chairman:** Would you hope that the Agency's interest in human rights would be confined to the scope of Community law?

*Mr Gil-Robles:* That is an important question. Should the Agency be restricted to dealing with Community law and the enforcement of Community law amongst Member States or should the Agency look at problems in accession countries or third countries when those third countries have agreements with the Union? In my view, the Agency fundamentally should concentrate on Community law and its enforcement, but the Agency has to be a useful instrument for the Union. If the EU has relationships with accession countries, candidate

countries, the Agency should be in a position to provide an opinion to the Union to help define its own position towards those third countries and accession countries, for people who want to join the EU. The Union's position in third countries is very important when it comes to human rights. I have seen how important the EU's position was in Russia and the Caucasus in terms of human rights. I was able to work with the EU to introduce in the Caucasus elements of human rights in the discussions between them and the Russians. Thanks to the EU's programme, we were able to organise training sessions, to create legal laboratories for people who had disappeared, to work with the police, very important tasks. If that is the EU's policy, the Agency could have that function which is very useful, but this has to be done in co-ordination with the Council of Europe as well. In my opinion, the Council has huge experience in dealing with those countries and the Agency therefore should include that experience. If I understand correctly what you ask me, the Agency has to be working with the whole legal framework, not only the European Convention on Human Rights and the Charter, but with all texts currently in existence in the field of human rights. It should not ignore the context or the interpretation of the Convention by the Strasbourg court and the Luxembourg court. It is within this broader context that the Agency has to define its opinions when dealing with the Union. I hope I have made myself clear.

**Q8 Lord Lucas:** Is there any precedent for the European Union acting in such a manner with the Council of Europe? Is there a pattern of co-operation that exists now that would serve as a pattern for the sort of co-operation you would like to see between the Fundamental Rights Agency and your successor?

*Mr Gil-Robles:* I can speak about my own experience. The Council of Europe has a number of agreements with the Union and the Union provides subsidies and grants for the work of the Council of Europe to a large extent. This is normal co-operation. The Council of Europe does not have a lot of money but the Union is rich so the Union supports the Council of Europe. On the other hand, in the past, the Union has asked the Commissioner for help. During the enlargement of the Union, the Commissioner for Enlargement asked me personally if I could provide a report on the 10 candidate countries and I visited those 10 countries. I drafted a report for the Council of Europe and the Union used the Commissioner's report in those discussions. The same applied in the Caucasus, where I worked directly with the Union. In my view, the Commissioner should be working very closely with

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

all international partners, the International Committee of the Red Cross, the High Commissioner for Refugees, the European Union. This is essential. Information should not be hoarded by any particular individual. It should be shared and we should pursue common objectives. Regularly, for example, I spoke to Commissioner Patten, the new Commissioner Mrs. Ferrero-Wladner, to Mr Vittorino, at the time as well, and Mr. Solana. Every time a particular human rights issue is of interest to us, I always talk to the Union to establish co-operation between us. This has worked very well. Personally, I am not afraid of dealing with questions of competence. We have to be very clear. We have to join forces as much as possible without being restricted by those issues of competence. I can assure you that there is good co-operation between the Council and the Union, between the Commissioner and the Union. This works perfectly well and this is something that we do on a daily basis. The programme promoting the regional Ombudsman institution in Russia launched by the Commissioner is a programme supported financially by the Union. I suggested this programme to the Union. They said, "Of course." When we want to do some work, we find a way of doing it.

**Q9 Lord Neill of Bladen:** Could I ask you a question about a statement you made a few minutes ago, where you referred to some investigations which are carried out by you and your colleagues in relation to candidate countries and third countries? One of the critics has said, about the proposal that we are now considering, great rigour is applied to the candidate countries. They are asked to meet a high standard in relation to human rights but, so far as the countries which are already within the Union, there is no enforcement mechanism and there is no zeal displayed by anybody to ensure that appropriate standards are being observed. In your view is that a correct vision of the distinction between the candidate countries and their treatment and existing Member States?

*Mr Gil-Robles:* I do not really want to speak about the European Union's point of view. I am not the European Union. I am speaking as a Commissioner of the Council of Europe and it is also my strictly personal opinion here. I think it is normal to ask candidate countries to meet some minimum standards in order to be part of a group of countries which uphold some values which belong to them. Some countries which want to be part of the European Union have gone through changes which they would not have gone through had they not been candidate countries. We have greatly helped the people of those countries in order for them to recover a state of democracy much more quickly than if they were not candidate countries. You have

said something that is very true. We do tend to look at what happens outside our borders. We do not really see what happens in our traditional democracies on a day to day basis. It really does concern me greatly because we think that democracy is a given. It is not a problem. We realise today that one has to face new problems and one is confronted with very serious problems. Our reactions are not very good when we look at the issues of immigration, of minorities, freedom of expression. We see that our responses are not exactly what they should be. When we look at the fight against terrorism we may not take the right measures. It may not be the right line of action, so it is right to have this type of reflection. It is true that in each country there are control mechanisms. We have courts, tribunals and ombudsmen in lots of countries, but within the European Union there is also the avenue of human rights, not only the Charter. The Charter exists but is not legally binding and human rights must be applied when Directives are drafted and when policies within the European Union are decided. It is not happening today. Today there is the Council of Europe, there are national controls, but they do not exist in the European Union. There is a vacuum and a void here which this Agency could fill but I do not think countries should be treated differently. The same standards should be applied to all countries.

**Q10 Chairman:** This gap that you say exists and could be filled by the Fundamental Rights Agency I understood you to say is in relation to European legislative proposals simply within the Union, and you are concerned that they do not already take sufficient account of fundamental human rights. That would be a function quite distinct from the role played by the Council of Europe and your role in monitoring human rights compliance across the Member States. Is that right?

*Mr Gil-Robles:* Yes. Today, since the Union is not part of the Council of Europe, controls are not carried out. It is beyond the jurisdiction of the European Court of Human Rights. As a Commissioner, I cannot monitor the decisions taken at the level of the Union in terms of human rights but I can go to a country and say that there are things which are not quite right. I cannot formally say to Brussels that things are not quite right and the Council of Europe cannot do this either. Within this framework and this context, the Agency has a point of reference, not as a monitoring agency or an inspection agency. This is not what we are talking about. I think each country has its own mechanisms for that and it is up to each country to use their own mechanisms. This Agency would be a major information tool for the Commission, for the Council of Ministers, for the Parliament, which

---

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

---

would give basic information for the elaboration of European policy in terms of human rights. I do not think this is within the scope of the political decision-making of the Union at the moment. There is no way to do this. There is something for racism and xenophobia, for example, but not on this. If we manage to create this Agency, it would be a very useful tool. It would not be a duplication of what the Council does. It would be an addition. Within the building of this Agency, the presence of the Council of Europe should be very much manifest. Otherwise, its function will be diluted. The presence of the Council of Europe must be very real within the decisions of the Agency with agreements which would take account of all the experience of the Council of Europe, working together. We should not think of this Agency as a substitution to the Council of Europe because that would be negative. I think this Agency should be an addition which would encompass the wealth of information of the Council of Europe for the benefit of the whole of the Union. In terms of competencies, we really must define in the statutes the very precise role and function of everybody.

**Q11 Chairman:** You will have read Mr Van der Linden's letter of 20 January in response to the Committee's call for evidence. You have seen his views expressed on behalf of the Council of Europe. He is concerned and, to some extent, sceptical about the proposed role and worried about overlap, competition, the weakening of the pre-eminence of the Council of Europe and the European Court of Human Rights. Do you share those concerns or do you merely share his anxiety to be sufficiently clear in the precise role that the Agency is to play if it is brought into being?

*Mr Gil-Robles:* I understand perfectly President Van der Linden's position. I think his concern is pretty logical and understandable because he is saying one must not create institutions which will do the same as the Council of Europe already does. We must not create institutions which will be in competition with the Council of Europe. I totally agree with him because it is absolutely logical. Of course one must not create organisations to do things that are already done by other organisations. That is why I insist greatly upon the main objective of this Agency. Someone asked me the same question a few days ago and I said, "In the fight for human rights we need everybody and everything". I am not afraid of the creation of an Agency but, as Mr Van der Linden said, we must clarify each and every function and introduce elements which will lead to synergy and not a dilution or dispersion of tasks. Within the context of the European Union creating an awareness of human rights is absolutely fundamental because within the European Union in

Brussels this awareness is lacking. Democratic values are missing. Economic values are there broadly represented but on top of the *realpolitik* I think there should be a policy in terms of human rights. The European Parliament does give opinions on this, as does the Commission from time to time. If they both give opinions, of course it is positive, very good and it is necessary. The problem lies with the relationship with third countries. There we need to find some sort of mechanism of co-operation. I can speak about my own experience. I have worked with the OSCE, for example, and talked with commissioners in those countries. I would ask how I could help in certain countries and I would provide information and opinions. I do the same in Geneva with the High Commissioner for Human Rights. The idea is not to create little fields and scopes for everybody. We need to gather all efforts for a common objective. Human rights must not just be words for people; they must become a reality. Within the framework of my fight, the more people I have on my side the happier I am but of course it is a personal opinion which I am formulating. I did communicate this to Mr Van der Linden through a personal letter yesterday because I thought it was very important to give him my own opinion. That is the opinion which I am defending before you today. We must not be afraid. We must make progress. In Spanish, we say that the path is made by walking. You travel by walking and we must carry on walking.

**Q12 Chairman:** The Council of Bars and Law Societies in Europe has proposed that the main role of the Agency should be to promote human rights in the decision and policy making of the Union and advising therefore at the early stage, the pre-legislative stage. As I understand it, that is to some extent your view too. It is an advisory role at an early stage rather than a monitoring or enforcement role. In connection with the advisory role they gather information, they research, they assemble statistics and an overall knowledge of the problems across the Union and feed that into the decision making process. Is that how you see it essentially?

*Mr Gil-Robles:* Yes. It is part of the activities of the Agency, regrouping and collecting this information and making it available to the main people who are responsible for legislation in the Union, but also to avail the states of this information because it must also be communicated to the states. States can ask for the Agency's opinion. It is also important for the Agency to rely on the Member States' co-operation. Member States should be able to give the necessary information to the Agency. The Agency is an instrument which is there to serve the Member States. It is not against the Member States. That is important. The Agency will gather information and

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

the necessary elements for policy making and distribute it to the Member States. For me, that is a very important role.

**Q13 Chairman:** JUSTICE, a body in this country who are giving evidence to us next week, have suggested that the monitoring of Charter rights by the Agency would complement the monitoring of ECHR Convention rights by the Council. Do you see that as the way ahead too? Do you agree with that? Should the Agency simply confine itself to the Charter and leave aside the ordinary Convention rights as it carries out its tasks?

*Mr Gil-Robles:* If the Charter exists, it is because the Convention exists. This is the culmination of 50 years' work so we cannot leave aside the Convention. The Agency must take account of the Convention and all the protocols which are around those organisations and also the interpretation by the Court of the Convention. It is all linked. That is what constitutes the wealth of the Court in Strasbourg. To me, it is very clear.

**Q14 Chairman:** Amongst President Van der Linden's concerns was that the Council of Europe was not going to be sufficiently represented on the body of the Agency. I am looking particularly at the points he was making on the details of the proposed Agency structure. He thought that should be strengthened in favour of further representations by the Council. Would you agree with that?

*Mr Gil-Robles:* On this particular point, I totally agree with Mr Van der Linden. The Agency must incorporate the Council in a much more operative way, particularly on the management board. That must be very clear but I have one doubt as to the structure of this Agency. This Agency must be independent. That is absolutely fundamental. The presence of the Commission is too strong. It is the Commission which will decide the work programme of the Agency. Why? The Commission will probably say in future, "You can work on these particular rights and not on others." It is very difficult. It is in contradiction with the independent status of the Agency. The Agency should draft its own work programme and present it to the Commission and Parliament. This is real independence. On the executive board, for example, there are two representatives of the management board and two representatives from the Commission. Why two representatives from the Commission? One is fine, and another from the Council of Europe; that would be more sensible. The role of the Director should be stronger. These are very clear elements which also show that within the Commission there is some sort of fear of this Agency. One is trying to control this Agency somehow. This Agency must be useful. It must not be dead in the water. It is not something

which should be controlled and monitored by the Commission, by the Parliament or by the Council. It should be independent and accountable. That is obviously a given. I agree with Mr Van der Linden that the presence of the Commission should be stronger.

**Q15 Chairman:** If the Commission is to be over-represented and the Council of Europe under-represented on the proposal as it stands, you would seek to even that up?

*Mr Gil-Robles:* Absolutely.

**Q16 Chairman:** The new Agency is to subsume the existing European Monitoring Centre on Racism and Xenophobia and to expand that into wider human rights concerns; and yet, at the same time as it is proposed to bring this into being, it is proposed to bring a quite separate body, a new European Institute for Gender Equality, into being. Do you think that is a good idea, to have now a second body concerned with some other closely related aspect of fundamental human rights?

*Mr Gil-Robles:* There is some contradiction. If the Agency wants to integrate the European Monitoring Centre on Racism and Xenophobia, yes, it is logical but in that case we could also incorporate as an essential part of the function of the Agency the fight for equality, because it is a major objective in terms of human rights today. It is true that there are lots of political and image issues here, but I am a very operative person. Instead of separating actions, we should concentrate things. The Agency could also deal with racism, xenophobia, first and second generation human rights and also gender equality. To me, it is a logical aspect of the fight for human rights. Operatively, it would be better to do all of this, but I am very cautious here because it is a very delicate political issue. I think the Agency can certainly be a specialist in terms of gender equality. Why not? It can be very active in terms of gender equality.

**Q17 Chairman:** How has the existing Monitoring Centre on Racism and Xenophobia worked in harmony with the Council of Europe because the Council of Europe and the European Convention on Human Rights are equally directed against racism and xenophobia. Has there been any overlap? Has there been any weakening of the Council of Europe's role because of that separate monitoring centre?

*Mr Gil-Robles:* No. The Council of Europe has ECRI, which does fantastic work. ECRI has never been in conflict with the Vienna centre. I organise seminars in Albania and other countries on issues of racism and xenophobia. I have invited the Vienna centre. We co-operate and work together very well.

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

ECRI is the major organisation in terms of the fight against racism and xenophobia and, to my knowledge, there has not been any negative influence or conflict between the Strasbourg vision and the Vienna vision. There is a perfect synergy between the two.

**Q18 Chairman:** If they worked harmoniously and non-competitively together and complemented each other's function without there being any formal structure such as you contemplate in respect of the relations between the new Agency and the Council of Europe, why cannot one look to equal success when the Fundamental Rights Agency, which is after all an extension of the existing monitoring centre, comes into being?

*Mr Gil-Robles:* I think it is a different matter because racism and xenophobia are two specific issues. The Agency will take on a greater role. We will be talking about all the structures of human rights. We are talking about all fundamental rights, all human rights and have a direct influence on the legislation and policy making of the European Union. Its function will be different from what the Agency can do today. Within ECRI you have the Council of Europe and the board of directors. The Agency does have a space. It will have to have a lot of means in order to become a major instrument in future. It should be able to use the Council of Europe as a decisive instrument so you would have the Agency and the Council of Europe. If they both work properly and very well, it will be a great strength in the fight for human rights because the European Union as it stands does assume its own responsibility and participate actively in the battle. It is not just something from the Council of Europe that exists. The European Union is a responsible, major player in terms of the fight for human rights but it must use the Council of Europe, its expertise, its history and its competence, in order to do the work. This is what must be clearly defined. As the Secretary-General of the Council of Europe and Mr Van der Linden say, all of this is not properly defined. If we can introduce these elements of good co-ordination, the synergy would be very positive. I am absolutely certain of it. I am by nature an optimist. When I arrived as a Commissioner, I had 46 states, 900 million people to deal with and three civil servants. We still managed to do something. We need to look ahead and one must not be afraid.

**Q19 Chairman:** Ought you, in your capacity as Commissioner for Human Rights, to be on the executive board of the new Agency, do you think?

*Mr Gil-Robles:* My successor should be. I think it would be a very good thing because the Commissioner has an additional function which the Agency must not have. The Agency must not be a

judge or a prosecutor. The Agency must simply gather information but the Commissioner can go out in the field, to countries and have a direct dialogue with various governments of the states that he or she visits. Good co-ordination between the Agency and the Commissioner would be a great strength in Europe for human rights. That is why the Commissioner must belong to the structure and be very clearly defined within the Agency. This is how I understand things. I would have liked an Agency to have existed in Europe when I started my work. It would have been wonderful and an immense support to the work of the Commissioner. We could have drafted work programmes, common projects and the means to carry them out. That is why I speak of my personal experience. My difficulty in Europe was always that I was working on my own. I had no choice. To have within the Union an institutional structure which could help is very important. When the Agency is created, the European Union will no longer be able to say, "We do not count in terms of human rights" because one can turn to an organisation which will give an opinion.

**Q20 Chairman:** The existing Monitoring Centre on Racism and Xenophobia has a staff of 37. The new Agency is proposed to start in January 2007 at that sort of size but to grow to 100 within about five years. If it does that, do you think there is any risk that it will overtake the role of the Council of Europe in the human rights field and submerge it?

*Mr Gil-Robles:* No. This is a little bit of fantasy within the European Union, this type of figure. The Agency will start to set up slowly and manage itself. We are not talking about having 100 people in five years' time. It probably will only need 40 or 50 people. Why 100 people? One might be able to do the work with 30, 40 or 50 people just as well. I do not think this is a significant figure. I think it illustrates these grand figures uttered by the European Union. I do not like that. We need the necessary amount of people and no more in order to do efficient work. Above all, I think we really need to work with individual countries and their national structures. The Agency must not be a substitute for the structures in each country. It must work with those structures. Why have 100 civil servants? That is my personal opinion again.

**Q21 Lord Norton of Louth:** To pick up on the last point you made about the role of national institutions, quite by chance I have just completed research on the role of national parliaments of the Member States and the Council of Europe in the protection of human rights and there are some quite interesting patterns there. I wondered how you

---

1 February 2006

Mr Alvaro Gil-Robles and Mr John Dalhuisen

---

would envisage national parliaments fitting into this particular process.

*Mr Gil-Robles:* It is absolutely essential because we must take account of national parliaments and their sensitivity. We must work with the human rights commissions which already exist. If they do not exist they must be created with ombudsmen within the parliament, with national institutions for human rights. We must work from the bottom up and not the other way round. In each country we need to do work which does not provoke antagonism in the fight for human rights. The Agency must not substitute work at the national level. National

parliaments are absolutely essential. They are a fundamental element of the creation of this Agency.

**Q22 Chairman:** It remains only to thank you again for coming. It has been enormously helpful to us. We are very grateful. We wish you a good flight and we thank you and Mr Dalhuisen for coming and giving us such a splendid start to this inquiry.

*Mr Gil-Robles:* Thank you very much. I am terribly sorry that I have to catch a plane because it has been a privilege being with you and I am really sorry to have to leave. If I have been useful, if my opinion has been useful, then I am glad. If you need me, I am entirely at your disposal.

---



---

WEDNESDAY 8 FEBRUARY 2006

---

Present	Borrie, L Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L	Goodhart, L Lucas, L Neill of Bladen, L
---------	--	---

---

### Memorandum by JUSTICE

#### INTRODUCTION

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE welcomes the Sub-Committee's inquiry into the proposed creation of the Fundamental Rights Agency ("FRA"). JUSTICE responded to the European Commission's consultation on the proposed creation of the FRA in December 1994.

Q1—*Is the creation of a European Union agency dealing with fundamental rights a useful initiative? Can you provide any examples of where the FRA might fill a gap in fundamental rights protection in the European Union?*

3. Yes, JUSTICE believes that the establishment of an EU agency dealing with fundamental rights is a useful initiative for several reasons.
4. First, the EU currently lacks a body responsible for monitoring the protection of fundamental rights within the EU. Instead, EU institutions rely on reports drawn up by the Council of Europe, the Network of Independent Experts, the UN, and human rights NGOs. Those produced by official intergovernmental bodies typically focus on a particular international or regional human rights instrument (eg the European Convention on Human Rights or the International Covenant on Civil and Political Rights). Those produced by nongovernmental bodies, by contrast, may reflect shifting internal priorities and are also particularly vulnerable to resource limitations. The Network of Independent Experts established by the Commission reports on fundamental rights in the Union and Member States but lacks a monitoring capacity. Although the EU Charter of Fundamental Rights and the ECHR are closely linked,<sup>1</sup> the Charter also contains many rights in addition to those found in the ECHR. It also contains several rights not expressed in any other international human rights instrument.<sup>2</sup> If the reason for the creation of the Charter was the need to "strengthen the protection of fundamental rights" in the EU,<sup>3</sup> then it seems less than satisfactory to rely on the piecemeal monitoring of rights drawn from other instruments. While duplication should always be avoided, monitoring of Charter rights by the FRA would complement the monitoring of Convention rights carried out by the Council of Europe.
5. Secondly, even where EU institutions and member states gather information on fundamental rights, there remains a certain lack of transparency. A useful role for the FRA would be promoting access and availability of such information to EU inhabitants.
6. Thirdly, in view of the continuing lack of independent legislative scrutiny of EU measures in the area of fundamental rights, we consider that it may also be useful for the FRA to perform such scrutiny where appropriate. However, this should not be seen as a substitute for internal scrutiny by either the Commission or the Parliament, but rather a complement to it.

---

<sup>1</sup> See especially Article 52(3) of the Charter: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

<sup>2</sup> See eg the prohibition on reproductive cloning (Article 3(2) of the Charter), the right to protection of personal data (Article 8), freedom of the arts and sciences (Article 13), the freedom to conduct a business (Article 16), the rights of the elderly (Article 25), access to services of global economic interest (Article 36), environmental protection (Article 37), consumer protection (Article 38), the right to good administration (Article 41), the right of access to documents (Article 42), the right of access to an Ombudsman (Article 43), and the right to legal aid (Article 47).

<sup>3</sup> Preamble to the EU Charter.

8 February 2006

7. However, while we support the proposed creation of the FRA, we recognise that the European Monitoring Centre on Racism and Xenophobia (“EUMC”) has played an important role in the fight against racism in the European Union and we are concerned that the creation of the FRA should not operate to reduce this focus on the problems of racism. We note that the *Analysis of Responses to Public Consultation* prepared by the European Policy Evaluation Consortium concluded that:<sup>4</sup>

Respondents (Member States and European Institutions) agreed that the focus and activities of the EUMC should be maintained, not least so as not to give the impression that Unions objectives in the field of fighting racism and xenophobia are abandoned.

Thus we consider racism should remain a priority area for action for the FRA.

Q2—*Should the FRA have a mandate to act outside the boundaries of the Union?*

8. No. In our view, extending the mandate of the FRA beyond the boundaries of the EU would weaken its coherence as a body concerned with the promotion and protection of fundamental rights under Community law. It would lead to unnecessary duplication of the work of other intergovernmental and nongovernmental human rights bodies, which possess greater expertise in international human rights. Nor do we think an exception should be made in respect of countries seeking accession to the EU, on the basis that they would already be members of the Council of Europe in any event.

Q3—*The FRA would be competent to provide assistance and expertise to institutions and bodies of the Community and of the Member States. Do you consider that this would in practice give rise to an overlap between its activities and those of the Council of Europe? What measures might be taken to limit or avoid such overlap?*

9. We recognise the potential for overlap between the activities of the FRA and those of the Council of Europe. We consider that this would be best addressed by rigorous adherence by the FRA to its mandate for protecting rights under Community law. In the event that Community law and Council of Europe measures are coextensive, we consider that the FRA should respect the superior institutional competence of the Council of Europe in these areas.

Q4—*Should the protection of gender rights be separated from other fundamental rights through the creation of two separate agencies? What are the advantages and disadvantages of this approach?*

10. No, we do not believe that separating protection of gender rights from other fundamental rights is either appropriate or necessary. It is unhelpful—both conceptually and in practice—to separate out a particular ground of discrimination from the right to equality in general, and similarly unhelpful to treat a specific right differently from other fundamental rights. As Patricia Hewitt, the then-Secretary for Trade and Industry, noted when announcing the UK government’s proposal to create a new Commission for Equality and Human Rights (“CEHR”):<sup>5</sup>

As individuals, our identities are diverse, complex and multi layered. People don’t see themselves as solely a woman, or black, or gay and neither should our equality organisations.

Indeed, the proposal for a separate gender equality body runs contrary to the general trend at the national level for the amalgamation of existing, single-issue bodies into a single comprehensive agency (see eg the CEHR, the Equality Commission for Northern Ireland, and the Netherlands Equal Treatment Commission). Similarly, although the requirements of Community law currently extend only to establishing bodies in respect of race and gender, the trend among countries without such bodies has been to establish comprehensive agencies (see eg Bulgaria, France, Hungary and Romania). In light of this trend, it seems especially inconsistent to absorb the work of the EUMC within the FRA and then seek to establish a separate body to address gender discrimination.

Q5—*How might the two bodies work together to ensure that overlap is avoided and that cooperation is maximised to improve their effectiveness?*

11. In view of our answer to Q4 above, we have no suggestions to offer in this regard.

<sup>4</sup> EPEC (2005) *Preparatory Study for Impact Assessment and Ex-Ante Evaluation of Fundamental Rights Agency, Analysis of Responses to Public Consultation*, p 10.

<sup>5</sup> Department of Trade and Industry press release, ref P/2003/537, 29 October 2003.

8 February 2006

**Q6**—*Are you aware of the existence of other bodies, at the national, European or international level, which perform activities similar to those which would be carried out by the FRA? How might the FRA affect the work of these bodies?*

12. There are numerous bodies at the national, European and international level whose activities include monitoring the protection of fundamental rights in the EU and/or assessing the impact of potential EU and national measures on the same.

13. As noted above, the Council of Europe institutions are closely engaged in monitoring rights under the ECHR and other Council of Europe instruments. Accordingly, we consider that the FRA's mandate should contain a general provision to the effect that its tasks and activities shall not duplicate the role and functions of Council of Europe institutions and mechanisms operating in the human rights field but rather seek to cooperate with and complement those activities.

14. The FRA should also have regard to the work of national human rights and equalities bodies, such as the equality and human rights commissions in Northern Ireland and the proposed CEHR in the UK; the work of national parliamentary committees, such as the European Union Committee and the Joint Committee on Human Rights; and the work carried out by NGOs, both national and international.

24 January 2006

### Examination of Witness

Witness: DR ERIC METCALFE, JUSTICE, examined.

**Q23 Chairman:** Dr Metcalfe, welcome back to this Committee. You were very helpful with our inquiry last year. I think you then appeared as one of four; today you are on your own and we can concentrate on help from you therefore. You know the situation; we are live and you will get a copy of the transcript and you will have the opportunity to correct and, if appropriate, to add to it. I think you have had a list of the questions about which we want your help. If we can start with the basic question: is there a need for this proposed new Agency, given (and JUSTICE know at least as much about this as anybody else) the large number of bodies of one sort or another, domestic and international, which already concern themselves with human rights issues? Is there still a gap that this proposed new body could valuably fill? Can we perhaps start by asking for your help on that question.

*Dr Metcalfe:* We certainly believe that there is a gap. In our written evidence we talked about a gap in terms of dedicated monitoring of protection of fundamental rights under European Union law. It is absolutely true that there are a great many international bodies, governmental bodies and non-governmental bodies, which are concerned with monitoring human rights, and their jurisdiction includes, if you like, Member States of the European Union and includes coverage of European law, but there is no official body which is dedicated to actually monitoring the effectiveness and protection of fundamental rights in relation to European Union law, and we consider that it is important. If you look first and foremost at the overlap between the Council of Europe institutions and the European Union, it is true that all European Union Member States are members also of the Council of Europe and so there

is coverage of protection of civil and political rights in those jurisdictions. Certainly there is also coverage in terms of the non-governmental organisations which look at those areas but there is no body that is concerned exclusively with the rights which are guaranteed under European Community law, by which I mean the Charter of Fundamental Rights. If we take that as a template of what fundamental rights are in Europe, then there seems to be a gap because no other body is concerned with looking at those rights guaranteed under the Charter. The one which comes closest is the Network of Independent Experts but that is of course not a formal, official body and I would hesitate to say that it comes close to performing the kind of role that the Fundamental Rights Agency ought to.

**Q24 Chairman:** Would you envisage that that body, the Network of Independent Experts would, so to speak, become subsumed within the new Fundamental Rights Agency? How would you see it working?

*Dr Metcalfe:* As I understand it, the proposal is to have independent experts involved in the Fundamental Rights Agency in an advisory or supervisory capacity. It is not entirely clear to me from looking at the current proposal exactly how that would operate, but my understanding is that the Network would at least be subsumed within the Fundamental Rights Agency in some form or another.

**Q25 Lord Goodhart:** Perhaps before I ask a question I should make a declaration that I am one of the Vice Chairmen of the Council of JUSTICE. Dr Metcalfe, do you agree that the role of the Fundamental Rights

8 February 2006

Dr Eric Metcalfe

Agency should be restricted to monitoring the implementation of EU law by the institutions of the EU or by the Member States when applying EU law and should not extend to a general monitoring of human rights in the Member States themselves, which would seem to be well beyond the competences of the EU institutions?

*Dr Metcalfe:* Yes, we are certainly reluctant to endorse a broader remit for the Fundamental Rights Agency, but perhaps slightly broader than the remit that you have just stated. We have suggested in our evidence, and this perhaps links on to a later question, that there may be a role for the Fundamental Rights Agency to play before measures have been implemented to even look at measures as they are being devised, so perhaps a form of legislative scrutiny role. At the same time we would not really want to emphasise that. I think perhaps the thrust of your question seems to be should the Fundamental Rights Agency take a much broader view of protection of human rights in EU Member States, and for myself I would be concerned that that might trespass into areas which are properly the provenance of the Council of Europe, particularly in relation to the monitoring of European Convention rights.

**Q26 Lord Clinton-Davis:** But if the Fundamental Rights Agency takes the view that it is very clear that some action should be taken, and none is taken, what in your view should the FRA do?

*Dr Metcalfe:* Action precisely in respect of what? You mean failure to properly implement a measure in respect of European Union law—

**Q27 Lord Clinton-Davis:** —Enforcement.

*Dr Metcalfe:* I would say in terms of the competence of the Agency, it would also have an advisory capacity, I think is probably the answer to that.

**Q28 Lord Clinton-Davis:** But if the advice which they tender is ignored by the Member States what do you think the FRA should do? Ignore it? Make representations? How would they make representation?

*Dr Metcalfe:* Under Recital 11, it refers to the “right to formulate opinions to the Union institutions and to the Member States without interference with the legislative and judicial procedures established in the Treaty”. I think that probably sets the terms. If its recommendations are made and ignored that is obviously something that should be taken up by the European Union institutions themselves. For instance, if it is a failure to act by the Commission or by a Member State then it would be for the Council or for the Parliament to take appropriate action having regard to the Agency’s recommendations. Similarly, if it is a failure by a Member State to act

then it should be a matter for the Commission to act on the recommendation. One would hope that the recommendations that the Agency makes in these areas would not be overlooked lightly, even if they do not have, if you like, binding force. I would like for the recommendations of an Agency in respect of fundamental rights ideally to have binding force, but I think that is a rather more bolder Agency than—

**Q29 Chairman:** —It will not itself have an enforcement role but it would alert its concerns to the other institutions—the Commission, Parliament and the Council—as may be appropriate?

*Dr Metcalfe:* That is correct.

**Chairman:** I think Lord Borrie has a question.

**Q30 Lord Borrie:** My Lord Chairman, I was a little anxious by Dr Metcalfe’s answer to Lord Goodhart in which he used I think a couple of times the word “broad” as to the role the Agency would have in monitoring. Your organisation has very helpfully in footnote 2, page 2, listed various matters which are within the Charter and therefore within the Charter’s concept of fundamental rights, but not in the European Convention, and some of them to my mind are rather astonishing, for example, environmental rights, consumer rights, prohibition on reproductive cloning, the freedom of arts and sciences, and I am not quite sure what that means but it means something different from individual human rights. I found the whole of that footnote exceedingly useful, but disconcerting, because of the range of things which, especially if the FRA takes a broad view of its monitoring function, it can engage in, stepping on the toes of numerous other bodies both at the EU level, the Council of Europe level and, for that matter, the level of separate Member States.

*Dr Metcalfe:* You are entirely correct, the remit is incredibly broad and the coverage of the Charter is incredibly broad. The purpose of our footnote was to indicate that there are areas that the Charter covers which are not covered by other international instruments in respect of which monitoring is available, and it would be coherent, if you have a Charter which protects fundamental rights in the Union, to have a body that is dedicated to monitoring that. At the same time, I would very much hope and indeed expect the Agency to exercise discretion and judgment when considering its monitoring exercise in such broad areas. For instance, freedom of the arts and the sciences or reproductive cloning. I would not expect for them to have a special person dedicated to those areas necessarily and certainly whoever the Agency appoints to monitor in those areas would have regard to existing work that is being done by the other competent international institutions or European institutions. We are not proposing that

8 February 2006

Dr Eric Metcalfe

they should add on monitoring in all those areas; rather that is something they should have regard to and, if you like, act in a co-ordinating role—perhaps co-ordinating is too strong—to gather relevant monitoring that has been undertaken by other European institutions and international institutions so that one can identify the relevant issues where they appear under each Article. We are not suggesting that they should be monitoring actively in an intensive way in each of those broad areas.

**Q31 Lord Borrie:** But part of the justification for the FRA that you and your organisation are putting forward is that other bodies may have human rights as their concern but the FRA (because the Charter has a much wider range of what are called “fundamental” human rights and obviously other organisations will not be monitoring those matters) will be doing something different, and that is a sort of justification, but what you regard there as a justification worries me because it includes under the head of fundamental rights so many matters which are dubiously there and which have been there now for five or six years.

*Dr Metcalfe:* Well, let us take one right in particular that I mentioned in footnote 2, say, for instance, the rights of the elderly, Article 25. In effect, on monitoring of rights in relation to, say, age discrimination there will be a number of national bodies and European bodies and other Council of Europe bodies which will be gathering information in respect of age discrimination issues throughout the Union, throughout the Member States, but, as yet, there is no European Union document that you can go to and find what is the state of rights under Article 25 of the Charter in the Union at the moment.

**Q32 Lord Borrie:** You picked a good example there because age discrimination is concerned with human rights, the same as sex discrimination or race discrimination, so you have picked an example of something—the rights of the elderly—that would be quite properly regarded as a fundamental right, but there are so many other areas within the scope of the Charter that would seem not to be suitable, and although perhaps it has not mattered very much in practice that these items have been there since the Charter came in, whenever it was, six years ago, it is going to matter a lot more if you have got a busy active, body—the FRA with staff and researchers and so on—and they look at the Charter and they can see those very broad phrases that are used.

*Dr Metcalfe:* Just to build slightly on the point that I made before. I am not suggesting that the Fundamental Rights Agency should be commissioning independent, fact-finding missions in respect of age discrimination throughout the European Union when it is carrying out its role under

its remit. If you think of the Annual Report to which Recital 13 refers, one would expect to find the list in Article 25, but that does not mean that they would necessarily be spending a lot of their resources on doing ground-breaking work in relation to age discrimination. It would perhaps be sufficient to discharge their duty to collate the information that is available in one place so you would be able to have at least a profile of the situation on age discrimination as it currently exists throughout Member States. That in itself would be a useful exercise because that would also help to identify gaps. By having the Charter as a framework you would be able to identify the areas in which information is available and you would perhaps be able to identify areas in which not so much information is available. Again, I think discretion and judgment are key elements here. If I can draw an analogy with national human rights institutions. In principle, they tend to have very broad remits, that is to say protection of human rights in, say, for instance Northern Ireland or Canada or New Zealand. In practical terms they tend to devote the lion’s share of the resources to very specific issues. They have broad remits but at a practical level they have no difficulty assigning priorities to various areas.

**Chairman:** I am so sorry, I did not want to interrupt but I am not sure how much longer we should spend on footnote 2. We had better move on. Lord Goodhart?

**Q33 Lord Goodhart:** Dr Metcalfe, the Charter of Fundamental Rights of course, as I understand it at present, does not have the force of law although it is something that has to be taken into account when considering what are the general principles of human rights recognised by the European Union. Do you think it is right that if it did get the force of law, which it would have done under the Constitution had the Constitution been approved, the enforcement body would have to be the ECJ, so the position then of the Fundamental Rights Agency would be rather like what the role will be of the Equality and Human Rights Commission in this country when the Equality Bill is enacted and comes into force?

*Dr Metcalfe:* Yes, I would agree very much with that assessment. I would see that as a good analogy. I do not see that it would be appropriate for the Agency to be the enforcer of its own decisions, but it would also be important for the Court of Justice to have regard to and place a great deal of weight, one would imagine, upon the recommendations that the Agency have made.

**Q34 Lord Goodhart:** Could I just add one thing which is, as I understand it, the Council of Europe does not now have anything equivalent to the FRA. It has not got any organisation whose responsibility

8 February 2006

Dr Eric Metcalfe

it is to monitor human rights across the Member States. That is dealt with entirely through the Court.

*Dr Metcalfe:* Yes. You do have of course the Commissioner, in my understanding—

**Chairman:** We have already had evidence from Mr Gil-Robles at some length last week. He goes on fact-finding missions.

**Lord Goodhart:** He is EU.

**Q35 Chairman:** No, he is Council of Europe.

*Dr Metcalfe:* Also, particular instruments of the Council of Europe do have their own capacity to monitor rights, for instance the European Committee for the Prevention of Torture, so it is correct, you do not have an analogous body to the Agency but you do have a number of committees set up under specific instruments. Also bear in mind that there is less need for an Agency insofar as you have a binding Convention on Human Rights that is applicable in the domestic law of most of the Member States.

**Q36 Lord Neill of Bladen:** I noted when you were answering Lord Borrie when you were talking about what the Agency was going to do, you referred to Recital 11 which talks about “formulating opinions for the benefit of EU institutions and also Member States”, and that I found reflected in Article 4(1)(d), producing opinions. Below that you have got “publishing thematic reports” at Article 4(1)(g), and I noticed in Article 5 that there is a Multiannual Framework which would say what the programme of work was and at 5(1)(b) you have “determine the thematic areas of the Agency’s activities, always including the fight against racism and xenophobia”. I want to get some feel for how you see this Agency in terms of monitoring. Is it a sort of crusading Agency that goes out with a programme of trying to eliminate what it regards as inappropriate, non-human rights type conduct in individual Member States? Is that what it would do, rather like the Commission in seeing that the basic provisions or the Directives are carried out in Member States? Is that its role?

*Dr Metcalfe:* From my reading of the Articles, the monitoring role is rather a broad one. A very technical meaning of “monitoring” would be the person who stands there and takes notes and keeps track of things. One would imagine with a human rights objective and a protection of fundamental rights remit that it is not just to monitor but that it would be tied to its role of making recommendations as well. So in one sense gathering evidence is one aspect of monitoring the statistical evidence but it would also perhaps involve fact-finding missions in particular areas, and that I think ties more closely with thematic issues because it is a point which has come up in relation to equality and discrimination bodies at the national level. They say that the focus

on particular articles is not always the best way to focus on an issue. If you just wanted to focus on Article 10 rights, or something like that, it might not be the best way to examine issues. A better way might be to focus on particular areas like detention centres, and you may find that detention centres run by the state, in effect, raise a package of rights, some of those concerned with inhuman or degrading treatment but also the rights to privacy and so on. My understanding is that a thematic approach would be to contrast with the Article and rights-based approach and to allow the Agency to focus on areas of human rights compliance and compatibility. There may have been other aspects to your question and I am not quite sure that I answered them all.

**Lord Neill of Bladen:** I think that is sufficient for the moment.

**Q37 Chairman:** It is of course going to be taking over the European Monitoring Centre on Racism and Xenophobia. Do you know how that body sets about its work? Taking a theme, does it examine its application and, if so, is it in a context only of Community law or wider than that?

*Dr Metcalfe:* I am not especially familiar with the European Monitoring Centre. That is in fact something that a colleague of mine deals with.

**Q38 Chairman:** Do you contemplate the Agency operating in essentially protecting rights under Community law and not straying beyond the areas of Community law? Is that right?

*Dr Metcalfe:* Yes, I think that is extremely important because of the abundance of other bodies that deal with rights under other instruments.

**Q39 Chairman:** Is there a danger of duplicating the Convention and the Council of Europe’s remit?

*Dr Metcalfe:* That is a very real concern and I think for this reason the Agency has to be very careful.

**Q40 Chairman:** I think we have probably dealt with question two, the sort of role—you see it as monitoring, advisory, not enforcement, but I think you also see it as performing a legislative scrutiny role. Is that linked with the matter the Clerk calls the improving of EU proposals and legislation which has no in-built monitoring system at the moment? Do you see it fulfilling a role in regard to that before legislation in Brussels?

*Dr Metcalfe:* We would hope so. We think it is an important issue and it is obviously something that might understandably be resisted by those parts of the existing institutions which already have a remit, the Commission perhaps. One would hope that members of the Parliament would support the creation of more scrutiny of human rights as always a good thing. I think a good example is the current

8 February 2006

Dr Eric Metcalfe

move among European Union Member States to agree minimum procedural safeguards for suspects and defendants in criminal proceedings. This is something which is currently under discussion. It is going to be discussed next week in Brussels by the Justice and Home Affairs Council. It seems rather unsatisfactory if you are going to be making measures that have such an important impact on the protection of fundamental rights, and you have a body that is charged with the remit of protecting fundamental rights, that it should not have a voice in some way in the process of making those measures rather than simply commenting on their implementation. One can draw, again, the analogy with national human rights institutions and one has regard to the Paris Principles on national human rights institutions. Those are the UN principles that were agreed in the 1980s. One of the primary roles of national human rights institutions is to contribute not only to the work of the executive but also the work of the legislature and policy-makers in formulating measures, so we would say that this is a useful role.

**Q41 Chairman:** Yes. How do you see the best way of avoiding duplication with the work being done already by the Council of Europe?

*Dr Metcalfe:* We thought the suggestion in Recital 16 of having a bilateral co-operation agreement with the Council of Europe would be an extremely good idea, given that it is by far and away the largest organisation doing work in this area, to make sure that it does not duplicate the work. In general, we do not have any specific recommendations but I would say good lines of communication are extremely important between the bodies to make sure that they are, first and foremost, aware of what the others are doing and to make sure that the Agency does not duplicate the work the existing bodies are already carrying out.

**Q42 Chairman:** I understand that you refer to the Recital but of course the Recital's interests are supposed to be carried forward into the body of the proposal and some of the Articles touch on this. Article 5(1)(e) includes the provision "with a view to avoiding thematic overlap with the remit of (in that instance) Community bodies, offices and agencies"; Article 9 talks about "co-operation" with the Council of Europe. Are you happy with the way these matters are couched? Do you think they adequately guard against the risk of duplication and overlap?

*Dr Metcalfe:* I would not say that this is necessarily the only safeguard. I think part of the difficulty is that it is hard to comment until we have seen something more specific as to the set up of the Agency and how it will run. Again, it much depends on the people who are appointed to staff the Agency, in particular those

in charge of managing it, to determine its practical role, and really one can only hope that they will have the appropriate regard to avoiding duplication, not reinventing the wheel in this area, but we do not see any specific proposals that could be made at the moment that would help to clarify this area.

**Q43 Chairman:** Can you bring to life your concern? Really question five invites you to offer a practical example of where the risk of duplication could arise and how best therefore to avoid it. Have you tried to think through the problem that might develop if this Agency is created?

*Dr Metcalfe:* The examples that we can think of are only the obvious ones, unfortunately. I do not think they are of a great deal of assistance. A straightforward example is torture, the issue I have mentioned before. In practical terms, given that the European Committee on Prevention of Torture is so active in this area in meeting with national bodies and inspection of detention centres, we would certainly hope that the Agency does not spend any time trying to do its own visits to detention centres in respect of protection of fundamental rights. Rather the appropriate thing for the Agency to do in those kinds of situations would, first of all, to be in touch with the Committee on the Prevention of Torture and read its reports. There might be an opportunity for it to ask questions if it feels there are aspects of its own work that are not sufficiently covered, but the kinds of conflict issues that we have in mind are the ones which are very clear-cut. We have difficulty thinking of more ambiguous areas, but we would have thought there was a presumption in the Agency's work that it should always give priority to an existing institution which already conducts work in a particular area. The presumption should always be that the Agency will let that other institution go first. In a way it will develop its role filling in the gaps because in fact this is why we see this as being an important body in the first place, because there are gaps that need to be filled.

**Chairman:** Lord Norton?

**Q44 Lord Norton of Louth:** I really wanted to pick up on the legislative scrutiny point and indeed relate that to the earlier discussion because, clearly, if one goes beyond a monitoring body to one that can make recommendations, it becomes a very different body. What I thought it would be very useful to get some feel for and some clarification of is which bodies are recommendations going to, particularly if you start engaging in legislative monitoring, legislative scrutiny? Who would the recommendations be made to? Are you envisaging they would go to the national level and the national parliaments or, if you like, upwards in terms of the institutions of the EU, or

8 February 2006

Dr Eric Metcalfe

would the recommendations just hang in the ether waiting for someone to pick up on them?

*Dr Metcalfe:* I suppose one would imagine the recommendations should be targeted to the relevant bodies. The difficulty with Community legislation is that there are so many bodies which have a potential to be involved with the making of legislation, but we would certainly have no objection to the Agency making recommendations to the national body, where that was relevant, if a national body is making implementing measures in respect of fundamental rights. I should just add a caveat to that: assuming that the Agency has the technical competence to make recommendations in that area. I would be surprised if it perhaps had the degree of expertise necessary to make detailed recommendations in all the areas in which implementation might take place, but the recitals already go to all the relevant Union institutions so we do not see any limitation.

**Q45 Lord Norton of Louth:** Presumably there would have to be some targeting? If it is a general going through all the institutions, isn't there a danger that none of them will actually pick up on the recommendations?

*Dr Metcalfe:* My instinct is that, first and foremost, its recommendations should be to the Commission and to the Parliament at a secondary level, but I do not really have any strong views on that.

**Q46 Lord Norton of Louth:** Arising from the point that was made earlier about the status of the Charter itself, presumably some recommendations would be harder than others in relation to what is embodied in the Charter?

*Dr Metcalfe:* Yes, I think people would have due regard to the strength of the obligations behind the particular Charter provision.

**Q47 Lord Norton of Louth:** So that would affect the response of a national parliament to a recommendation if it is not actually EU law?

*Dr Metcalfe:* No, but that is something that could be said in respect of any obligation. Obviously greater weight is probably going to be paid to a Charter obligation that is backed by, say for instance, a Convention right than otherwise, particularly a vague obligation such as, say, the freedom of arts and sciences.

**Q48 Chairman:** But every piece of advice or recommendation given and made by the Agency presumably would be a public document, would it not?

*Dr Metcalfe:* Yes.

**Q49 Chairman:** You are not contemplating that they would ever privately advise the Commission or anyone else, or are you?

*Dr Metcalfe:* No.

**Q50 Chairman:** So anything they produce would always be available to the Community as a whole. It might be targeted but it is copied to and available to and able to be accessed by any Member State or anybody else?

*Dr Metcalfe:* Yes, and we would see that as consistent with one of the roles of the Agency, which is to increase the transparency of the Union institutions in respect of the protection of individual rights, because a great deal of the Community's workings while they are public they are also fairly opaque.

**Q51 Chairman:** Turning to question seven, in a way you have touched on this already, but you are not suggesting that the Agency should have regard solely to the Charter? What I understand you to be saying is that insofar as it alone has any remit in respect of the Charter, while certainly it should have regard to the Charter, but with regard to other human rights instruments, notably the Convention, then it has regard to those but only in the context of protecting rights under Community law. Is that how it works?

*Dr Metcalfe:* Yes. I would approach it the other way round, if you like, that the framework of the Charter is built into the remit of the Agency, but because the Charter itself draws upon international instruments and is informed by other international instruments, in particular the Convention on Human Rights, it would almost be incoherent for the Agency to conduct its work in relation to Charter rights without having regard to the relevant jurisprudence of the Council of Europe in relation to the Convention. You do not understand many Charter rights without first knowing what the content is under the European Convention on Human Rights. Similarly, I cannot think of any examples off the top of my head, but several provisions of the Charter are directly informed by the provisions of the International Covenant on Civil and Political Rights. It would obviously be prudent for the Agency to have regard to the jurisprudence of the Human Rights Committee when it considers what the content of a particular right is under Community law, so it would be important for it to have regard to the relevant international human rights instruments, say instruments on human trafficking for instance, but its formal work should be defined by the terms of the Charter.

**Q52 Chairman:** Just before we move on to the geographical scope of the Agency, are you in a position by reference, say, to Article 4, which sets out the tasks which it is intended the Agency should fulfil,



8 February 2006

Dr Eric Metcalfe

to identify which of these you see perhaps as the more crucial, the more central and where the existing gaps are that would be met?

*Dr Metcalfe:* It seems to me from looking over Article 4 that gaps exist in many of the categories that are listed there. In particular, I would say reference to the first two: “record, analyse and disseminate relevant information and data”, because one of the most important functions of the European Monitoring Centre was the data that it gathered and collated.

**Q53 Chairman:** With regard to racism and xenophobia?

*Dr Metcalfe:* Yes, there was a genuine information gap, if you like, in relation to that.

**Q54 Chairman:** It performed that function but obviously across a wider field of racism and xenophobia?

*Dr Metcalfe:* Yes.

**Q55 Chairman:** Right, so it goes out and collects and collates and all the rest of it?

*Dr Metcalfe:* To be fair, that would take up a great deal of the Agency’s work.

**Q56 Chairman:** Yes, I do not doubt it would be quite a—

*Dr Metcalfe:* So in our written evidence we have suggested that the legislative scrutiny function is important but perhaps this is not a priority. I am not sure if this is its most essential priority but we do not disagree with any of the things set out in Article 4. The issue that we had concerns about was the extraterritorial remit, if you like, outside.

**Q57 Chairman:** Shall we then move on to that because, as I understand it, JUSTICE is against any form of extraterritoriality, in other words, you wish to confine the Agency’s operations entirely within the existing EU States?

*Dr Metcalfe:* Yes, I should perhaps qualify that. We do see a potential role—and this is raised by one of your other questions—and it would perhaps have to be a very limited advisory role in relation to where the Commission itself seeks information in relation to an accession country, but we certainly do not think that the Agency should be established on those lines.

**Q58 Chairman:** Sorry, how would that then work? As a candidate country for accession various demands are made of it by whom? The Council, the Commission, by whom?

*Dr Metcalfe:* My understanding is that it is primarily undertaken by the Commission. The Commission undertakes this work.

**Q59 Chairman:** And then?

*Dr Metcalfe:* Should the Commission desire it, we consider the Agency should be able to assist the Commission in any area that the Commission would like assistance on. If it happens that there are particular experts within the Agency who may help in determining whether a particular issue in an accession country or candidate country requires clarification, then we certainly would not oppose the Agency being allowed to work or provide assistance to the Commission in that area, but we think it is extremely important to be clear about the extent of the involvement. The Agency should be able to assist the Commission where the Commission asks for help in that area, but we do not think that the work that is currently undertaken by the Commission should be shifted to the Agency. It is only if the Agency is able to provide assistance.

**Q60 Chairman:** How do you understand the Commission informs itself presently as to the state of human rights in some candidate accession countries?

*Dr Metcalfe:* My understanding is that they rely a great deal upon the work that is done by the Council of Europe because of course being a member of the Council of Europe is part of the criteria.

**Q61 Chairman:** Why is it a good idea then to superimpose upon that this other body, this other possible way of informing itself?

*Dr Metcalfe:* We are not suggesting that it is. We are suggesting that if the Commission finds that it might be useful to avail itself of assistance from the Agency then that would be fine, but we certainly do not agree that the Agency should be involved.

**Q62 Lord Borrie:** Just on that point, Dr Metcalfe, are there some risks that—and I will call it but you can disagree if you think it right—a non-political agency, the Fundamental Rights Agency, could be accused, justly or unjustly, of preventing or being part of the way in which an accession candidate country is prevented from joining the EU or is subject to a number of qualifications on membership because it has done this sort of advisory work before that country is actually a member of the EU and subject to the FRA in the normal way, with of course its own member on the management board (because every member country has got a member on the board)? I am wondering if there are some difficult political questions on the involvement of the FRA in this kind of work with the candidate country that you envisage?

*Dr Metcalfe:* I have to be honest we had not envisaged that as being a particular issue, no. I would say that were the FRA to be involved in that way it would be no more subject to criticism than perhaps the Council of Europe’s human rights work is subject to the same

8 February 2006

Dr Eric Metcalfe

criticism. I am not aware, for instance, that the Council of Europe is subjected to criticism simply because it may make criticisms or hand down judgments in respect of a candidate country or a potential candidate country in relation to their human rights record. To use an example, Turkey gets criticised a great deal for certain of its actions so do other potential candidate countries—Armenia for example. The mere fact that the Council of Europe has been involved in constructively criticising human rights records is not seen as overtly political. I think the independence of those bodies is respected. That said, I do not really envisage the Fundamental Rights Agency having that kind of role in relation to accession countries. Our concern was really that it was involving itself in countries outside the Union which is really beyond its remit and, from our own general human rights experience of doing work in other countries, we have a very tightly defined domestic remit. You always have to be extremely careful going into a new country and a new jurisdiction because the circumstances are very different.

**Q63 Lord Neill of Bladen:** When you speak of the Commission examining, as it were, the track record of the accession country, the Commission presumably is doing that as agent for and on behalf of the Council? It must be for the Council of Ministers to decide whether to admit to the ranks of its members an accession country? That is right, is it not?

*Dr Metcalfe:* Yes, that is my understanding. I think it would always be for the Council of Ministers to make the decision on ultimately how much progress a particular country is making towards the relevant criteria. I think ultimately it has to be a political decision rather than a formal, legal one, if you like.

**Q64 Chairman:** You see a possibility of invoking the whole of the Agency with regard to candidate countries, but the further away you get from the European Union, the less justification for involving them, so that when you get merely to non-EU States that have concluded agreements with human rights provisions, your reservations about candidate countries presumably become more pronounced and in turn more pronounced still with regard to states with which the EU has no agreement whatever?

*Dr Metcalfe:* Absolutely. If we can just spell out our reservations in relation to getting involved in accession countries and so forth. There is certainly a case to be made that, after all, the Commission is undertaking this work so if you have a dedicated body concerned with fundamental rights, why not give them this job as well, but it is not sufficiently strong. First of all, although the Charter covers more rights than the European Convention, the Charter itself and the protection of fundamental rights is only

one part of the relevant criteria, and certainly when we are talking about the *acquis* much, much less. That involves a great deal more material than merely fundamental rights. All the accession countries and prospective candidate countries are members of the Council of Europe or are likely to be. The only exception I can think of is Belarus and I would say that is a long time in the future if ever. They are also members of the Organisation for Security and Co-operation in Europe, which has its own rule of law monitoring its undertakings. When you look further to the idea of the Fundamental Rights Agency being involved in concluding agreements, Cotonou or the agreement on the European Neighbourhood Policy, to look at the Cotonou Agreement as it relates to 77 countries—African, Pacific, Caribbean countries—short of Asia, we are talking about a global remit. Similarly, when you look at the Neighbourhood Policy many of those countries are members of the Council of Europe. The kind of expertise involved in monitoring fundamental rights in those areas tends to be very different from the fundamental rights issues you find arising within the European Union.

**Q65 Chairman:** I think that probably answers questions eight and nine. I think we have probably got your answer to ten, too. If you do not bring the FRA into monitoring compliance with regard to candidate countries and indeed human rights clauses in agreements between EU States and non-Member States, who should help the Commission on this? And the answer seems to be the Council of Europe. Is that about it?

*Dr Metcalfe:* Yes. I am not aware that they have encountered any difficulties in this area previously. It is possible that they have but we are certainly not aware of it as an issue. Were it an issue, we do not have any objection to the Agency providing advice but we think it would be a mistake for the Agency to become a kind of “super” human rights body that is acting both within and without the EU.

**Q66 Chairman:** Unless anybody has anything on that group of questions, can we pass then to the Gender Equality Institute. I think JUSTICE’s position is really fairly clear here. You say for every reason, conceptual and in practice, it would be unhelpful to create a separate institute just to deal with issues of gender inequality. As I think you point out in your written evidence, Patricia Hewitt in connection with the proposed new English Commission for Equality and Human Rights states: “As individuals, our identities are diverse, complex and multi layered. People don’t see themselves as solely a woman, or black, or gay and neither should our equality organisations”, and you would suggest, as I understand it, the same in this regard? It would be absurd to have a dedicated, discrete, separate body

8 February 2006

Dr Eric Metcalfe

to deal with gender, leaving all other aspects of fundamental human rights over to the new Agency; is that right?

*Dr Metcalfe:* We find it very surprising that at the very point at which the proposal was to eliminate a dedicated, single-issue body on racism and create a unified human rights body, there is a suggestion at the same time to create a separate, single-issue body. As we identified in our written evidence, this runs very much counter to the current trend at the national level, which is to assimilate, if you like, the experience of equality and discrimination across various strands into a single body because the experience of people working in the anti-discrimination field is that people do not experience discrimination on a single issue basis. So it is very surprising.

**Q67 Chairman:** Do you understand any reason whatever for the suggestion that there should be two separate bodies?

*Dr Metcalfe:* The only reason that perhaps suggests itself is the long-established rights under Community law that relate to gender discrimination. It is fair to say that perhaps the longest track record of Community law in relation to the protection of fundamental rights has been in relation to (in the human rights field at least) equal pay for men and women, and those kinds of discrimination issues. So perhaps it is understandable given they probably have the most developed work and legislation in that area that they felt that there was enough material there that they should dedicate a specific body, but I really do not see that as a sufficient justification for creating a separate institution. At the same time it undercuts the justification for creating the Agency in the first place.

**Q68 Chairman:** It might very well be the basis for a thematic report?

*Dr Metcalfe:* Absolutely.

**Q69 Chairman:** But not a separate Agency?

*Dr Metcalfe:* Yes, and it would be perfectly proper for the Agency in its working to devote a significant amount of resources if in practice it finds that many of the fundamental rights issues in Community law arise in this particular area. Then there would be no criticism, I am sure, if the Agency were to devote more resources to work on this area than perhaps age discrimination, but I do not see that as being an argument for a separate institution.

**Q70 Chairman:** They have managed all these years without having any body dedicated to eliminating gender discrimination.

*Dr Metcalfe:* As I say, I find it very difficult to understand the reasoning.

**Q71 Chairman:** Finally, the question of resources and managerial efficiency and the numbers that are proposed for these various bodies. Have you got any comments on this? Do they strike you in any particular way as being perhaps top-heavy, excessive?

*Dr Metcalfe:* A management board of 30 representatives for an organisation of 130 does strike me as somewhat top-heavy. If you had an advisory board of 25 to 30 representatives that would seem to be perfectly reasonable but a management body which is somewhere between 20 to 30 per cent of the organisation itself seems unhelpful. It is also striking in respect of the relative size of the proposed Gender Institution and the Agency itself. It is far more sensible, I think, to take the 30 people that you have for the Gender Institution and add them to the staff of the Agency. We also consider it is contrary to the principle of proportionality that the Commission's proposal refers to. It seems disproportionate to have that amount of management and that separation of resources.

**Lord Borrie:** Might it be worthwhile to make the point that the size of the management board, which Dr Metcalfe already thinks is rather large in relation to staff and so on, will become even larger as each new candidate member becomes a member?

**Chairman:** Yes, as I understand it, the figures for the Gender Institute as proposed would be 25 in management, because there are 25 Member States, but actually 15 workers, so many more chiefs than Indians.

**Q72 Lord Neill of Bladen:** Can I ask a question about the Indians. It seems to me that if you leave out of the count the applicant or accession states and just take the existing members it is 25 Member States. Has this Agency got a remit to look at what happens in each of those countries and whether there are significant abuses of Charter rights? Does it also look at the forthcoming legislation in each of those 25 Member States to see whether they are skewed and contrary to best practice in human rights? Is that a function?

*Dr Metcalfe:* That really is something that I think would have to be determined by management, and there seems to be enough to make that decision! I think the interesting question is how you set up these organisations. There is a good parallel with the discussions that are currently underway in relation to the UK's own Commission for Equality and Human Rights. There was a great deal of discussion about whether the Commission should have, for instance, powers to undertake judicial review. We initially were cautious about this because we understood that as a policy organisation that also gets involved in individual cases, individual casework can be extremely time-consuming. It can take a great deal of time away from other work that is one is undertaking. In relation to the division of labour

8 February 2006

Dr Eric Metcalfe

between monitoring and legislative scrutiny, it would be perfectly appropriate to make legislative scrutiny part of the remit of the Agency but leave to the management of the Agency the decision as to how to develop that. Another way of saying it is that they will not necessarily do all the tasks that they are able to on day one, and as organisations grow over time they may find that it is better to concentrate on a specific thing, and if it is a matter of priority then we would suggest monitoring first and foremost and then, if they have time and resources left over, to assign time to scrutiny as well.

**Q73 Lord Neill of Bladen:** I was thinking in terms of the overall burden. 25 countries, 21 languages, we were told by the European Ombudsman the other day, and four workers per country, forget about the management board. It is bound to grow if it is going to perform a worthwhile job.

*Dr Metcalfe:* It is difficult to make predictions about growth but, yes, I would suspect that it would have to grow beyond that. There tends also to be a division in most human rights organisations that I am familiar with between what is called policy and what is called casework or grassroots work. Most people spend most of their time and the lion's share of resources goes to things like monitoring and gathering evidence. These are the most time-consuming things and you tend to have a small policy department that perhaps deals with the big issues. To do them in a comprehensive way, yes, it is going to take a lot of people.

**Q74 Chairman:** What is the strength of JUSTICE numerically?

*Dr Metcalfe:* Numerically, approximately ten, of which five are full time—an average-sized NGO for the United Kingdom. At the upper end, for example, Amnesty International's UK section has around 130 employees, so this would seem to be equivalent in size.

**Q75 Lord Neill of Bladen:** May I ask one question slightly off what we have done so far. It caught my eye in Article 15 that it stipulates in 15(1) the Agency "shall fulfil its tasks in complete independence", which is fine, and then I look at Article 5(1)(c) which says "the multi-annual framework within which the Agency operates must be in line with the Union priorities as defined in the Commission's strategic objectives." Supposing the Agency thinks the Commission has got it wrong and it has got the wrong objectives? Is it genuine independence or is it

really part of the machinery of the Commission with its programme controlled by the Commission?

*Dr Metcalfe:* That is an excellent point that I had not considered. Yes, I would definitely raise that as an issue as to their independence. If the Agency is to be truly independent, yes, I would say—

**Q76 Lord Neill of Bladen:** —There might be a problem?

*Dr Metcalfe:* In practice I doubt it would arise but in principle, yes.

**Q77 Chairman:** Having regard to the detailed provisional proposal, is there anything else that you think we ought to be particularly alert to? In two weeks' time we are seeing a witness from the Commission. If you were in our shoes, what particular aspect of this would you think we should be focusing most intently upon?

*Dr Metcalfe:* I think the questions which you had asked in relation to the overlap and how it proposes to handle the overlap with the existing Council of Europe bodies and other human rights bodies. That is bound to be the most important issue for the Agency.

**Q78 Lord Borrie:** I understand that the new body is to be located in Vienna. With modern technology in relation to the passing of information and communication, perhaps it does not matter where it is located, but if you have got to have co-ordination, you have got to have friendly social relationships, so does it matter where it is located, or is Vienna rather inconvenient?

*Dr Metcalfe:* We had an internal JUSTICE discussion on this issue when we were originally invited to respond to the proposal. I think that it is probably correct that with modern communications it does not make as much difference. However, it would also strike me as very convenient if one is doing work in relation to the European institutions—the Commission and Council and Parliament—to be closer to Brussels.

**Q79 Chairman:** Are there perhaps some political interests and considerations at play when it comes to deciding on the location of a new European Agency, or is that beyond your remit?

*Dr Metcalfe:* I suspect it is outside my remit but I have heard—I do not know, I am not sure I am allowed to pass on gossip to your Committee.

**Chairman:** I think that is a sufficient response. Unless there are any other questions, then it remains only to thank you again for coming and helping us. You have again proved to be very helpful. Thank you very much indeed, Dr Metcalfe.

---

WEDNESDAY 15 FEBRUARY 2006

---

Present	Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L	Lucas of Crudwell and Dingwall, L Neill of Bladen, L Norton of Louth, L
---------	---	---

---

**Examination of Witnesses**

Witnesses: MR FRANCISCO FONSECA MORILLO and MRS SAASTAMOINEN, DG Justice, Freedom and Security, and  
MRS LISA PAVAN-WOOLFE, DG Employment and Opportunities, examined.

---

**Q80 Chairman:** Can I formally greet you on behalf of the Committee? Alas, not everybody has been able to be here today but we are extremely grateful to you for coming to assist us in this inquiry. As you know, this is a public hearing. There will be a transcript which will be sent to you in due time. Mr Morillo, I think you have a lady who is going to assist in interpretation if necessary but we shall treat you, I suspect entirely accurately, as somebody amply fluent in the English tongue. I gather that you would like to start by making brief preliminary observations and, just so that everybody knows where we are, you are of course yourself from the Directorate General Justice, Freedom and Security and therefore concerned principally with the proposed new Fundamental Rights Agency. Mrs Pavan-Woolfe, you are of course from the Directorate General of Employment and Opportunities, and it is that Directorate which is, so to speak, sponsoring the proposal for the Institute for Gender Equality. I think you are going to make one or two opening remarks but perhaps most conveniently, just before we get to that chapter of our inquiry which starts at question 15, and I know you have had a copy of the questions that we would like your assistance on. Mr Morillo, would you like to start?

*Mr Fonseca:* My Lord Chairman, thank you for inviting me here. I am very grateful to be able to come before this Committee. I will begin by saying I am sorry—I am Spanish; nobody is perfect. If I were Portuguese, I would be Mr Morillo. As it is, I am Mr Fonseca. Fundamental rights and anti-discrimination form the guidelines for the European Commission under the leadership of President Barroso. Our ambition is to put the protection and the promotion of fundamental rights in the place they deserve, namely, at the heart of all the policies and measures of the Union. This is for the direct benefit of all Europeans. The decision to develop a European Union Agency for Fundamental Rights, as requested by the Heads of State or Government in December 2003, by extending the mandate of the European Monitoring Centre on Racism and Xenophobia in Vienna is a logical consequence of the growing importance of fundamental rights issues within the European Union. Indeed, the present position of fundamental rights in the European Union's

institutional system is the outcome of a lengthy historical, legal and political process which one could summarise as a number of dynamics which created the current situation in the European Union in this field. The first dynamic, of course, was the evolution of the Court of Justice of the European Community's case law starting in 1969 where the Court stated that fundamental rights are part of the general principles of Community law that the Court is to protect. The second dynamic consisted of the gradual incorporation into the treaties of provisions aimed at the protection of fundamental rights, the most important of them being the current Articles 6 and 7 of the Treaty of the European Union introduced by the Treaty of Amsterdam and, last but not least, thirdly, it resulted from the proclamation of the Charter of Fundamental Rights in December 2000. I would like to use the opportunity here to show my respect for Lord Goldsmith, who represented the UK Government in the Convention which adopted the Charter of Fundamental Rights, and in particular for the two representatives of the House of Lords in this Convention, Lord Bowness and Baroness Howells of St Davids. The project for the Agency is in line with the aim of strengthening the area of freedom, security and justice. European integration in this area is based on a rigorous concept of the protection of fundamental rights. Responding to the decision of 2003 and the challenge made to the European Commission by the Heads of State or Government, the Commission adopted on 30 June 2005 two proposals: a proposal for a Council Regulation establishing the Agency of Fundamental Rights and a proposal for a Council Decision empowering the Agency to pursue its activities in the areas referred to in Title VI of the Treaty on the European Union. Before presenting the proposals, of course, the Commission carried out a wide-ranging public consultation with civil society, the European Parliament, the Member States and international organisations. The Council of Ministers and the European Parliament are currently negotiating over the Commission proposals. The United Kingdom Presidency already progressed well by starting the first reading of the proposed Regulation and Decision. The negotiations under the Austrian Presidency also look promising. The Austrian

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

Presidency is committed at the highest level to do its utmost for the adoption of the proposals in 2006. We are thus positive that the European Union Agency for Fundamental Rights will become operational from January 2007.

**Q81 Chairman:** Thank you very much. It is right, as I think you reminded us, that it was in December 2003 that representatives of Member States within the Council agreed to extend the European Monitoring Centre on Racism and Xenophobia into a larger Fundamental Rights Agency, but shortly before that is it right that there had already been established a Network of Independent Experts on Fundamental Rights? How do you see those two relating to each other, this Network already in existence and then an Agency to come into being after that?

*Mr Fonseca:* Of course, the Network of Independent Experts on Fundamental Rights is a well-established body in the European landscape. This Network was established and financed by the Commission and issues annual reports on the situation of fundamental rights in the Member States and the European Union. However, this European Network is placed at the European level on a contractual basis. I mean that the Network does not have the capacity to continue to work beyond September 2006. Why? Because, and Lord Clinton-Davis will remember personally, in the European Union all the preparatory actions, all the budgetary lines without a legal basis, can only have a life for a maximum of five years, but usually between three and five years. That means that in September of this year this European Network will be over. That is simply a financial and budgetary question. However, we think that this European Network has an important role and must continue to play an important role in the future framework of the Agency of Fundamental Rights because the Agency of Fundamental Rights is for the European Commission a network of networks. We consider that the European Network of Experts on Fundamental Rights can continue to work on the wider basis which will be essential for the future work of the Agency but it cannot continue to work with an independent life because it will be over in September 2006. It is a question of finding a good synergy between the work of the future Agency and the work of the European Network of Independent Experts on Fundamental Rights.

**Q82 Lord Clinton-Davis:** Why can the European Network not be extended beyond 2006? I am not an enemy of the Commission, as you rightly say. I served on the Commission from 1985 to 1989 but I fail to understand why the European Network cannot be extended beyond 2006.

*Mr Fonseca:* Because there is no primary or secondary legal basis for permitting the life of the European Network of Experts to continue. I must stress that now we are, in parallel with the negotiations on the future Agency of Fundamental Rights, negotiating the adoption for the Council and the European Parliament of a wide financial programme in citizenship, justice and fundamental rights issues. If the Council and the Parliament accept the proposal of the European Commission for the Agency, the solution for this European Network would be to have a contractual relationship with the future Agency so that it would be linked to the future Agency but it would not be like a body financed by the European Commission because we do not have a legal basis for that.

**Q83 Chairman:** So you propose that the new Fundamental Rights Agency takes over the work both of the Monitoring Centre on Racism and Xenophobia and effectively the Network of Independent Experts?

*Mr Fonseca:* Yes.

**Q84 Chairman:** Does it need to do any more than that? What other gap, once those two bodies have completed their business, will there be to fill?

*Mr Fonseca:* My Lord Chairman, that is an excellent question because I must confess that when the Commission received the mandate to extend the Observatory in Vienna to a future Agency of Fundamental Rights, the first question for me, and at this time for Commissioner Vittorino, was to say, "But we have the Council of Europe and its Member States have national institutions protecting fundamental rights. What are the gaps? Before we begin preparing a formal proposal we need two things. First, we need to open a wide public debate asking civil society, national parliaments and Member States, 'What do you think of that?' Would it be really useful to establish a future Agency? And second, at the same time we need to carry out an impact assessment of why we should create a Fundamental Rights Agency." Of course, there are already many bodies in the European landscape who promote the protection of different fundamental rights but I would like to underline that they are not part of a system. We need one specialised body which would deal expressly with the fundamental rights issues in the field of European Union legislation, in the field of how the European institutions act, how they decide, how they implement the law. There is no specific body to deal with this issue. In answer to your question, there is a battery of problems that the future Agency can help to avoid. First, we consider that there is insufficient compatibility of monitoring and reporting in terms of timing and coverage of

---

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

---

issues relating to European Union adopted legislation. Secondly, for us there is also a lack of collection of quantitative data in respect of fundamental rights both by new and old Member States to implement the European Union law. Thirdly, we think that the vast body of data requires a real data management tool in order to pick up the information which is needed in Union policy making. Last but not least, we believe that at the national level courts in the Member States monitor compliance with fundamental rights standards. How? Through dealing with cases of a legal fundamental regulation propped up by individual decisions, but we think also that this monitoring which is carried out by the national courts of justice is not systematic and comprehensive. Each Member State has also different institutional, administrative and political arrangements for the national human rights institutions dealing with these questions. On a broad institutional map in the area of fundamental rights at European level, we believe that there is a need to have a complementary tool, the Agency, and to be able together to develop co-operative relationships between the future Agency, the national institutions dealing with human rights and, of course, the Council of Europe.

**Q85 Chairman:** Have you discussed these four areas of need that you have just described to us with the Council of Europe to see whether they share your view that these are identifiable gaps in the present scheme for promoting human rights?

*Mr Fonseca:* Yes. Before we presented our proposals one of the first preparations was to discuss them, of course in an informal way, with our colleagues at the Council of Europe. I would like to stress that we discussed not only these questions with them but also the fact that the main task to be given to the future Agency is the monitoring. We think that the best way to show the complementarity of the action of the future Agency of Fundamental Rights and the current work of the Council of Europe is, first, that the future Agency will focus on monitoring the situation on fundamental rights within the scope of Community law at European level and not on studying the valuation of the national situations as such. Secondly, the Commission is going to propose, and we have already begun to discuss this with our colleagues at the Council of Europe in Strasbourg, signing a memorandum of understanding between the Agency and the Council of Europe in order to avoid unnecessary overlapping of work. Just to sum up, in the field of human rights the big brother is the Council of Europe. The Agency will be created to fill the gap on the control of the application of fundamental rights for Community legislation.

**Q86 Chairman:** Who have you been discussing this with in the Council of Europe?

*Mr Fonseca:* First of all, my Lord Chairman, of course there have been informal discussions with the European Court of Human Rights, with the people—

**Q87 Chairman:** With whom at the court?

*Mr Fonseca:* With the Registrar, who was (because now he has retired) our friend Mr Mahoney, with the Director General in the Registrar's office, and with people who are working daily with the predecessor of Mr Terry Davis because now, with the arrival of Mr Terry Davis as a Secretary General, it is at a political level that Mr Frattini and Mr Davis discuss the matter. We have met with people in the Cabinet of the General Secretary and the Deputy of the General Secretary, Mrs Maud de Boer-Buquicchio in the Council of Europe and, of course, with my colleagues, for example, Mr de Vel, who is the Director General for Legal Affairs in the Council of Europe. Those are the informal discussions. Also, in the current discussions at ambassador level in the Council of Europe the Commission has based in Strasbourg a special adviser who participates in all the discussions with the Council of Europe ambassadors in Strasbourg and we introduce and discuss all these questions, including the future memorandum of understanding between the Council of Europe and the future Agency.

**Q88 Lord Lucas of Crudwell and Dingwall:** In drawing the boundaries between yourselves and the Council of Europe and yourselves and the Agency and the national institutions do you foresee that any functions currently performed by the Council of Europe or by national institutions will naturally transfer to the Fundamental Rights Agency?

*Mr Fonseca:* It is very difficult to answer that in this situation, of course, because we are negotiating now the legal instruments. Frankly, I do not think so. The Commission's idea is to guarantee the independence of the future Agency. We have established a job description for the members of the management board that in our opinion ensures a cross-fertilisation of responsibilities between the national institutions of human rights and the members of the future management board of the Agency. I do not think we really feel that there will be a transfer of tasks between those carried out by the national institutions and those carried out by the Agency in order to monitor how we, the Commission, the European Parliament and the Council of Ministers act in political life and in the execution of European law. I do not think that really there is a transfer of competence. It is clearly a repetition of that. A few minutes ago I said to My Lord Chairman that our intention is to fill the gaps because we feel that at

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

European level there is not a body able in an independent way to indicate that we are acting well or badly or that we need to implement this or that. It is a question really of monitoring.

**Q89 Chairman:** Did I understand you to say that one of the gaps was in terms of scrutinising proposed legislation in Brussels to ensure that the Commission's proposals were compliant with fundamental human rights; and, in turn, as the legislation passes through the Parliament and into the Council, likewise is that a role that you foresee for the Agency? If so, do you see that it is provided for in the present statement or mandate of the Agency? Where are we to find it in the proposal? Is it there as a task to be fulfilled, pre-legislative scrutiny?

*Mr Fonseca:* In our opinion the question of scrutinising the proposals of the European Commission is not a hard-core business action for the future Agency. Why? Because the Commission solemnly decided to self-constrain in 2000 with the Charter of Fundamental Rights and in April 2005 we adopted a Communication on the compliance of each proposal with the Charter of Fundamental Rights.

**Q90 Chairman:** I interrupt you only to say that, as perhaps you know, last year we ourselves carried out an inquiry into that and have submitted a report. Have you had an opportunity to study our report on that Communication by the Commission?

*Mr Fonseca:* Yes.

**Q91 Chairman:** You have seen our report?

*Mr Fonseca:* Yes.

**Q92 Chairman:** Therefore, of course, we understand what the Commission's proposal was but we noted that it lacked any independent monitoring proposal. It was wholly dependent upon internal self-discipline by the Commission.

*Mr Fonseca:* Of course, we have studied your report of November 2005. My Lord Chairman, excuse my being very direct in this question but it may be my Spanish character. What is the situation? What is the picture? We have a legislative proposal made by the Commission. With the Communication we have set internal standard controls in order to be sure that our proposal is in compliance with the Charter of Fundamental Rights. We adopt the proposal and we send the proposal to the European Parliament, the Council and you, the national parliaments according to the protocol of the role of national parliaments in the European decision-making process, and according to the subsidiarity principles. I think that between the moment when we adopt the proposal and when you, the people, find a problem in terms of compliance with fundamental rights in this piece of

legislation, you have the right, you have the duty, to intervene and to say, "We cannot accept that". Let us take an example. I do not agree with the position of the Dutch Senate against the future Agency but that is the expression of the people. That is their voice. Jesus Christ said, "Give unto Caesar the things that are Caesar's". The Commission has internal control standards. You must intervene in the process of adopting a regulation and, when the regulation is adopted, if there is a problem we have the Agency of Fundamental Rights to monitor the situation and to point out what is the problem. I think that is a multi-step approach. It is probably a classical European soapbox.

**Q93 Chairman:** Do you see that role provided for in the Regulation for the establishment of this Agency as presently drafted? Is it provided for? I do not follow where we find that set out as one of its tasks. I am looking at Article 4 under the heading "Tasks".

*Mr Fonseca:* If I understood you, my Lord Chairman, you read paragraph (d) of Article 4.

**Q94 Chairman:** It was Article 4(1)(d), "formulate conclusions and opinions on general subjects, for the Union institutions and the Member States when implementing Community law,"—

*Mr Fonseca:*— "either on its own initiative or at the request of the European Parliament, the Council or the Commission".

**Q95 Chairman:** So "implementing Community law" also means evolving, devising, proposing, legislating?

*Mr Fonseca:* No. I fully understand your point. In our opinion, but I do not ask you to agree with me, we cover that pre-legislative assessment with the self-obligation of the Commission. We are having the political debate on this at this moment, and the European Parliament and the Council have the right to modify the Agency proposal and you have the right to intervene on the focus of the Agency, because it is a question of coherence. There is not a universal scope Agency. Its scope is to focus on the implementation of the legislation but, of course, in a concrete drafting concerning our proposal for the Agency it is crystal clear that the Agency could intervene because they are independent. They do not receive instructions from anybody.

**Q96 Chairman:** So the Agency would come in after the adoption of the legislation?

*Mr Fonseca:* Yes, in principle. That is the current rule. Mrs Saastamoinen tells me that according to paragraph (d) it is not excluded for the Agency to intervene before, so maybe I was misleading you before. My point is that the core business of the Agency will be exposed in the implementation of the



15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

legislation but paragraph (d) does not prevent them from intervening before. It is a question of positive priorities, to use administrative language.

**Q97 Chairman:** While we are looking at the proposal and discussing the independence of the Agency, Article 15, of course, provides expressly that the Agency “shall fulfil its tasks in complete independence”, but Article 5(1)(c) says that the Multiannual Framework which the Commission has to adopt for the Agency “shall be in line with the Union priorities as defined in the Commission’s strategic objectives”. Do you see any tension, any conflict, any prospective threat there to the absolute independence of the Agency?

*Mr Fonseca:* My Lord Chairman, you are absolutely right in your appreciation of this kind of possible contradiction or problem between Article 15 and Article 5. For the Commission, we think it is clear in the proposal that the general reference point for the Agency is, of course, the Charter of Fundamental Rights but the Charter of Fundamental Rights is not clear. I must express that in this House. The Charter is very broad and includes a large number of different rights, not only rights but also a large number of principles. We have a situation in which we must decide the areas in which the independent Agency works. Therefore, in order to focus the work of the Agency and use it as well as possible, we suggest, you are right, that the main areas of activity of the Agency will be focused through the Multiannual Framework. Regarding the Multiannual Framework we propose that the Commission establishes the draft of the Multiannual Framework and discusses it with Member States in the so-called Regulatory Committee under Article 5 of the Comitology Decision, and remember too that in the Regulatory Committee Member States have the right to say no to the Commission. If they say no, the proposal can continue to the Council, and the European Parliament can ignore the Regulatory Committee and also establish the principle that it prefers the discussion to go to a full legislative discussion. It is a Regulatory Committee procedure. That means that we have the Commission and we have the national administration in this kind of commissary administration in Brussels to set the Framework, but, of course, the Agency will stay completely independent within this Framework, because it is the Agency which will, in the Annual Work Programme, respecting the general Framework, decide in which field of fundamental rights they are going to focus their annual programme. We think that this is a balance between absolute independence and the need to avoid the possibility of unguided missiles. There is also a question of accountability and we need to be

sure that the future Agency is independent and answers to the criterion of accountability.

**Q98 Lord Norton of Louth:** Can I pursue that because the Agency is going to be a monitoring agency so it is not going to be a loose cannon that can actually fire anything, so I cannot quite see where the problem is, why it needs to be given guidance by a body which itself is largely monitoring for compliance with human rights provisions. Why not just allow it to monitor? Does it really matter if the Agency itself is determining at any particular time what priorities it should have? Would that not be preferable to allowing the Commission perhaps to determine priorities which might move it in a direction in which the Commission wishes it to go but which might be moving against something the Commission itself is doing?

*Mr Fonseca:* No. It is not a question that the Commission, if I understand your question, shall obey or not the work of the Agency. We think that the Agency, as a body of the European Union landscape, needs to be set in the general mood, and the general mood is the pluri-annual legislative priorities adopted. The Agency’s mandate originates from the political understanding between the Commission, the Council and the European Parliament. After that the Agency in its day-to-day business is completely independent. Who is governing this Agency is the management board, and the management board, according to the proposal of the Commission, will need 29 members and the Commission will have only two members, only two votes. The Agency will stay independent and the Agency will need to decide important matters by two-thirds. That means 20 votes. I think this guarantee of independence and autonomy is safer, if I can express it like that.

**Q99 Chairman:** In fulfilling its task that you told us you envisaged for it of collecting quantitative data and also managing data, what sort of data have you in mind? Are you thinking of going out into Member States to see how they are complying with various fundamental rights? If so, are we talking about ECHR Convention rights or are we talking about that whole range of rights that the Charter has beyond the scope of the Convention?

*Mr Fonseca:* First of all, the fundamental rights that we envisage are the fundamental rights included in the Charter of Fundamental Rights because the action of the Agency will focus on the European institutions’ actions.

**Q100 Chairman:** Can I just interrupt. These include such matters as freedom of the arts and sciences, freedom to conduct a business, rights of the elderly,

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

access to services of global economic interest, a host of rights that clearly would not be found within the basic rights set out in the Convention. Are these the sorts of rights where data as to those will be covered by the Agency?

*Mr Fonseca:* My Lord Chairman, I think we can find the answer in Article 51 of the Charter of Fundamental Rights. The scope of the action in the field of fundamental rights at the European level depends on the intensity of the action that the European Union institutions can develop. For this reason our intention is to establish—excuse me for coming back to this question—a general framework of reference to focus the work of the Agency with a view to helping the Agency to be accountable, as I said before. Concerning the collection of data, I think I said at the beginning of my intervention that for us the future Agency will constitute a network of networks. The Fundamental Rights Agency must be the central reference to which all the different networks—NGOs, civil society, national parliaments, the European Network of Independent Experts and so on—contribute to supply the information, adequate reliable data, and the future Agency will run this network of networks. For this reason in this proposal we have advanced the idea to create not a single scientific committee but an open forum in order to ensure we have the whole expertise, the academic scientific and concrete scientific expertise, in the field of fundamental rights and who will participate in the forum in order to help the Agency to provide this work. I am sure that the final result will not be perfect but that is life, we are in human life.

**Q101 Chairman:** Your very distinguished fellow countryman, Mr Gil-Robles, came to help us a week or two ago. I imagine you will have read certain of his reports when he has visited countries, as he visited this country two years ago and produced a report last year. To what extent do you expect the Agency's inspections and collection of data to mirror the sort of work that he does when he visits Member States?

*Mr Fonseca:* Clearly the work distinction is that the High Commissioner of the Council of Europe has the right to realise inspections, to go to the countries and to go *in situ*, to use a Latin expression. He produces national reports saying, "In this aspect, the situation concerning that, that and that is very dangerous or is a problem". The Agency will benefit from these reports, first of all for the monitoring of diplomatic situations and what that means for discrimination, for minorities, for the problems of refugees and so on and so on. If the question is really, really, really very serious we have established in the proposal for the Regulation that the Council of Ministers can ask the Agency to establish a report for the Council in order

to decide if, yes or no, it is a serious persistent violation of fundamental rights according to Article 7 of the European Union Treaty (TEU). If the council decides that it is, there is the question of sanctions to be established against a Member State. For us there is common work, there is the work of the High Commissioner of the Council of Europe, very political, very sensitive, focused in a national way, there is monitoring of the situation according to the competence of the treaties. If the situation is very, very serious the Agency could provide only to the Council—I would like to stress only to the Council—a report, an opinion, concerning the possible application of procedures of Article 7 of the European Union Treaties. My Lord Chairman, I insist there is common work, it is team work, and we think that the Council of Europe, the Agency of Fundamental Rights and the political institutions of the European Union can work with team spirit in this matter. I am getting a bit poetic, excuse me.

**Q102 Chairman:** Mr Gil-Robles thought that the proposed structure, organisation of this Agency is too weighted in favour of the Commission as against the Council of Europe. On the management board one member only from the Council of Europe, two from the Commission; on the executive board nobody from the Council and two Commission representatives. Would you sympathise with that view?

*Mr Fonseca:* My Lord Chairman, I have a clear answer to your question. The Council of Europe participates now in the management board of the Observatory of Racism and Xenophobia in Vienna. We want to keep this role for a representative of the Council of Europe. That is the first point. The second point is it is true that the difference between the current situation and the future situation is that the representative of the Council of Europe will not sit on the executive board. That is the situation now. The Commission decided in February 2005 to propose to the Council and the European Parliament an inter-institutional agreement for a common structure for all the agencies of the European Union. In the proposal from the Commission we were obliged to follow the official position of the Commission. That is one of the questions that have been discussed politically by the Council but we, as civil servants from the Commission, were obliged to follow the official decision taken by the Commission in February 2005. That concerned the role of the Council of Europe. I would like to stress that the representative of the Council of Europe on the management board will keep his right to be on the board, as is the current situation now. Concerning the presence of the members of the Commission, the situation now is there is one member of the

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

Commission on the management board, in the future there will be two. That means now there is a management board of 28 persons, one vote for the Commission, but with the Agency it will be 29 persons, two votes. We do not feel that is a seriously imbalanced situation.

**Chairman:** The Council of Europe might be expected to be an influential vote though. They have a considerable expertise and pre-eminence in this field. However, Lord Neill has a question.

**Q103 Lord Neill of Bladen:** I apologise for my late arrival, also to my Lord Chairman, but I think I have heard most of your evidence. I want to take you back to the work that the Agency will carry out on the ground in the Member States. I completely understand what you said about the Agency being well-placed to receive reports coming in from NGOs, all sorts of bodies, all round the Union, but is it envisaged that they will do some serious work on the ground to investigate whether there are dark corners, whether there are fundamental rights, really important rights, which are not being observed in a particular Member State, notwithstanding when inquiries are made all is said to be well? Do you understand my question?

*Mr Fonseca:* I understand perfectly your question. The Agency will be a small body of the European Union. They do not have the capacity to be a big war machine. That is my first statement. Secondly, we want to establish coherence in our approach so that the Agency works in a complementary way with the work and expertise of the Council of Europe. The Council of Europe has more competences. For example, in the current discussion now on the CIA flights the Commission does not have any investigation powers but the Council of Europe does under Article 52 of the Convention. We need to keep this complementarity. We want to benefit from the work of the High Commissioner on Human Rights of the Council of Europe and from the extensive data collection, extensive expertise and reports made by the Council of Europe. We do think that the main role of the Agency will be to make inquiries in the field because we are monitoring the implementation of Community law. If there is a problem in terms of fundamental rights because there is a breach in one of the Member States according to the European Community *acquis*, we have the judicial control that begins at the national level. We do not think that this Agency has investigation powers, which in this field are very well filled by the Council of Europe.

**Q104 Lord Neill of Bladen:** It seems to me by that answer you have cut down the role of the Agency as being the assistant handmaiden—you speak Latin—*ancilla* to Strasbourg. Strasbourg is the big player

making the inquiries and you, with this new Agency, are the assistant, not yourself making these inquiries on the ground in 25 Member States.

*Mr Fonseca:* I think that will be the final picture. The Agency is not there to establish inquiries in the field except in a very, very serious situation. Five minutes ago I referred to this question of Article 7 TEU. We believe that Article 7 TEU is like the nuclear weapon; we need to have a nuclear weapon but never use it.

**Q105 Chairman:** We are very conscious that we have yet to bring Mrs Pavan-Woolfe in and we are quite anxious to reach the Gender Institute but can we just touch on the geographical aspect. As I understand it, so far as candidate countries are concerned and other non-EU states that already have agreements with the Union which have human rights provisions in them, the Commission has assistance at the moment from the Council of Europe. Is that right? They assist you in evaluating the human rights situation in candidate states, states who are trying to accede to the Union, and other non-EU states that have already got agreements with the Union? How does the Commission in practice currently monitor human rights protections in these states?

*Mr Fonseca:* In the third countries?

**Q106 Chairman:** Yes, in the other countries.

*Mr Fonseca:* You are absolutely right as regards the current evaluations. We have a special clause in the proposal for the third countries. Again, for us it is a question of intensity. First of all, we have the situation of the candidate countries. All European states who want to become members of the European Union need to fulfil the Copenhagen criteria and the first criterion is fundamental rights. In negotiations for accession to the European Union, after the Copenhagen criteria we have a new chapter, chapter 23, to implement the situation of fundamental rights in those countries. We deal with that in the Directorate General of justice, freedom and security. With the enlargement we are monitoring the evolution of fundamental rights in the candidate countries. We think that is wise and has a political sense in that the Council or the Commission can request of the Agency to establish a specific report or specific item on the situation of fundamental rights in one candidate country because unless they fulfil the fundamental rights criterion they cannot become members of the European Union. We also suggest that when the negotiation has moved forward and we are in the heart of the discussion we can accept the participation of one person from the candidate country on the management board as observer. By the way, that is the current situation in the Observatory of Vienna. We are now discussing whether the Croatians will become an observer next

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

year. The second situation is the European States called Neighbourhood Countries. With this second category of countries, there is no question that they would become observers on the management board of the Agency but we think that if we have established an association agreement with these European countries, neighbouring countries, and in this association agreement the clause on fundamental rights is in the heart of the agreement, it is important that, at the request of the Commission, before signing the association agreement, we have a technical report from the Agency. That is not obligatory, it is on request only. Thirdly, there is the broadest situation. If the Commission considers that it is important for the policymaking on the promotion of fundamental rights in the world to have a specific advice in this matter of a third country, it can request advice, again it is not obligatory, it is a question of request and only if we have an international agreement of association with these third countries.

**Q107 Chairman:** Can we move to the section that Mrs Pavan-Woolfe is principally concerned with, the Gender Equality Institute. Will you perhaps make your preliminary comments about that, please?

*Mrs Pavan-Woolfe:* Good afternoon, and thank you, my Lord Chairman, and Members of the Committee for inviting me today. I will make a very short statement. My name is Lisa Pavan-Woolfe and I am the Director for Equal Opportunities in the European Commission. The proposal to set up an Institute for Gender Equality has been prompted by the need to have a new instrument with which to further develop policies for equality between women and men in Europe. Under Article 3(2) of the Treaty, the European Union must promote gender equality in all its activities and policies. This mission is in addition to the specific competences that the Union has had for some decades in this area, in particular to ensure equal opportunities in employment. We now have 13 Directives and almost 200 rulings of the European Court of Justice in this area. They are proof of the importance of this policy, of its maturity, and of the concrete impact that this policy has had on the lives of women and men in Europe. The policy of gender equality is not only about the right to work, it is not only about the right not to be discriminated against, the right to be equal; it also aims at achieving a variety of objectives and I will give you a few examples. One is better reconciliation between work and family life. Equality between women and men also aims at a more balanced share of responsibilities between women and men in the economy, in society, in politics. It is also about integrating a gender dimension in a variety of policies. Gender equality is a lot more than the observance of a fundamental right to non-discrimination; it is a specific

comprehensive policy which is based on a variety of instruments of which legislation is only one. The European Commission's reports on equality between women and men show that progress has been achieved but it has been slow and remains insufficient. The increased diversity of the enlarged Union with regard to gender equality has made it even more necessary to have technical support both for the Member States and for the Community institutions, and in particular for the Commission in the area of equality between women and men. This, my Lord Chairman, is the backdrop against which the Commission has presented the proposal for the creation of the Institute.

**Q108 Chairman:** Thank you very much. As I am sure you know, at national level a number of Member States are on the whole bringing various strands of fundamental rights together to be protected by one central body, and indeed that is what is happening in this very country, we are going to mirror the Northern Ireland body to look across the entire spectrum. So it seems rather an oddity here in the Union that almost at the same time as you bring into being this proposal for a Fundamental Rights Agency there is also a proposal for an Institute for Gender Equality which is so closely related a concern. Is that possibly because there are different Directorate-Generals who are concerned with each of these aspects?

*Mrs Pavan-Woolfe:* I do not think it is because of that, my Lord Chairman. There is only one Commission, although there are various departments within the Commission, and the proposals for both the Institute and the Agency have come from the Commission. First of all, the trend that you have noticed is true in some countries but by no means in all Member States. Some Member States have gone for an overarching approach and they are setting up equality bodies which will look at anti-discrimination on the various grounds of discrimination: race, age, sex, sexual orientation, ethnicity and religion. This is not true of all the Member States. The Commission, before tabling the proposal for the Institute, carried out an evaluation and did consider the possibility of giving these new tasks either to existing agencies or, indeed, to the future Agency for Fundamental Rights. We felt that for a variety of reasons—but mainly because we are dealing with a very specific policy and a well-established one and because the future Institute on Gender Equality is going to look not only at questions of anti-discrimination—we needed a separate agency, a separate institute. This departure is not unique to the Commission. This is what the UN has done. I am sure you are aware at the United Nations separate bodies look at human rights and then you have a separate committee for the status

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

of women. If you look at fundamental rights in the Union you have specialised agencies which now deal with specific fundamental rights. This is the case for the environment and health and safety at work. On the whole, we felt that the possible advantages of merging the Institute of Gender Equality with the future Agency on Fundamental Rights would be outweighed by the possible disadvantages of not giving enough visibility and enough weight to a policy which is partly encompassed by the fundamental rights question but it is not only about fundamental rights.

**Q109 Chairman:** Racism and xenophobia is obviously a crucially important theme in human rights and yet that now is being brought into the mainstream of consideration of human rights. Plainly it is going to be one of the principal themes of the work of the proposed new Agency. Do you think that same approach could satisfactorily meet the needs of the promotion of gender equality?

*Mrs Pavan-Woolfe:* No, because when you talk about race you are talking about fundamental rights and anti-discrimination. When you are talking about gender, you are talking about that but other issues as well, and I have given you some examples such as the question of reconciling work and family life, the question of childcare, issues to do with equal pay. Equal pay is a right, and it is a fundamental right, but even though we have legislation on equal pay we still have a wage gap on average of 15 per cent in the Union. That is an issue that goes beyond the question of fundamental rights.

**Q110 Chairman:** Looking at the structures of the bodies concerned, the proposed Gender Equality Institute, as I understand it, is to have a staff of somewhere between 15 and 30 but of course a management board of however many Member States there are, 25, plus one or two supernumeraries to represent the Council and all the rest of it. To those of us who pay our taxes that smacks of being a bit top heavy. How do you think you are going to be able to persuade everybody across the Union that that is a good idea?

*Mrs Pavan-Woolfe:* The original proposal from the Commission foresaw six representatives from the Member States and six from the Commission. Discussions in Council have evolved in the direction that you have rightly pointed out. Recently we have had an opinion from two of the European Parliament committees and they go to plenary in March.

**Chairman:** I know you had been warned of the possibility of a division. We will break for a short time.

*The Committee suspended from 5.30pm to 5.37pm for a division in the House.*

**Q111 Chairman:** Can we then pass to question 17 on the list which notes the absence of any proposal in your Institute's scheme to participate in the agreement of the Annual Work Programme of the FRA, the Agency. Do you think you ought to be playing a role in setting the Agency's Annual Work Programme?

*Mrs Pavan-Woolfe:* Before I answer that question, if I could finish what I was saying just a moment or two ago.

**Q112 Chairman:** I am so sorry, you are absolutely right. We were rudely interrupted by the division bell.

*Mrs Pavan-Woolfe:* I had almost got to the end but not quite. The Commission proposes six members on the board representing the Commission and six from the Council. The Council is now proposing 25-plus representatives from the Commission and Parliament seems to be going in the direction of nine from the Member States plus one from the Commission. We will have to see what the final result will be. We are hoping that the management board will be a manageable size. You are absolutely right, it would not make sense to have 25-plus members in the board when the Institute is meant to be a very small and agile structure.

**Q113 Chairman:** Are there any comparable EU agencies which have a small number, significantly fewer than the number of Member States represented?

*Mrs Pavan-Woolfe:* I am not sure at present. This is certainly the new trend that the Commission is trying to follow. We put on the table an institutional framework for future agencies in 2002 and this is what we propose, parity between Member State representation and Commission representation, but the numbers that we propose are six for each.

**Q114 Chairman:** That is helpful. I apologise for having overlooked that you had not completed that answer. Can we now move to question 17 which is the question as to whether you feel it would be sensible for the Gender Equality Institute to take part in agreeing the Agency's Annual Work Programme?

*Mrs Pavan-Woolfe:* We do and we have the mechanisms in place to do that. Article 4 lays down a duty of co-operation and co-ordination between the Institute and the Agency. The Women's Committee of the Parliament has proposed an interesting amendment there, amendment 45, whereby this co-ordination between the Institute and other agencies would ensure work programme co-ordination between the agencies in the area of gender

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

mainstreaming. Apart from this general duty of co-operation and co-ordination, in Article 10 we have a provision whereby the directors of the relevant agencies will be called as observers at the meetings of the management board. There is another provision which lays down that the Commission has to be consulted on the work programme of the Institute and to prepare its position the Commission will have to consult internally. In a way that will ensure that from the Commission's representatives on the management board will come not instructions but some directions to the work of the Institute, so that there is proper co-ordination between its work programme and the work programme of the Agency for Fundamental Rights.

**Q115 Chairman:** These are the matters that are basically catered for in Article 4 of the proposal. Article 4(2) requires that your work programme—I say “your”, I am speaking of the Institute—“shall be in line with the Community priorities and the Commission's work programme” and then in (3), to avoid duplication et cetera, to take account of information from wherever else, activities carried out by other institutions and so forth, “and work closely with competent Commission services”. Do you see the need for concretising, crystallising, some of these obviously sensible underlying tensions into a more formal way of ordering your affairs?

*Mrs Pavan-Woolfe:* I do not think that it is really necessary, we have got everything in place there. If you look at the end of 4(3), the last sentence, it refers to this general duty of co-operation and co-ordination with all relevant agencies. That implicitly means that the Institute will have to co-ordinate its work programme with the work programme of the Fundamental Rights Agency.

**Q116 Chairman:** Do those answers also address question 18 dealing with the problem of overlap and the provisions that bear on that? Again, we are looking at Article 4, are we?

*Mrs Pavan-Woolfe:* Yes. As I said, we have things in place to ensure both that the Institute work programme is in line with the European Commission's work programme but also with the work of other relevant agencies and duplication is avoided through these mechanisms and through the presence of the directors of the other agencies in the management board of the Institute. That is Article 10.

**Q117 Chairman:** Now perhaps as to where this new Institute, if it is to come into being, is to be located. We know that the Fundamental Rights Agency is to be in Vienna, what is the present thinking in terms of the Gender Equality Institute?

*Mrs Pavan-Woolfe:* I am sure you know that it is not for the Commission to propose the seats of the agencies.

**Q118 Chairman:** I am sure they have their ear to the ground.

*Mrs Pavan-Woolfe:* We know that some Member States have proposed their own countries as the seat of the Agency.

**Q119 Chairman:** Is that always the way it works, a Member State proposes itself? Does it ever propose some other Member State?

*Mrs Pavan-Woolfe:* Not that I am aware of. They might side with the proposal coming from other Member States. As these deals are done in packages at the European Council, it might well be that some Member States side with others in the final make-up of a deal. The Commission does not take sides on questions like these, the decision comes from heads of state.

**Q120 Lord Clinton-Davis:** Does it discuss the situation or not?

*Mrs Pavan-Woolfe:* Not really.

**Q121 Chairman:** Are there not significant advantages in possible locations as opposed to others?

*Mrs Pavan-Woolfe:* We looked at this when we were looking at the advantages of having one agency. We obviously thought of Vienna because the Observatory is there and we also thought of Dublin, and we were not the only ones, some Member States thought of that too because the Foundation for Working and Living Conditions is there. I do not think there will be any particular advantage. There might be some cost savings in things like general running costs, sharing costs of IT or some infrastructure. The main cost of the Institute will be its expertise, its personnel, and because we are convinced it is quite separate expertise from that that will be required in the Agency for Fundamental Rights we do not see a particular advantage of locating the Institute in Vienna. There might be some, only some, slight financial advantage to be gained in sharing fixed costs.

**Lord Clinton-Davis:** I was not in the room when question 16 arose, I only heard it in part.

**Chairman:** Can we tell you that a little later? The answer is it looks now as if they are going to propose something rather smaller than the suggestion in the question. Are there any other questions because we must keep an eye on the clock? We have rather extended your visit, in part because of the division bell, but we are aware you have got to catch a train and get back to Brussels tonight.

---

15 February 2006

Mr Francisco Fonseca Morillo, Mrs Saastamoinen  
and Mrs Lisa Pavan-Woolfe

---

**Q122 Lord Norton of Louth:** A general question. You have stressed the limitations, and this will apply to both the FRA and the Institute, in the sense that the primary role is going to be a monitoring one, or possibly building on that, but what it is monitoring may be in some cases rights that as yet are not well defined. Presumably the Agency—I do not know whether this applies to the Institute as well—will have some scope in terms of interpreting what in some cases are rights expressed in fairly broad terms.

*Mrs Pavan-Woolfe:* Do you want me to answer first? I did not go into the role of the Institute but the Institute is supposed to be a very technical body which will gather data, statistics, carry out some research, provide methodological expertise to the Commission, so it has a very limited and very technical role. It is by no means a political role, it will not intervene in the implementation of legislation.

**Q123 Lord Norton of Louth:** But even the data collection must be within the scope of some interpretation of what equality means?

*Mrs Pavan-Woolfe:* As I said, in the area of gender equality there are well and long-established policies. We have 30-plus years of interpretation by the Court of Justice on legislation. We also have a consistent body of work at international level, such as the United Nations with the Beijing platform for action. In this area there is much less uncertainty. It is a vast area to explore but I think the contours of the research are quite clear.

**Q124 Lord Norton of Louth:** So the contours of the Institute are very well defined, whereas presumably with the Agency we may be dealing with a very different situation?

*Mr Fonseca:* I would like to answer Lord Norton, if I can. For the Agency the question is clear. The provision of Article 51 of the Charter of Fundamental Rights—it is our bible—applies to institutions and bodies, like the Agency, of the Union with due regard for the principle of subsidiarity. This Charter does not establish any new powers or tasks for the Community or the Union. Of course, in the field of fundamental rights the borders are not so clear but I think that is under control.

**Q125 Lord Norton of Louth:** I was not concerned at the level in terms of subsidiarity, it was merely the scope of definition. How does one define freedom of the arts if one is limiting it to the institutions of the Union, which is what they are doing? It is not so much the scope but the actual interpretation of the rights being applied within that limited scope.

*Mr Fonseca:* As you know, during the negotiations of the Constitutional Treaty one of the points that was stressed more strongly by the UK delegation was that the comments on the articles of the Charter—I refer to the question of the arts—which were explicit in their restrictions in interpretation will be an integral part of the constitutional body. We have a full declaration on that. We are *In the Mood*, like in the Glen Miller song.

**Chairman:** I think on that note, we had better be on the move too. Thank you for coming, it is a long way to come but it has been of great assistance to us. Thank you very much indeed.

---

---

WEDNESDAY 1 MARCH 2006

---

Present	Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L Goodhart, L	Lester of Herne Hill, L Neill of Bladen, L
---------	--	---

---

**Examination of Witnesses**

Witnesses: BARONESS ASHTON OF UPHOLLAND, a Member of the House, Parliamentary Under Secretary of State—Department for Constitutional Affairs, and MR EDWARD ADAMS, Head of Human Rights Division—Department for Constitutional Affairs, examined.

---

**Q126 Chairman:** Minister, as ever, we are extremely grateful to you for coming.

*Baroness Ashton of Upholland:* My pleasure.

**Q127 Chairman:** You were very helpful to us last time you were here. I am sure you will be again today. You do not need any explanation as to the transcript and that sort of thing. Perhaps we can proceed at once with the questions. You, I know, have had a copy of the 15 questions or areas of questioning on which we would like your assistance. Since then, we have had the benefit of your helpful letter of 15 February in response to Lord Grenfell's letter of 1 December. I think you also have had, as we have, a copy of the draft memorandum of understanding as between the Council of Europe and the European Union which was touched on by our witnesses last week from the Commission and which itself makes a brief mention of the Fundamental Rights Agency.

*Baroness Ashton of Upholland:* I have to say, I do not have that document.

**Q128 Chairman:** A small point may arise at a later stage with regard to that. Could we perhaps start with the first question, which raises the matter in a fairly general fashion. We all know there is a large and, dare one say, growing number of bodies which concern themselves with human rights issues, but do the Government think there remains a gap to be filled by some body such as this proposed new Fundamental Rights Agency? Assuming you do think there is a gap, what precisely is the gap and how would it be filled by the proposed new Agency?

*Baroness Ashton of Upholland:* We think there is a gap. The current position demonstrates that there is not any body that enables the European institutions to get the benefit of advice or assistance when it comes to fundamental rights. I am sure we will debate the type of organisation and the remit of the Agency as we go through our discussions, but in principle it would be right to say there is a gap and potentially it is for this Agency to be able to offer that expertise.

**Q129 Chairman:** Is it a gap in the way, so to speak, of fact finding or a gap in the way of advising? What is the real gap, bearing in mind there already has existed since 2002 the Union Network of Independent Experts?

*Baroness Ashton of Upholland:* I think the particular issue would be the ability to look across the European Union and to provide information that is comparable—something which is not available at the moment and which could be of use to Member States, could be of use to Community institutions. I know we will come on later in the questions to the role as regards legislation and whether there is an opportunity through the Agency to be able to consider issues that the Commission is proposing at an early stage.

**Q130 Chairman:** Pre-legislative scrutiny.

*Baroness Ashton of Upholland:* A kind of pre-legislative scrutiny. I do not want to pre-empt the later questions as to how I would regard that. I think there is the potential to offer advice to institutions when thinking about areas of fundamental rights. Whatever view members of the Committee might take, I think it is right to say that, in those particular areas, at present there is not one body where advice, assistance, support, monitoring would be available, and this Agency, in our view, could offer that.

**Chairman:** In a way that takes you straight to question 2. Are we talking here, therefore, of a monitoring role or an advisory role.

**Lord Lester of Herne Hill:** Before we go to question 2, could I follow up on question 1?

**Chairman:** By all means.

**Q131 Lord Lester of Herne Hill:** I have to say that I have deep scepticism about the gap. I wonder if I could summarise in a couple of sentences why and then ask you for your comment if that is convenient. The European Court of Human Rights has a backlog of 70,000 cases.



1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

*Baroness Ashton of Upholland:* Indeed.

**Q132 Lord Lester of Herne Hill:** By 2010 it will be 250,000 cases. The institution is therefore in crisis. In the old days there was a European Human Rights Commission which would have done this opinion-giving and fact-finding. That was abolished. We now have a Human Rights Commissioner, who does not have that much resource or power but he is there, and we have candidate countries in the Council of Europe who are not yet in the EU. It seems to me that the last thing we need at the moment is new institutions that are managerially top-heavy with the usual “every country wanting their people on it” to create yet further balkanisation on the subject of human rights. It is particularly undesirable when the United Nations, as we know, has just decided to rationalise the treaty bodies of human rights into a single body—and here we are not with just one but two new bodies. We can, of course, develop the ideas of gaps, I agree, but should we not be putting our brains behind rationalising, simplifying, avoiding waste of duplication, streamlining, rather than proliferating yet further institutions—and I speak as someone who, I hope you know, is pro-Europe and pro human rights, but I am dismayed by this and broadly agree with the Dutch Senate. I would be grateful for your comments although I realise you are a prisoner of previous decisions.

*Baroness Ashton of Upholland:* I am not much of a prisoner on things, as you know, Lord Lester. To go back to what you said at the beginning, it is always convenient to answer your questions. I was not sure, though, in what you were saying whether you were inviting me to suggest that resources spent on the Agency might better be spent on dealing with some of the concerns you raised about the backlog in the European court or whether you were suggesting that a rationalisation would enable the work that this body was undertaking to be undertaken elsewhere—which, in a sense, is the Dutch Senate position at present. There are different views, of course, about how best we might address this. The proposition that lies in front of us is that one way of dealing with some of the questions that are being raised, providing—and again we will come on to this—the relations with, for example, the Council of Europe are dealt with effectively, is to offer this particular support to Member States and Community institutions. In everything you have said, Lord Lester, you did not, I feel, suggest that any of these bodies would be able, for example, to support the Commission in looking at legislation before it becomes legislation. That does not exist at present. Equally, I am not convinced, from what I have seen, that any of the bodies currently operating across Europe have the capacity or the ability to bring together information, to make it comparable across Member States, which

increasingly could—and I say could because I do not know if it would—be of value in looking at issues in fundamental rights and human rights between nation states. While I accept that for the Dutch Senate, and obviously for you, there is a genuine “Should we be doing this at all?” my answer to that is that if we accept that the things I have identified which need to be done are valuable in themselves, then I wait to see a proposition that gives me an alternative way of doing that.

**Q133 Lord Lester of Herne Hill:** That seems to me, if I may say so, a very important answer. Could I add to the panoply of existing machinery one which has not been mentioned, which is that the Secretary General of the Council of Europe of course has special power under the European Human Rights Convention which he has started to use of writing to each Member State or some of them to say, “How are you complying with so and so?” The Council of Europe institutions can and do give advice to Member States on their better compliance with human rights, so, speaking for myself, I am not persuaded that it is better to do this within the narrower European Union context than the Council of Europe but I realise that reasonable people can disagree about the institutional architecture. But I think it is right, is it not, that there is that capacity still, not much used within the Council of Europe, to perform some of these functions and maybe because human rights organisations are a poorer vacuum they are creating a new one to do something which the European Council could have done itself?

*Baroness Ashton of Upholland:* I think you have raised, Lord Lester, a fundamental point, which again we will come on to in the questions, which is about the relationship between the Council of Europe and the Agency. Certainly, in the discussions I have been involved in with the LIBE Committee—and I know Lord Norton of Louth was there last week and I had a discussion with him yesterday about the Committee itself—there are genuine concerns about ensuring that that relationship works effectively. There probably is a question about whether the Council of Europe could exercise its powers differently, that would mean the Agency would not need perhaps to take on different functions, but that has never been raised at the Committee meetings I have been to as an issue. It has been much more about: How do we make sure there is not an overlap in function?—and in a sense the focus has been around the management structures on that. I think there is a debate to be had, and it needs to be had, which in a sense the Dutch Senate intervention will enable to happen, which is about making sure that everyone is using the best of the resources they have in terms of the powers they have to address some of the issues that have been raised.

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

**Q134 Lord Neill of Bladen:** As regards the scrutiny of forthcoming pending legislation made by Member States, our last witness was from the Commission, when we last took evidence, and I had the distinct impression—although I do not have the transcript here—that that was not a role that they were thinking very hard would come their way. Could we leave that part of it on one side, looking at legislation. On the basis of what is happening in the Member States—and I am now looking at a report by the Network of Independent Experts—they claim they monitor the situation in each of the 25/26 Member States and they produce reports on each country and on the basis of that they produce a synthesis report which identifies the main areas of concern and makes recommendations. In that survey of what is happening, is there a gap? Is there any fault between what they do which needs to be filled with the FRA?

*Baroness Ashton of Upholland:* I do not think there is a gap in what they do, but I think the description of what the Agency can do is a different one. The Commission, as you will know, Lord Neill, spends a huge amount of its time looking at the way in which it wishes to bring forward legislation and to look at Directives and so on. At the moment, of course, there will be internal scrutiny by the Commission but there could be an opportunity for the Agency to provide advice and support in that area. I would say, by way of a caveat, which I think probably fits with where the Commission would have been in their evidence to you, that there is no question they could do it on every piece of legislation—that would be impossible to do—but, nonetheless, there will be within the Commission's work areas that are particularly relevant to what the Agency is doing, where early advice could enable the legislation to be drawn up more effectively, with a due regard for fundamental rights. That is a role that I think I identify as being a genuine gap that could be fulfilled by the Agency: it does not cut across what the independent experts are doing but rather is a function that as yet is unfulfilled.

**Q135 Chairman:** It may be that it is not very useful to try to categorise the precise nature of the role, as question 2 invites, but does one describe what you envisage for it as a monitoring role, an advisory role or what?

*Baroness Ashton of Upholland:* I think it is monitoring and advisory, but in the question I saw you asked me the question, My Lord Chairman, quite rightly, as to whether we saw it as an enforcement role, which we do not, so I would say it certainly is monitoring and advisory only.

**Q136 Chairman:** It is certainly not enforcement.

*Baroness Ashton of Upholland:* No.

**Q137 Chairman:** How does the answer you gave to Lord Neill tie in with question 3, the concept of pre-legislative scrutiny? I certainly understood from your

recent letter, when you addressed that (second page, bold type) that it is the Commission which is ultimately responsible for monitoring compliance with fundamental rights by EU institutions, and essentially you do not think it is a good idea to entrust that task to the Agency. Or have I misunderstood your response?

*Baroness Ashton of Upholland:* No, you have understood it completely.

**Q138 Chairman:** So no to pre-legislative scrutiny.

*Baroness Ashton of Upholland:* I was trying to identify, as I said to Lord Neill, that if you simply took it on the basis of volume and nothing else, it would be quite impossible for the Agency to do a pre-legislative scrutiny of all legislation. Having said that, I think there are opportunities with particular pieces of legislation that are coming forward or particular areas where the Agency could and should play a role in helping the Commission to work out that the—

**Q139 Chairman:** It would be a bespoke role, bespoke by the Commission, is that it?

*Baroness Ashton of Upholland:* It would be a bespoke role by how we design the Agency. We will come on to management structures, I know, my Lord Chairman, later, but there is, I think, a genuine question that this could be something that the Agency could take on, providing it is absolutely clear that we are not suggesting it be every piece of legislation, and, indeed, that it is narrowed in a way that makes it possible for the Agency to be used to best effect.

**Q140 Lord Lester of Herne Hill:** I wonder whether one might go a little further. Of course it cannot give comprehensive scrutiny—that would be impossible—but the disadvantage of the Commission doing the scrutiny is that it proposes the legislation in the first place. Therefore is there not a role, rather like the Joint Committee on Human Rights in our national system for government as an independent scrutineer? Provided it is bespoke, is it not very important that there be some role for this independent body, if they are to do any good at all, to be able to take some important pre-legislative issues and scrutinise them and publish the results of the scrutiny so that there is transparency for the citizens of Europe?

*Baroness Ashton of Upholland:* I agree with that. The only question I would put, Lord Lester, is that the Commission, like the Government here, looks to legal advice and support when examining the legislation it is putting forward, so I would not want to suggest—as I do not think you were anyway—that because they create the legislation they do not do that role properly, because I think they do—just as I hope you would accept the Government seeks to do that

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

here. But I do accept there is a sort of similarity, potentially, in the work of the Joint Committee on Human Rights, although as you, Lord Lester, will know yourself, the danger is always being overwhelmed with the amount of work that needs to be done. If we can identify properly a function that says, in areas where the Commission is considering legislation that is particularly relevant to the work of the Agency, that the Agency could look at and publish advice on this, I think we could probably find a useful role that might even make you, Lord Lester, warm slightly to the possibility of the Agency.

**Lord Lester of Herne Hill:** It would. It would make me much warmed!

**Q141 Lord Goodhart:** Where would the initiative for this quasi-scrutiny procedure come from? Do you envisage that the Commission would invite the Agency to comment on draft legislation or would the Agency have the power to sift through what the Commission is proposing to do and to decide which items of that it would like to have a look at, or is it a mixture of the two?

*Baroness Ashton of Upholland:* It could be either or neither, in the sense that one of the areas that we have yet to look at precisely is the question of to whom the Agency will be responsible in terms of its work plan. As you will know, Lord Goodhart, there is a question mark at the moment, because, from the Council's perspective, we think it is right and proper for the Agency to have a strong relationship with the Council and the Commission will have a different view potentially of how that ought to work, and the Agency itself may well, as it comes into being, wish to identify that properly. It seems to me, though, in developing its work programme, that it is a good example of where the kind of collaboration between the Agency and the Commission could produce a useful proposal to go through the Management Board of the Agency and to the Council which said—because the Commission often knows what legislation it is going to be dealing with for quite a long time ahead; particularly, for example, in my area where the Hague programme in a sense dictates what programme will look like—“For this year's programme, these are the five”—six, ten, whatever—“areas where the Agency plans with the Commission to work on pre-legislative of that kind.” That would be my personal view of how it would work best because that would make most sense and everybody would see the very transparent way that had been worked through between the organisation itself and the Commission. So perhaps I would identify it as a process of negotiation.

**Q142 Chairman:** For these comparative studies that the Agency would be carrying out for the benefit of the various EU institutions, would they be looking

essentially at ECHR rights or would they be steering clear of those and looking instead at the other rights that are in the Charter?

*Baroness Ashton of Upholland:* I would describe the Charter—and this is my word and nobody else's—as a sort of backdrop that enables issues that are broader than perhaps we would see in the bases of human rights to be considered. The basis of calling it the Fundamental Rights Agency is to enable it to look at that broader spectrum. However, I think any Agency being set up will have to make decisions about its priorities, simply because it is not going to have huge amounts of resources—of that I can be fairly certain—and it will have to be quite clear about what is of most importance to it. This, in a sense, also goes back to its relationship to the Council of Europe, and making sure that there is not an overlap, which is something I think we are all concerned to address, so that the work they do is complementary to the Council and not in conflict or overlapping with it.

**Q143 Chairman:** We will be coming in a very short time to the possible overlap, but, just before that, question 4, as you know, raises the spectre of a possible problem about independence, given the provision of Article 5(1)(c) that the Agency's Multiannual Framework will “be in line with the Union priorities as defined in the Commission's strategic objectives”. Might that compromise the complete independence which Article 15 assures the Agency?

*Baroness Ashton of Upholland:* As you know, My Lord Chairman, at the present time we are still in great discussion about quite how it is going to work. The Commission's proposal at the moment is that there is a much clearer role for the Commission throughout the administrative processes to sort out the way in which the Agency would work. The position we hold and the Council's position, just as I was indicating to Lord Goodhart, is that we have an annual plan and the work plan is agreed by the Council of Ministers. That, in our view, does two things. One is that it is absolutely clear that the Agency has a strong relationship to the Council which is separate to that of the Commission, and, secondly, in a way it binds the Council in to the work of the Agency, because, after all, if the Council approves the work of the Agency then in a sense it is accepting that the Agency will be looking at particular areas. I think it is also quite important that the Council sees the Agency as a resource that goes beyond simply the relationship it has with the Commission, important though that would be, and that I think would be a more appropriate way of ensuring the Agency has a life that is valuable rather than just—as I think is feared amongst members of your Committee, my Lord

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

Chairman, and certainly outside—as yet another bit of bureaucracy being set up somewhere in the world.

**Q144 Lord Lester of Herne Hill:** On this word “independence” which we have in the context of the Equality Bill and our own new Commission—and you and I have had to puzzle over this in the course of the passage of the Bill—presumably we would agree that, whatever independence means, it would mean no unnecessary interference either by the Council or the Commission with the judgments taken by the Agency (merit appointment and all the rest of it as well) in order to ensure practical independence whatever one feels about formal independence. Would that be right?

*Baroness Ashton of Upholland:* I think that is right. Certainly, as you know, Lord Lester, we did puzzle over this in terms of the Commission and reached I think a very happy solution to it. But I think we have to be clear too that the ability of the Agency to look at issues has to be part of a plan that has been approved. Beyond that, I think that if the Council, as we would wish, has agreed the areas where the Agency is going to look at and agreed the way in which it is going to take this forward, it is then for the Council to recognise that it must accept that the Agency will reach conclusions and those conclusions will be in the public domain and will be coming back to the Council. I hope we will have the right kind of independence, in the sense that the Agency is working directly on behalf of the Council but able, within that remit, to reach, as you rightly indicate, independent decisions.

**Q145 Lord Clinton-Davis:** If there is a dichotomy between the Commission and the FRA as far as the strategic objections are concerned, how can that be resolved?

*Baroness Ashton of Upholland:* In what sense, Lord Clinton-Davis?

**Q146 Lord Clinton-Davis:** The FRA and the Commission find themselves facing a situation where there is no possibility of agreement.

*Baroness Ashton of Upholland:* Again, that goes back as to whom the Agency is ultimately responsible. Under the proposals that we support, the Agency will be responsible to the Council, so the Council will be working with the Agency to determine its work programme. Of course the Commission is a huge part of how that would be put into effect, but in a sense the Council would be the arbiter of saying, “This is the work programme and this is what will be done.” It would be not surprising that the Agency, in reaching conclusions, may not make everybody on the Council, never mind the Commission, entirely happy with the conclusions that are reached—that may be true in legislation, it may be true in other areas as

well—but, nonetheless, if we are very clear about the responsibilities of the Agency and we are very clear about its role and its independence, I think we can avoid some of those dilemmas straight away.

**Q147 Chairman:** As an introduction to the next group of questions about any possible overlap with the Council of Europe, if I could just have drawn to your attention—and I gather it was sent to your office on Monday, but hiccups occur—this draft memorandum of understanding. It will not take you a moment to assimilate. It is headed Draft Memorandum of Understanding on the Strengthening of Co-operation between the Council of Europe and the European Union. If you go to page 5, the last page, under the heading 3, Human Rights and Fundamental Freedoms of Democracy and the Rule of Law, it says, “The Council of Europe and the European Union will continue to exchange information, examine policies and initiatives . . .” etc “in particular in the fields of human rights, fundamental freedoms . . .” and then it says, “In the field of democracy and governance collaboration should be enhanced through . . . (d) once established”—and this is its reference to the Agency with which we are principally concerned—“the future of the European Agency of Fundamental Rights will strengthen the European Union’s efforts to ensure respect for fundamental rights. The Agency will constitute an opportunity to further increase co-operation and synergy with the Council of Europe and its various organs and contribute to greater coherence and enhanced complementarity in the field of human rights . . .” etc. I must say I start worrying when people talk about “enhanced complementarity” but put that aside. This synergy, where are we going to find it? Who is going to secure it and how?

*Baroness Ashton of Upholland:* Having looked at it, I think they are saying that if you take the role of the Agency and you take the role of the Council of Europe then being able to bring together the way in which they are seeking to address questions which are similar may provide an opportunity to deal more effectively with issues across the European Union. I have not, as you have, my Lord Chairman, studied this—and I tend to agree about enhanced complementarity: it is a great expression—but I think within this they are seeking to try to begin what is actually going to be quite a long conversation with the Council of Europe about precisely how they work together. I take their use of the word “synergy” to recognise that they have to make sure you do not have the Council of Europe and the Agency working in a sense in conflict with each other, or indeed attempting to do the same job and attempting to try to find ways of working on the same issues. The synergy for me is absolutely working closer together.

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

That has implications for the management structure, implications for the collaboration and co-operation, and implications for the work programme as well.

**Q148 Lord Lester of Herne Hill:** I think the awful phrase “enhanced complementarity” is now, like “stakeholders”, a jargon term which is accepted unfortunately. We now have two European Parliaments: a parliament which has to go back and forth by plane and train between two European cities because different countries want it; we have two European courts; we have now two European human rights systems needing enhanced complementarity. It is not really so much a question as a protest, but I do want to say, looking at this draft memorandum, that it is patching over something which is fundamentally very hard to achieve, which is the avoidance of wasteful duplication and added value. I have just come back from Azerbaijan, which is a member of the Council of Europe, thinking to myself: “How is this going to help human rights in Azerbaijan who are outside the European Union? Only if the Council of Europe mimics what is happening within the European Union and applies it in some way.” This is going to require lots of resources and you have said there are not going to be many resources, and therefore I wonder, doing the best you can, how you can be optimistic that this is going to add real value as between these two European systems, instead of rationalising them, slimming them down and making the thing more efficient overall. Because, looking at this, I find I do not think it is going to work very well.

*Baroness Ashton of Upholland:* I fear, Lord Lester, you have cooled down again in your warmth for this Agency, which I thought I had achieved something with. Obviously you have had the benefit of looking at the document and I have not, but I would refer you to an answer I gave some time ago, which is that the way I view the Agency is that it has to have a very specific and clear brief around, for example, the legislative programme of the Commission, and, for example too, around the provision of information across the European Union. Those could be done in a way that would be entirely complementary to the work of the Council of Europe. I do not think I would subscribe at all—which I do not interpret (d) to mean, although the lawyers will crawl all over it—to trying to develop two organisations doing the same tasks. There are opportunities within the work of the Agency and the work of the Council of Europe for both organisations to benefit from the knowledge and expertise of the other—certainly already from the Council of Europe, and over time from the Agency. It is not going to be a hugely resourced organisation, of that I am sure—I do not know what the figure will be, but it will not be by any means huge—but there are particular functions that are not currently being undertaken that could be undertaken

which, done properly, would not get in the way of the work of the Council of Europe but could be additional to it. I think that is the premise on which the Government is willing to support the proposition that is coming out around the Agency, but it is on that premise.

**Q149 Lord Goodhart:** This is following up from Lord Lester’s question to some extent. I think when the Charter was first being introduced what was seen as the main risk of conflict was between decisions of the ECJ and decisions of the European Court of Human Rights. Now the Agency is not a body which enforces or which will make the law. Is there any comparable body, therefore, in the Council of Europe with which it might find itself coming into conflict on human rights?

*Baroness Ashton of Upholland:* I suspect I do not have the proper expertise to give you a proper answer to that question. Certainly in all the discussions that I have had around the difficulties for the Fundamental Rights Agency, certainly within the Presidency, that was not an issue that was ever raised. There were many difficulties raised, but that was not one of them, so I do not believe there is a comparable question for the Agency. I think of particular concern around conflict has always been around the Council of Europe and the potential for there to be overlap and duplication.

**Q150 Lord Lester of Herne Hill:** We do have the comments from the President of the Parliamentary Assembly of the Council of Europe essentially being extremely cautious, and I would have thought the European Human Rights Commissioner, the new one, Thomas Hammarberg, will be very concerned that there should not be undermining of his role by the Agency. On Lord Goodhart’s question as to whether there is someone on the Council of Europe, I suppose he would be the person most likely to be involved.

*Baroness Ashton of Upholland:* Indeed. I took Lord Goodhart’s question to be institutional rather than individual.

**Q151 Lord Lester of Herne Hill:** He is an institution.

*Baroness Ashton of Upholland:* Yes, I completely see that. However, in my mind he was an individual at that point. I certainly think it would be deeply damaging if the Agency at any point were in that position of undermining the Commissioner’s role, however, that is exactly the reason why these discussions about ensuring that the relationship is done properly are so crucial to the success of the Agency in the future.

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

**Q152 Chairman:** We did hear evidence at an earlier session from Mr Gil-Robles, who is the present Commissioner, coming to the end of office shortly and no doubt to be replaced by the gentleman to whom Lord Lester referred, and he gave a cautious welcome to this proposal but was very concerned to stress the need that there should not be any duplication and that nothing should be done to question the pre-eminence of the Council of Europe in the entire field of human rights. We have people in Strasbourg as well as Brussels. What do our people there think about this proposal? Do they feel concerned, sensitive to the fears of overlap, duplication, weakening of the Strasbourg pre-eminence in the human rights field?

*Baroness Ashton of Upholland:* My Lord Chairman, could you define our people in this context?

**Q153 Chairman:** Members of the Parliament there, people on the Council of Europe and the Parliament there.

*Baroness Ashton of Upholland:* I think those involved in the Council of Europe are quite rightly concerned about these issues. In terms of the Parliament, the main body, as you know, my Lord Chairman, which has dealt with this has been the LIBE Committee, where we have quite a wide spectrum of views. Kinga Gál who is the *rappporteur* on this issue has done a rather splendid job of trying to bring it together, and to try to get the Committee to have a proposal that will find support within the Parliament that avoids two extremes. One is creating something that would be in direct conflict with the Council of Europe but would be wide-ranging and would find no support in Member States; and on the other hand something that would be considered to be so pointless that it would be rejected by the Council as being a waste of money. I know Kinga—in that I have discussed this with her on several occasions—has sought to achieve that and I think has managed it with some success. I think the LIBE Committee under Jean-Marie Cavada's chairmanship has also taken this quite seriously and recognises that there is still quite a lot of work to do, because, certainly the last time I appeared before the Committee with Commissioner Frattini, the question of how the Council would operate was perhaps the most substantial issue that the LIBE Committee was facing.

**Q154 Chairman:** I also was concerned more with those in the Council of Europe than those in the European Parliament.

*Baroness Ashton of Upholland:* Indeed.

**Q155 Chairman:** Have we addressed every aspect of what is encompassed in question 6? I am not sure we have crystallised our thinking, in terms of how on a

practical level can there be this co-operation, co-ordination, to ensure that there is not this overlap and that we get complementarity/synergy rather than, on the contrary, duplication and weakening.

*Baroness Ashton of Upholland:* I think there are two or three areas where we have the potential to resolve this. First of all, there is the question of representation on the Management Board by the Council of Europe and what role that will be and whether they will have what one might call voting rights in the context of the Agency. That is the first way in which we can make sure there is a direct link. I think, secondly, there needs to be a clear understanding in the Council of Ministers and also in the Commission of the differences in the roles and where they complement each other and what we are seeking to do. Thirdly, in the work plan and work programme of the Agency I would expect there to have been dialogue with the Council—which would become obvious and apparent when the work plan is put before the Council of Ministers if that is where we end up—such that in a sense the Council is able to support the work plan and the Council of Ministers is clear that that is a part and parcel of what is happening. If we get that kind of clarity of programme, if we get clarity about the relationship between the Council of Europe and the Agency and we get the right management structure, including the Council of Europe representation, we should, with a fair wind, my Lord Chairman, be able to resolve any issues that arise—which there may be as operational questions come forward—one way or other, through one of those three different routes.

**Q156 Lord Lester of Herne Hill:** Do you think the European Parliament should have any role at all in reviewing the composition, for example, of the Management Board without, as it were, selecting or anything, in order to give some kind of broader legitimacy to the operation?

*Baroness Ashton of Upholland:* As you know, there was a big discussion quite early on in the deliberations about the relationship between the European Parliament and the Agency about whether, indeed, the Agency should be established under a different article of the Treaty establishing the European Community. That was to move it away from Article 308, where it currently is, to Article 13. You may also remember, Lord Lester—I think I may have raised this at the Committee previously on this issue—that there was quite a lot of desire on behalf of the Parliament to see themselves in a co-decision-making relationship upon the Agency, but that under Article 13 we could not have set up the Agency that we have currently planned to do. So there is an agreement between the Commission and the Parliament through the LIBE Committee of giving them a consultative role that is addressed by the appearance of the

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

President of the time, in terms of the European Presidency, and also the role of Commissioner Frattini. Hence, when I went to the Committee, it was with the Commissioner, and, although it was not a formal trilogue, it was nonetheless an opportunity to talk in greater detail than you would expect on a particular subject. From the Parliament's point of view, there will be many members of the Parliament who feel that this should be pushed further and that they should have a stronger role. We are quite clear, though, that the competence for setting up this rests within Article 308 and therefore the role of the Parliament should be consultative only.

**Q157 Lord Neill of Bladen:** I think part of your answer included the point that there would be somebody on the Management Board from the Council of Europe. As a matter of arithmetic, it is one in 30, is it not? You have every Member State, you have an independent person for the Parliament, one for the Council of Europe and two for the Commission, which is a total of roughly 30. One voice is going to be in a pretty weak position from which to argue the merits or whatever.

*Baroness Ashton of Upholland:* I think that would be right if we saw this as just being another member of the Management Board. The role could, indeed, be designed to see the Council of Europe role in a different light, and I would envisage that one of the areas for discussion that needs to take place is in terms of the relationship of that one individual to the representation on the board more generally. For example, Lord Neill—and I have no basis to say this other than it is an example from my point of view—it could be that the Council of Europe representative has a particular consultative role on the Management Board, therefore they would, in a sense, be able to speak on behalf of the entire Council of Europe and their views would be weighted accordingly—not in voting rights terms, necessarily, but weighted accordingly. That does happen, as you would know Lord Neill, on other organisations, where particular bodies may be represented numerically by small numbers but nonetheless what they say really does carry more substantial weight. If we get the relationship right, that sort of relationship would for me resolve the problem of the numbers on the Management Board, but I think there is quite a long way to go—and I am certainly not the one negotiating this—to determine how best to make sure that that happens appropriately.

**Q158 Chairman:** I think you would accept that involves further work but I do not think we find that in Article 11—unless I have missed something—a special voice or role, and you have the same problem with the European Parliament independent representative.

*Baroness Ashton of Upholland:* Indeed. The reason it is not there is because that is not the position at the moment, but, because we are quite clear that one of the key remaining questions for the Agency that will have to be resolved, is its relationship to the Council of Europe, it is an opportunity perhaps to look at how the individual who serves on the Management Board might have what I would describe as an enhanced role. That could also be pertinent to the Parliament but it is certainly true for the Council of Europe.

**Q159 Chairman:** In a way, it is the point just covered. Under Article 11, one vote for the representative of the Council of Europe and one vote for the independent person appointed by the European Parliament, you think this could be a strong vote or a more potent vote than the rest, but I have two questions. One, you could make it more potent by increasing the number of representatives or you possibly could write into the provisions something to guarantee that “particular attention must be paid to” or something of that character. Is that something that could come out in negotiation?

*Baroness Ashton of Upholland:* It might come out in negotiations but I suppose I hesitate about the word “voting”. My impression would be that if we get this right it is the Management Board which is overseeing a programme that has been determined by the Council and that the need to vote on anything may be reduced if not completely taken away. I know that in setting up bodies it is quite important for people to know they do have voting rights. I would hesitate to increase the numbers too, simply because the size is already in my view quite large and I am not sure that increasing the numbers would enhance the opportunity. It really is about how does that individual represent the Council of Europe and how does the Management Board view the weight of that representation. That, for me, is much more important than whether it equals three votes, four votes, or it is five people. I think that is yet to be determined. In terms of the Council of Europe's approach to this, I would imagine that they are considering this simply because, if I have thought of it, I am sure they are way ahead of where I am on this.

**Q160 Chairman:** Is this a convenient moment to discuss one matter that you raise in your recent letter which is that there is a French proposal currently under examination for an alternative management structure for the Agency. You say that it is not yet fully analysed, but “. . . a dual structure based on a Management Board and a Scientific Committee might prove a better means of ensuring the independence of the Agency from the Commission, the Agency's accountability to the

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

Council and effective advice and expertise on human rights issues.” It is the last matter you deal with in your helpful recent letter. Do we know enough about this French proposal to know whether it may involve a very substantial alteration to the proposal under Article 11 to the existing Management Board?

*Baroness Ashton of Upholland:* I do not know enough about the proposal yet. Certainly it is an intent, I think, from French colleagues to try to look at alternative possibilities. I am not sure that I have seen yet anything which suggests to me that it has gained substantial support, nor indeed that it will perhaps resolve the issues that are currently on the table. In a way, my Lord Chairman, I think we have to go back to first principles and say that we have to determine precisely what the Agency is going to do and then work out the management structure that flows from that, rather than the other way round, and I think we still have some way to go, not least, as I have indicated, in discussions about its relationship to the Commission, to institutions, to a work programme and to the functional role it will perform, and then perhaps to look at how best that is put forward in the management structure. Certainly Member States need to play a substantial role in that, and, as we have already indicated, there are also other parties, such as the Council and Parliament, who have to have the right kind of voice, and it also may be that we need a management structure that over time can evolve as the Agency beds down and people perhaps become more able to deal with it in different ways. We may find its relationship with the Council, for example, changes over time.

**Q161 Lord Neill of Bladen:** Minister, perhaps you do not really like us to be talking in terms of voting, because it suggests a clash around the table as to exactly how you see this operating. But, so far as this representative of the Council of Europe being given an enhanced role, hand-written at the moment, that representative is given a reduced role if you look at paragraph 6 of Article 11. You probably know this: that representative can only vote on points (a) and (b).

*Baroness Ashton of Upholland:* That is right, and, as I hope you appreciate, Lord Neill, that is something on which we have views and which is under discussion at the current time. Our view is that they need to have voting rights. Within the context that I have set, I think what is really critical is the weight given to the individual and the responsibilities they hold rather than how many times they end up pressing a button or putting their hand in the air. In a sense I think it would be a pity if that were the way the Management Board were to run—on any organisation, I hasten to add, not just this.

**Q162 Lord Lester of Herne Hill:** Please do not think that I am hot or cold in this area, I am just puzzled. This body is going to have very limited resources and a very clearly defined role, yet it is going to have a very large Management Board and, on the French proposal, in addition, a Scientific Committee (whatever that means).

*Baroness Ashton of Upholland:* Indeed.

**Q163 Lord Lester of Herne Hill:** So the whole thing is going to be hugely top-heavy for performing an important but very limited function. Is there any way in which the Government could come up with something a bit leaner and slimmer and more efficient and less bureaucratic?

*Baroness Ashton of Upholland:* I am always in favour, Lord Lester, of having something that is leaner and less bureaucratic. The reality, however, is that if you set up a new institution you have to recognise, as I am sure you do, that you need a management board that addresses the concerns of the parties setting up the institution. It is very difficult to envisage at this stage creating a management board perhaps with fewer representatives because I am not convinced that people have yet, as it is brand new, the confidence to do that. The point I was trying to allude to in my previous response that that will change, is that I do believe as organisations settle down and become more comfortable it is possible to address the way in which the management board operates—and that is true in any organisation in any country. That, I think, will be something that the Council and the Commission and the Agency itself will need to consider in the future. At the present time, we recognise that when you are trying to get an agency set up between 25 Member States and the Commission and the Council of Europe and the independent advisor, there are lots of interests that need to be addressed, and that I think leads us to the point where the kind of large management board which you would not normally expect to see needs to happen if we are going to get the Agency into existence. But I absolutely take the point, and my hope would be that if the Agency is successful and if the Management Board needs to be smaller that there will be ways found to do that. It really comes back again though to the function of the Management Board. If this is going to be a group of 30 people who spend their time voting on different issues, then that is one type of management board where it would be very difficult to decrease the numbers because people want their voting rights. If, however, it becomes a management board where strategically it takes the work programme and makes sure that the work that is going on fits in with that and has the kind of debate and discussion that some of the best boards in organisations currently have, then it could well be smaller. But I think we



1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

are not at that point yet and I think we just have to accept that the Management Board in a sense has to reflect the needs of the partner organisations trying to set it up.

**Q164 Lord Lester of Herne Hill:** One could think of the body that Lord Goodhart and I belong to, which is the Governing Council of Justice. One could imagine that there would be a council, with all the interest groups meeting four times a year maximum, who would delegate to a management board the meetings every month perhaps and be accountable to the broader structure. But the idea of a management board of 30 with a Scientific Committee (whatever that means) under it as well does not seem to me very sensible. Is there any scope for any change in this structure at this stage or do we have to wait and hope it develops in the course of time?

*Baroness Ashton of Upholland:* We could spend some considerable time arguing about the structure of the Management Board. I think the truth is that in the limited time—if this is going to come into fruition under the Austrian Presidency, which is their ambition—there are issues that we would see as having a greater chance of success; in terms of, for example, the relationship with the Council of Europe. So, realistically, if I were to ask my officials, led by Edward Adams here, to go and do that, I think they would probably slightly baulk at the idea that this was the most fundamental thing on their agenda. I think, however, Lord Lester, you raise an important point about the opportunity that the Management Board has to find ways itself of managing this. I am very keen, once we have got this established and we have sorted out its remit, we have sorted out its work programme, we have sorted out its relationships, we ought to let it get on with it, and, if it chooses to set up within its Management Board a sub-committee or a different way of doing a particular piece of work, I think that is for it to do—rather like we talked about with the Commission for Equality and Human Rights—not for nation states to dictate.

**Q165 Chairman:** The Agency, as I understand it, is intended to become operational on 1 January next year. If I understand what you are saying, for that to be achieved, the structures would have to become crystallised during the Austrian Presidency; that is, by the end of June. Is that what you are saying?

*Baroness Ashton of Upholland:* The position is exactly that. The Austrians are very, very keen for this to be something that is dealt with under their Presidency, so they want to get to political agreement on it all by the end of their Presidency in order for it to come into being on 1 January next year—which is the plan at the moment. Therefore we are in a sense constrained because of that laudable ambition: it is a proposal that has been on the table for some considerable time.

The focus I think for us is to make sure that we have the right remit, and in a sense I would let it worry itself about how to make sure its management structure works.

**Q166 Chairman:** Part of the Austrian enthusiasm may flow from the fact that it is to be established in Vienna.

*Baroness Ashton of Upholland:* Of course. I take nothing away from the Austrian Presidency for that. That is an ambition they have had for some considerable time. No time like being under your Presidency to establish it. That is completely reasonable.

**Q167 Chairman:** As we turn the page I am conscious that we have thus far addressed specifically the first seven questions. You have obviously covered some of the ground encompassed in the later series. Could I ask: Are you under any appalling time constraints tonight? You do not have any plane to catch, as I think you had on one occasion.

*Baroness Ashton of Upholland:* I did, though I seem to recall I was here for two and a half hours on that particular occasion. My Lord Chairman, I am in your hands entirely.

**Q168 Chairman:** That is very helpful. Could we turn to a group of questions which concerns the relationship between the Charter and the ECHR Convention. How does Government see this? Do Government see the main point of reference for the Agency as the Charter with all the wider rights that are encompassed in that or the narrower convention?

*Baroness Ashton of Upholland:* I think it is the Charter and I described it earlier as a backdrop because a lot of what is in the Charter is incorporated elsewhere, but the reason that we describe the Fundamental Human Rights Agency in the way we do is because we do see the Charter as being that. Having said that, as I have already indicated it will be important for the Agency to consider the areas that it wants to cover more generally in its work and specifically in its annual work plan.

**Q169 Chairman:** Do all Member States have the enthusiasm for the wider rights encompassed in the Charter?

*Baroness Ashton of Upholland:* There is a difference of view between Member States. We have not, of course, had any serious discussion of this on the Council yet, so I think some of that will evolve from the politicians rather than from the officials, who of course are working on the technicalities at the present time, and there are a wide variety of views about the Agency itself and the role and function it could perform. I would expect nothing less with 25 nation states taking an interest. But I think if we are very

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

straightforward about it, then the obvious approach in my view is to have the Charter as the backdrop, as I have described it, and then to enable the Agency to put forward to Member States the work that it seeks to do and the appropriate weighting it would give to particular aspects of the Charter.

**Q170 Chairman:** The fact that the Charter includes those rights like freedom of the arts and sciences, the freedom to conduct a business, the rights of the elderly, right of access to documents and a host of non-ECHR rights, does not give any cause for concern to the Government here?

*Baroness Ashton of Upholland:* It does not give cause for concern in the sense that the basis on which the Charter is founded does not give us cause for concern. It may well be that for the Agency it will look across these different rights and it will decide that it wishes to focus on particular rights which are more akin to or more relevant in terms of human rights. On the other hand it may decide that actually it would like to do something slightly different and look at, for instance, the example that you gave, Chairman, how that works across the whole of the European Union. It will be for it to come forward with propositions and for the Council to see the relevance of them and approve the work plan, if that proposal is the one that is accepted.

**Q171 Lord Lester of Herne Hill:** The Charter itself, as I understand it, is gathering together the economic, social, political and civil treaties by which all the Member States are bound anyway, and therefore it does not have to be entirely court-based or civil and political rights-based in its view, any more than our own Joint Committee on Human Rights can look at any of those as it thinks fit. What about those rights that are economic rights of the European Union, freedom of movement and so on? Is it not sensible at least to exclude those from the scope of its work because those are mainstream EU rights that are different in character from the human rights we are talking about, or does one leave the whole thing entirely at large for them to decide upon as they think fit, because that goes beyond the Charter, does it not? Things like freedom of movement and freedom for the right of establishment and so on, are not human rights in the sense they are talking about. They are fundamental rights springing originally from the Treaty of Rome. Am I making myself clear? I am not sure I am.

*Baroness Ashton of Upholland:* Lord Lester, you are always clear, but what I was trying to argue was that we see the Charter as being the backdrop against which the Agency is established, that if one looks across the incorporation of different “rights” there will be some issues where it could be argued that there is a fundamental human rights question where the

Agency may well wish to focus attention because these are areas where, either through its pre-legislative scrutiny kind of role these are areas of deep importance, or in offering advice and support, or indeed perhaps during the kind of information gathering I have described, it enables you to contextualise across the European Union and to compare. Those will be higher on the agenda than others. It will be for the Agency though, in this sense of being independent, to look across and say, “We think these are particularly important and we must put this as part of our work programme”, and for the Council to say in a sense yes or no to that. I am conscious that, though I want the Agency to be very clear about its function, we have to give it some flexibility in looking at what it considers to be relevant, and it may be that areas that perhaps neither you, Lord Lester, nor I would consider to be of legal importance may be of great importance in particular states and of great importance if one is looking across the whole of the European Union, or indeed trying to support the Commission in its legislative scrutiny.

**Q172 Chairman:** It would help me if somebody would bring to life the purpose of all this by giving us a paradigm example of just what this Agency would in fact go out and do. What particular inquiry would it go and conduct, and would it inquire across the entirety of the states of the Union and compare and contrast and then come up with something? How does it actually work? You perhaps have a very clear notion of how it works but for my part I confess I do not.

*Baroness Ashton of Upholland:* No, and, Chairman, you get to the nub and the heart of the problem in the sense that I can envisage areas where perhaps it would be interesting to have a European perspective on particular aspects of human rights that may or may not be relevant and appropriate for the other 24 nation states or indeed be a priority for the Agency. One of the deep questions that is currently being examined in the working group process is trying to establish within the broad remit, where I think there is quite a lot of agreement that I have described already about monitoring and so on, precisely what that might look like and what that role might be. I think that what we have to see next is the working groups working towards a position where the Council of Ministers can make some kind of initial decision that it is the right direction that can be translated into what that means in terms of the way in which the organisation needs to be set up, who needs to be employed by it and so on, which is also part of this whole debate, of course, and then how the Management Board would work in order to deliver that. However, we are not there yet so, although I am a supporter of what the Agency potentially can do

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

and I am pretty clear about the kinds of areas it should look at in terms of, as I have already described, monitoring and pre-legislative scrutiny and so on, I am very mindful that we are not yet at a position (though we hope to be soon) to be able to be as crystal clear as we possibly can, and again that rather goes back to what its relationship with the Council of Europe is, where can it add value in the whole process, how can it offer things to Member States that will be of value, what should it be offering the Commission? I am afraid you have absolutely hit the nail on the head: it is quite difficult to envisage at this stage quite where it might end up.

**Q173 Lord Lester of Herne Hill:** But it could, for example, say there is too much secrecy and lack of access to official information across European institutions, or there is inadequate protection of personal privacy in data processing across Europe. Taking what we would call data protection or freedom of information, they could say that those issues matter very much and they want to monitor those in close collaboration with the Council of Europe, could they not? That sort of link would do, although governments might not like it very much.

*Baroness Ashton of Upholland:* I think you have again hit the nail on the head. I think in looking at that they would have to justify why that was their priority, bearing in mind, of course, all the work that is currently going on in data protection within the European Union and bearing in mind that they may find Member States are not particularly keen that that be a real priority in the first year of its operation. I declare my interest, of course, as the Minister responsible for both freedom of information and data protection, and I knew, Lord Lester, that that might well be why you raised it. If they were able to put up a good case as to why that was something they should focus on and it was relevant in the context of the Charter, relevant in the context of the work programme and hopefully relevant in the context of the Commission then perhaps they should look at it, but in a sense, because the Commission is looking at data protection in any event, if we had the Agency it might well in the future have already given the benefit of its knowledge and advice to the Commission in looking at that legislation.

**Q174 Chairman:** Can we move to the geographical scope of the proposed Agency? You touch on this again, helpfully, in the recent letter on the second page, and you express the Government's concern about an extension of the Agency's geographical scope with reference to efficiency and effectiveness, and you have already pointed out that you do not want to over-burden it by widening its thematic mandate, and that is a question, I think, of the second pillar. When it comes to candidate countries, as I

understood your letter, you say that the Agency should play a role in assisting candidate countries to prepare for membership of the EU but, as I understand it, not otherwise. Is that how it works?  
*Baroness Ashton of Upholland:* Indeed, we think that is right. It is Community institutions and candidate countries only.

**Q175 Chairman:** I just wondered how that squared with the existing draft of Article 3(4), "Without prejudice to Article 27, the Agency shall, at the request of the Commission, provide information and analysis on fundamental rights issues identified in the request as regards third countries with which the Community has concluded association agreements or agreements containing provisions in respect of human rights, or has opened or is planning to open negotiations for such agreements...". Does that square with that or does Article 3(4) concern you as to overload?

*Baroness Ashton of Upholland:* We are very clear, Chairman, that we think the role of the Agency should be within Community institutions and candidate countries only. That is partly a recognition of the role of the Council of Europe and partly in recognition that there is a limit to what this Agency could and should do, and we do not believe that it will find huge favour amongst the Council to support a role that goes beyond that. Certainly in terms of candidate countries, we are always mindful that in preparing to join the European Union there is support that could be given to candidate countries to get them ready. I mention it particularly because in the world of justice and home affairs we are looking at what we might be able to do, both in a Government sense and a European Union sense, to help countries be ready around issues that can be fundamental to their ability to participate within the European Union, so there is an opportunity for the Agency perhaps to offer assistance there that would be very much welcomed by those candidate countries, but we do not see a remit beyond that.

**Q176 Lord Goodhart:** Since the role of the Charter is supposed to be limited to the EU institutions or the actions of Member States in implementing EU legislation, it seems that there would be no scope therefore for looking at general human rights issues in countries which are not members of the EU.

*Baroness Ashton of Upholland:* That is true, but that is why we want to be quite specific about whether there is a function that it could perform which we would build into the work that the Agency was doing that was of benefit to candidate countries.

**Q177 Lord Goodhart:** I can see there would be a special position of candidate countries that are going to have to join the EU institutions and would need

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

advice on preparatory work. It does seem pretty obvious that there ought not to be a scope for anything beyond candidate countries.

*Baroness Ashton of Upholland:* I agree, Lord Goodhart, completely with that.

**Q178 Chairman:** Does the existing Monitoring Centre for Racism and Xenophobia which, after all, is what the new Agency is going to absorb, itself play any part in scrutinising and monitoring the situation in terms of racism and xenophobia in candidate countries?

*Baroness Ashton of Upholland:* It does not, as I understand it, at the present time.

**Q179 Chairman:** And you would not expect the Agency to do other than follow that same pattern?

*Baroness Ashton of Upholland:* What we are proposing is that there could be a valuable role for the Agency in helping those candidate countries, as Lord Goodhart said, as they move towards becoming members of the European Union, to deal with issues of concern that they may have or in making sure that they, if you like, fit into the European Union. It is very much a supportive role that I think would be worth building into the work of the Agency which is different from racism and xenophobia at the moment.

**Q180 Chairman:** But that and no more?

*Baroness Ashton of Upholland:* That and no more.

**Q181 Lord Lester of Herne Hill:** There is a body called the ECRI body in the Council of Europe. That does monitor racism and xenophobia throughout the candidate countries.

*Baroness Ashton of Upholland:* Indeed, and that is why we want to make sure this does not overlap with what that is doing. Again, we are back to that fundamental relationship between the organisations and that is already covered appropriately within the Council and therefore it should be left in that way.

**Q182 Chairman:** Article 27 provides that “The Agency shall be open to the participation of those countries which have concluded an association agreement with the Community and have been identified . . . as candidate countries . . . where the relevant Association Council decides on such participation”, but as I understand it the Government would not support that.

*Baroness Ashton of Upholland:* The Government, as I say, is very clear, and again this is partly why all these negotiations are under way, that we want a very clear, restricted relationship that goes outside of the European Union institutions, which we think is appropriate for candidate countries for reasons I think the committee would understand, but absolutely no further than that. I think it would be

very difficult to imagine how the Agency could conceivably do more and I think it would bring it straight into conflict with the Council of Europe, which would be a waste of resource, if nothing else.

**Q183 Chairman:** Do you understand that to be basically the thinking of other Member States as matters now stand?

*Baroness Ashton of Upholland:* Certainly there will be other Member States which would agree with that. There are possibly other Member States which would take a different view. We have not yet had the political conversation at the Council of Ministers level. When we had the Presidency I did talk about the Fundamental Rights Agency to a number of other states but, of course, as you know, Chairman, it was not the Presidency priority of the UK, so that limited for me the way in which I approached it.

**Q184 Chairman:** I follow. Can we then move to the final chapter, which is on the Gender Equality Institute? As we address it can we perhaps remind ourselves that a number of Member States are bringing the various strands of fundamental rights together and envisaging their protection by a central body, and indeed, as I understand it, our own proposal here is for a single body to consolidate the EOC, the CRE and the Disability Rights Commission. On the face of it, it might be thought it would be counter-intuitive to be at one and the same time bringing different agencies into being to deal with different strands of fundamental rights. Why do you think the decision has been taken to bring them separately into being?

*Baroness Ashton of Upholland:* I support the decision to bring them separately into being at this stage but I never rule out the opportunity that might be available in the future to bring things together. If you contrast it with what has happened in terms of our new Commission here, we have a number of bodies with varying track records in terms of length of time and to a degree varying responsibilities who now need to come together with a very clear work programme and a very clear legal base whereby none of them loses anything in terms of the capacity of the work they were doing before in terms of the law. As I see it, what we have with the Gender Institute is a body that will have a very clear remit to look at a particular issue right across the European Union. It is formed under Article 13(2) so it is a co-decision making legal base in any event, and what we have on the other hand is a body that is inevitably going to take some time to find its feet but is seeking to do something that is of a different order. The Gender Institute will be focusing, I would imagine, for example, on issues of pay, issues of child care, issues that affect the relationships of gender in economic, social and other terms in relation to the European

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

Union. I think that is a very clear-cut remit and the legal base under which it is set up is very clear too, that Parliament has a very particular role for its work, and I think it would be a mistake at this stage to say that, on top of trying to set up this Agency, on top of trying to get it to think strategically across the European Union (and to a degree in the candidate countries) about what it can offer against the backdrop of the Charter, we will add in something that has a completely different legal base and in a sense a very clear piece of work to do and open it out for the future. However, I think we will be doing neither organisation any favours and probably lose momentum, certainly on the gender issues at this point, because there is a potential—I say no more than that—for us not to take those issues forward with the speed and momentum that we can get both from the co-decision making process and also because they are much clearer.

**Q185 Lord Clinton-Davis:** Is it not much more difficult though to adopt the policy which you outline after the organisation has been established? Is there not then a great temptation to justify how valuable that organisation is?

*Baroness Ashton of Upholland:* Of course, and I would expect organisations to justify their own value but, exactly as we did with the new Commission on Equality and Human Rights within this country, we had a long process of negotiation between the different organisations that sought to demonstrate how important it was to bring them together and the value that it would offer not to the organisations but to the people they are seeking to serve. If it becomes clear that the Gender Institute and the Fundamental Rights Agency ought to be in the same place it will be on the basis that they will be serving the citizens of Europe more effectively by doing that, and that, they will have to accept, is more important in a sense than whether the organisations survive independently.

**Q186 Lord Lester of Herne Hill:** Minister, I do not think it is reasonable to ask a minister to be consistent; that is probably demanding more than is necessary for good administration, but I must ask you this. If you look at your letter, you say that merging the European Institute for Gender Equality with the Fundamental Rights Agency would marginalise gender equality issues within the wider context of fundamental rights and that establishing two separate but co-operating agencies would raise the profile of these important topics. Is that not exactly the argument that the Government rightly rejected in this country when special interest groups pleaded that we should have still an EOC or a CRE and so on, and is it not rather strange to single out gender as deserving of special separate institutional recognition as distinct from race or all of the other

very important strands? The charge of inconsistency could be levelled at that, and you will no doubt give me a reason for saying it is not at all inconsistent because what is happening in Europe is different from what is happening in this country. I do suggest to you, however, that it makes no sense to be creating a new Gender Institute when sex equality and sex discrimination are part of human rights generally, as are race equality, for example, and they should all be within the same Fundamental Rights Agency.

*Baroness Ashton of Upholland:* Lord Lester, I am always consistent in my view and I think we are in two entirely different places. I do not think it is about Europe being one place and the UK being in a different one. I think you have to look at what the organisations are going to do. When I look at the potential of the Gender Institute, for example, for me—and I speak in a sense not as a minister but as a woman—I would hope that the Gender Institute would look at the question of equal pay across the whole of the European Union. It might also look at the question of child care support across the whole of the European Union. I hope it will have a very clear work programme of particular issues that are important to address. I do not rule out, of course, that there are other issues that are of deep importance to members of minority and ethnic communities and so on, but I simply focus on that because that is the Institute we have. It is quite different from the role that I was describing of the Fundamental Rights Agency, which is monitoring, looking across the European Union to provide advice and assistance and looking at what legislation is coming through, so I think these are bodies that are quite different at this stage in their development and quite different in their potential. When we merged the organisations through the legislation in this country and sought to set up the new Commission we were fundamentally looking at organisations that had a huge overlap in terms of the way in which they worked, and the difficulty we identified was that if you had more than one characteristic of the discrimination that you suffered then you were dealing with more than one organisation and we did not get the potential of bringing them all together even in terms of the economies of scale that that would imply, but also the opportunity to thematically think differently about issues of discrimination. If we had in Europe a series of organisations or institutions similar to those which we have in the UK I would be arguing on exactly the same basis that they should be brought together, but we are not at all in that position and therefore I argue at the moment that there is a particular piece of work to be done around gender which is different from the role of the Fundamental Rights Agency.

**Q187 Lord Lester of Herne Hill:** Let me just be quite clear. If we label one silo “the Gender Institute” and the other silo “the Fundamental Rights Agency”,

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

and we are looking at the problems of, say, Roma women, insofar as we are looking at them as women it is the Gender Institute, and insofar as it is Roma it is the other one, and insofar as it is Roma women the two silos have got to come together in some way. That is institutionally and architecturally what we will finish up with, is it not?

*Baroness Ashton of Upholland:* No, I do not think it is at all because what you are seeking to do is to say that the Fundamental Rights Agency's role is the same as the Gender Institute's role; it is just not dealing with gender, and that is not at all what I see it to be doing. It is a body that is being set up, if it turns out the way we hope it will, that will have a very clear strategic overview. The Gender Institute, I think, is taking very specific issues and trying to see how to address them, but it is different, and I do not think that you could encapsulate, for example, the difficulties that Roma women face, by saying, "If you are Roma you are in one, if you are a woman you are in the other", because actually they would not be looking at them at all in the same way. It may well be that the Gender Institute will look at particular concerns of Roma women which may be around education, may be around child care, may be around employment and so on. That would be perfectly logical for it to do. If the Fundamental Rights Agency were doing that it would be within an annual work programme designed across 25 nation states that had a much more strategic view, perhaps looking at what is happening on the gender issues that are relevant across the states and perhaps gathering information that would be of use to the Gender Institute as it did its work. They are fundamentally different organisations in my view and therefore we are not comparing like with like. I therefore believe it would be possible to see that they would complement each other rather than overlap.

**Q188 Chairman:** Minister, I appreciate that it was not you who gave evidence to Sub-Committee G which looked into the proposed Institute for Gender Equality, but I suspect you will have seen the report, and paragraph 46 of that concluded that the case for a separate European Union Institute for Gender Equality had not been demonstrated and they recommended that further consideration should be given to the alternative of incorporating their work in the envisaged Agency.

*Baroness Ashton of Upholland:* Indeed, but they did not have the benefit of my appearance before them though I would have been delighted to talk to them. I do not know which sub-committee letter I am in at any one point but I would be delighted to talk to them. It could be, could it not, Chairman, that if I had described the Fundamental Rights Agency in the way I have described it to this committee this evening they might have taken a different view because my

suspicion is that when that was produced, and indeed I do know the document but I cannot say I know it very well, we would have been at an earlier stage of development. As things stand we can envisage two quite distinct organisations at this point, but I am sure that the members of the committee, with their vast experience, would be fully aware that, just as the Government has travelled in the direction in our own Commissions of bringing them together at an appropriate moment, we would be extremely foolish to rule that out as a possibility in the future. I just think we are not there yet.

**Q189 Chairman:** I follow. As to doing that in the future, is it perhaps one thing to bring together three domestic bodies such as we have now done, but another thing to do that in the context of the European Union where presumably they are going to be sited in different cities and different countries? It might be politically a very great deal more difficult to close down one agency in one country in favour of another.

*Baroness Ashton of Upholland:* One of the questions always around the European Union is the siting of particular agencies and you will know that discussions are currently under way as to where best to site the Gender Institute. I know there is quite a strong move to site it within reasonable distance of where we expect the Fundamental Rights Agency to be sited, so that could be addressed in that way. I think we have to recognise that increasingly the communication between different organisations is not done face to face and it is quite possible for organisations right across the European Union and parts of the European Union to communicate very effectively and work very collaboratively together without having to be in the same city or even in the same building.

**Q190 Lord Goodhart:** In view of the fact that having separate Management Boards, separate geographical locations and so on is going to make it extremely difficult to bring these together if it is thought a good idea to do so in the future, is there a case, given the top-heavy nature of some of these Management Boards, for saying that there should be a single Management Board which would be responsible for both the Fundamental Rights Agency and the Gender Institute?

*Baroness Ashton of Upholland:* It is certainly a proposition you could put. I think I would argue again that I would envisage these organisations being quite different at the present time and therefore to try and load on to a Management Board, that after all has to set up either one of them, a different range of responsibilities I think could be quite difficult. I am more optimistic than I sense you are, Lord Goodhart, about the potential to bring them together in the

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

future. Who would have thought 10 years ago we would have brought together the different Commissions as we have successfully done within the new legislation? It was not an easy challenge but it was a challenge to which they all rose and a challenge that they recognised, geographically apart as they were, as well as in a sense issue-based apart, that they had a responsibility to provide the right kind of support to the people of this country. At the end of the day it is critical that organisations do not just continue because they have always been there, and if it means we have to sort out management functions in order to provide a better service to people, so be it. I am sure that if it becomes crystal clear that these organisations ought to be in the same place as they develop there will be many in the Commission and in the European Parliament and on the Council who will rise to that challenge.

**Q191 Lord Neill of Bladen:** Would a subsequent decision to merge the two bodies involve unanimity in the Council and a vote in favour in the Parliament?  
**Baroness Ashton of Upholland:** That is a very interesting question because, of course, the legal base for both is different, so I would imagine what one would have to do would be to have both of those decision-making processes reach the same decision. Under Article 13(2), under which the Gender Institute is being established, we would have to have co-decision and QMV in the Council, while for the Fundamental Rights Agency it would have to be unanimity. That of itself would be an interesting challenge but, as we have already recognised in this country, we would perhaps be able to provide some advice and support, having successfully achieved it in our own commissions.

**Q192 Lord Neill of Bladen:** I could foresee problems.  
**Baroness Ashton of Upholland:** There could be.

**Q193 Lord Lester of Herne Hill:** This is the last opportunity we have to cry “stop” before this goes ahead, though I am sure it will go ahead, but is not Lord Clinton-Davis right that once we set up these institutions, just as we set up CEDAW and CERD and CAT and the Rights of the Child Commission internationally, we create a problem which has never been solved in Europe of reducing the number of institutions instead of proliferating them? Your justification for creating two bodies is that what they do is entirely different, but how is that so? If we are concerned about the rights and welfare of women I do not understand why a Fundamental Rights Agency which had that within its remit would not look at discrimination, promoting equal opportunity, a family welfare policy and all the other matters, but would do so in the broader context of other rights and interests, like race, for example. You

seek to suggest that there is some clear dividing line. I have not understood why there should be such a line and even less so why there should be different Management Boards, different premises, all at the European taxpayer’s expense. Is it too late for the British Government to say, “No, let us have a single body”?”

**Baroness Ashton of Upholland:** I think a single body would not achieve the objectives that we want to see. If you remember, Lord Lester, when I began with the committee I talked about the role of the Fundamental Rights Agency as being advice and monitoring and providing support to the Commission in terms of legislation in the way I described. That seems to me a very clear role that can span across a whole range of issues that are important. I have not ruled out in the end that we would bring those organisations together but I also identified that I thought the Gender Institute would have an opportunity to focus on, for example, issues of employment in a different way, and be able to take up those issues and address them more effectively. It is possible that a proposal might come forward that said they should share a Management Board or that there should be some way in which one could establish a mechanism that they might come together in the future, but you are then also into the tricky problem that they have a completely different legal base. To be honest, it would be very difficult to find a way to do that at this point, when both have been set up and where there is undoubtedly great interest in the Parliament for the Gender Institute where they do have co-decision making. They would probably be deeply reluctant to give that up in favour of unanimity on the Council, and there is no appetite on the Council to give up unanimity in favour of QMV and co-decision with the Parliament, not least because, if you change the legal base from 308 to 13, you have a different Agency from the one that is being proposed, so it would really be a back-to-the-drawing-board exercise. That may please you in the sense that that might be where you want to be but it is not where the Presidency of the European Union is at the present time. I think we have to pursue this by recognising that there is a real appetite to do something in this area and I believe a gap that could be dealt with. The critical question is, as Lord Clinton-Davis said, how do you persuade organisations to abandon themselves in order to bring them together, not least because, as Lord Neill said, you have the Parliament having to agree one thing and the Council in two different ways having to agree another. That is for another day in a sense. Those are difficult and tricky issues but I do not believe they are impossible to deal with and it may be that in a few years’ time that is what we will have to end up doing. I am visiting the Netherlands next Wednesday specifically to talk about the

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

Fundamental Rights Agency and to get the latest information on what the Dutch position is because at the present time, of course, the Dutch are not minded to support this proposal, and it needs unanimity in the Council so there is quite a lot of work to be done to see whether there are ways that they could support it, which I believe, though I have yet to verify this, is partly around the relationship with the Council of Europe.

**Lord Lester of Herne Hill:** Thank you very much. You have now explained something that I had not thought about. The nonsense makes more sense.

**Q194 Chairman:** We were told, I think a fortnight ago, by Mrs Pavan-Woolfe from the Commission in Strasbourg that there was continuing discussion about the Management Board of the proposed new Gender Institute and there was a real possibility that it will not after all consist of representatives of each of the Member States. Do you know how matters stand on that front?

*Baroness Ashton of Upholland:* Chairman, I do not, and the main reason for that is that the lead body in government is the Department of Trade and Industry on the Gender Institute and I have not had the opportunity at present to discuss this in any detail. What I was going to suggest was that I would write to the committee and perhaps, having discussed it with my ministerial colleagues, set out in more detail what the current state of play is. We have not been able to establish that. I had hoped to try and do that today but I am afraid I failed to be able to do so, for which I apologise.

**Q195 Chairman:** Not at all. But if it were possible with the creation of that new body to slim down or streamline the board to a degree and to have a number of representative members, a council in effect, might there not be some possibility of achieving that similarly, perhaps as a condition of co-operation on the Dutch front and so forth, with regard to the Fundamental Rights Agency?

*Baroness Ashton of Upholland:* As I have already indicated, the difficulty with the Management Board at this stage, I believe, is that there is a very strong desire from all parties to participate in some form and it is always extremely difficult, when one can see the logic of slimming it down, to ask people not to be on it. I fear that if we were to seek to achieve that in what is a relatively short timetable it would be at the expense of trying to get the Agency into the right shape.

**Q196 Chairman:** Can I ask, and I perhaps should know this, with regard to the Management Board of the European Monitoring Centre on Racism and Xenophobia, does that have a Management Board which has a member from each state?

*Baroness Ashton of Upholland:* Yes, it does.

**Q197 Chairman:** So, perhaps, as that will close another one will open, but one cannot but expect the expense of it all to increase notwithstanding.

*Baroness Ashton of Upholland:* I think there is an issue, of course, about the resources that will be made available to it and, as I have indicated, there is a view that says that this is an unnecessary new bureaucracy which is a waste of European taxpayers' money, to take that particular point. The critical thing is that this has gathered momentum and has the potential to do a useful and valuable job. The job that we have is to make sure that that is exactly what it does and that it does it within the resources that are necessary but no more. If it proves itself to have a wider and more interesting remit in that sense, then that can be reviewed and revisited, the same for the Gender Institute too. If I might just say, my first introduction to the whole question of the Fundamental Rights Agency was in a conversation with the then newly appointed Commissioner Frattini who talked about the need to be able to balance on the scales the need for the European Union to take issues of security and terrorism very seriously, and the measures that were being taken on that, and a recognition of the importance of fundamental rights, so from the Commissioner himself on a personal level as much as the Commission level, he felt very passionately that this was the other side of a recognition of the work we had to do on security and co-operation in that way.

**Q198 Lord Lester of Herne Hill:** What troubles me is that on the one hand people like myself are saying, is all this necessary, and you reply that it is in a narrow compass and there will not be much in the way of resources, and then it would be seen as balancing our commitment to the struggle against terrorism. We could finish up with a situation where it really is starved of resources so much that it becomes a lip-service kind of institution. The reason that I mention that is that I remember when Judge Dame Rosalyn Higgins was on the UN Human Rights Committee. She is, as you know, a very responsible person. I remember her saying that they had so little money that they did not even have the money for glasses of water to be given to the members of the Human Rights Committee and they could not do their job properly, and they are still massively under-resourced and the result is that they are not doing their job properly. If we are setting up the Fundamental Rights Agency and the Gender Institute, even if it has a narrow focus, it is really important that it has enough resources to be able to do the job properly. If it just becomes a sort of lip-service thing that will be the worst of all possible worlds.



1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

*Baroness Ashton of Upholland:* I agree, but personally I did not want to suggest that in the scales that Commissioner Frattini was weighing against all of the measures around security and terrorism and so on he simply put the Fundamental Rights Agency on the other side. It was part of a whole package of issues, not least, for example, data retention. You know, Lord Lester, that I am also looking at data protection within this context, so it was about what do the scales look like and what do we need to be seen to be aware of in the work that we do. Secondly, my belief is that you need absolute clarity of what an organisation is going to do in order to be able to make sure that the resources are available. One of the problems, and I am not suggesting it is an example you gave, that organisations often have is that they are completely unclear about the work they are going to do. They get given a tranche of money and it is quite impossible for them to fulfil the remit, so I am hopeful that what we will get is clarity about what it is going to do and where it is going to be based which will enable it to have the budget set appropriately. The additional advantage of coming back to the Council with the annual work programme will be that, of course, it will have the opportunity to say, “If you approve this work programme it comes with a price tag”, and in a sense the Council will then have to accept that as part and parcel of accepting the programme of work. That may be to its advantage. It may be more to its advantage than indeed the proposed relationship with the Commission would be, so I agree with the sentiment but I think the solution to it is to be as clear as we possibly can about what it is going to do and to make sure that it itself costs what it is going to do every time it comes forward with a proposal.

**Q199 Chairman:** Minister, if to some extent the new agencies, and particularly the Fundamental Rights Agency, are being, so to speak, brought into being as a counterbalance to the fight against terrorism and therefore the risk of repressive attitudes in that regard, ought the Agency not to have the opportunity to consider third pillar matters, at least judicial co-operation in criminal matters? I ask the question against the background of your letter which says that the position is unclear as to the third pillar, that you foresee the potential risk of overloading the Agency if it has to address third pillar matters.

*Baroness Ashton of Upholland:* I did not want to suggest in what I said that somehow I thought what was happening across the European Union in terms of crime, security and terrorism was anything other than a very sensible set of measures that will enable us to work more effectively to ensure that we keep our citizens safe from harm, which is a fundamental role of governments everywhere, and I do not see any repression within that.

**Q200 Chairman:** I think that was an ill-chosen word on my part. To some extent the counterbalancing is, I think, there.

*Baroness Ashton of Upholland:* I was not even trying to suggest that it was a counterbalancing. What I was trying to suggest was that, just as we have to deal with issues of security in a collaborative way, so it is also important that we are clear about the rights that people have and should enjoy and that those in a sense go hand in hand. They are not opposites; they go together and they go together in the kind of democratic society we want to live in. Therefore, what Commissioner Frattini was keen to do was to see them in that vein. Scales may be the wrong analogy, although it was his analogy, but we did not try to suggest, “We are doing horrible things over here; we should do nice things over here”, which would have been a more simplistic way of describing it. Rather, he said, “These things fit together and need to fit together appropriately and well”. That, I think, is the core of what is being done. It is our view that we should not add the third pillar to this. There is not an appetite, as you will be unsurprised to hear, across Member States to do that. We think it would be inappropriate at the present time. There is always the opportunity to revisit that but we believe that the way in which the Agency needs to get itself established is appropriate and that we should get on with it now, try and develop a work programme, get its relationships right with the Council of Europe, try and get a Management Board that makes sense, deal with how that should operate, get it into appropriate premises with the right kind of budget to begin with and then move on from there and let us see what it itself does as it becomes independent. This in a sense comes back to our national domestic legislation with the new commission, that you have to allow it, once it has got going, to decide what it wants to come back and tell us it wants to do. That will be an interesting relationship, I think, just for the new commission that we are having here. There comes a point when governments should stop telling organisations what to do and start to enter a dialogue that says, “This is what we think we want to do”.

**Q201 Lord Lester of Herne Hill:** It is not telling them what to do. It is telling them what they cannot do. What you are saying is that the Agency cannot look at fundamental rights issues under the third pillar because it is—whatever word you use—inappropriate, undesirable, but surely one needs to have safeguards, counterweights, counterbalances, checks, just as much on the third pillar as on the other pillars and therefore, by preventing the Agency from looking at it at all, in that area you are weakening what otherwise would be the position of the European citizen.

---

1 March 2006

Baroness Ashton of Upholland and Mr Edward Adams

---

*Baroness Ashton of Upholland:* I am glad you are warming back up to the Agency and wanting to expand its remit; what an interesting turn of events. What I was trying to say was that you begin with any organisation trying to be clear about a remit that has support, in this case, across 25 Member States, the Commission, the Council of Europe and the expert advisers. In order for this Agency to thrive at all it has got to come into being with that support available to it. Once it is in existence and it has begun to demonstrate its role, it will be perfectly capable, I believe, of challenging if it believes its role needs to be expanded or extended. I am simply in a sense being a

pragmatist about what you begin with and what you seek to achieve. If we simply overload it, if we simply try and give it things that do not have support, it will fail. That would be an even greater waste of resources than anything I can imagine and that we must not do.

**Q202 Chairman:** Minister, thank you very much. We really must draw to a close and I reiterate our great thanks to you for coming along and being so very helpful.

*Baroness Ashton of Upholland:* Thank you very much. I enjoyed that.

---

---

# Written Evidence

---

## Memorandum by Amnesty International EU Office

Amnesty International attaches great importance to the Commission proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights (the Agency), as well as the Commission proposal for a Council Decision empowering the Agency to pursue its activities in areas referred to in Title VI of the Treaty on the European Union<sup>1</sup>.

The establishment of the Agency will mark a highly significant step in the process whereby the EU is shaping its policy with regard to observance and fulfilment of human rights within its own borders. However, it is precisely for that reason that Amnesty International is at the same time very critical of the proposals—not for what the Agency will be able to do, but for what it will be precluded from dealing with. Thus, while welcoming the proposals as a step in an incremental process, Amnesty International takes issue, as it has done consistently in the consultations<sup>2</sup>, with the fact that this process reflects a too limited and *ad hoc* approach to fundamental rights policy in the EU.

While Amnesty International will continue to advocate a broader remit and a stronger Agency (I), it will also make a number of specific recommendations based on the current proposals (II).

### I. THE FUNDAMENTAL RIGHTS AGENCY IN THE CONTEXT OF THE EU'S INTERNAL HUMAN RIGHTS POLICY

The establishment of the Agency is the latest in a series of developments in the human rights policy of the EU, which have finally put human rights in the EU firmly on the political agenda:

- the adoption of the EU Charter of Fundamental Rights in 2000<sup>3</sup>;
- the establishment of an EU Network of Independent Experts in Fundamental Rights in 2002;
- the Commission Communication on the application of Article 7 TEU<sup>4</sup> in 2003;
- the creation of a Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in 2004;
- the Commission proposal for a Regulation to set up a European Institute for Gender Equality in 2005<sup>5</sup>; and more generally
- the stated commitment to ensuring a proper balance between security and human rights; and
- the overarching goal of strengthening the EU as an “Area of Freedom, Security and Justice”.

On the face of it, these developments constitute a significant process of shaping a domestic component of the EU's overall human rights policy, in terms of standards, their institutional anchoring and their implementation within the EU. However, the reality is that the EU does not move beyond a minimalist conception of its domestic human rights role, and excludes from its internal human rights policy the very situations it should be most concerned with. The EU officially does not recognise a role for itself in relation to human rights problems which arise when Member States act outside the scope of Community law. This has led to the EU turning a collective blind eye to structural human rights problems within its own borders.

### Human rights in practice

Over the past year Amnesty International has appealed in vain to the Commission to fulfil its role as “guardian of the treaties” over the expulsions of “illegal immigrants” back to North Africa, without due process and in breach of international human rights obligations. A recent report demonstrated a significant human rights deficit in the EU's counter-terrorist effort<sup>6</sup> and called for an examination of the threats to the “balance”

<sup>1</sup> COM(2005) 280 final, Brussels, 30.06.2005.

<sup>2</sup> See also *Promoting EU Fundamental Rights Policy*, Presentation by Dick Oosting, Director of Amnesty International EU Office at the European Parliament public seminar, 25–26 April 2005; *The Purpose of the EU Fundamental Rights Agency*, Presentation by Dick Oosting at the Public Hearing on the Agency, 25 January 2005; *Amnesty International Contribution to the Commission Consultation on the Establishment of an EU Fundamental Rights Agency*, December 2004, all available at [www.amnesty-eu.org](http://www.amnesty-eu.org).

<sup>3</sup> Proclaimed in Nice on 7 December 2000, OJ C364, 18.12.2000, p1.

<sup>4</sup> Communication from the Commission *Respect for and promotion of the values on which the Union is based*, COM(2003) 606 final, October 2003.

<sup>5</sup> COM(2005) 81 final, 8.3.2005.

<sup>6</sup> *Human rights dissolving at borders? Counter-terrorism and EU criminal law*, Amnesty International EU Office, May 2005, available at [www.amnesty-eu.org](http://www.amnesty-eu.org)

between security and human rights. Furthermore, the UK Government's recent statements about changing "the rules of the game" in the fight against terrorism, and exempting itself from certain human rights obligations related to the absolute prohibition of torture and of *refoulement* to countries where serious human rights abuses occur, raise serious human rights concerns—but ones which the EU will not address itself.

### Building mutual trust

What is particularly striking and disconcerting is that the situations which the EU refuses to take into consideration, impact so heavily on one of its stated aims, namely the creation of an "Area of Freedom, Security and Justice". With the "Hague Programme" in November 2004 the Council set out to enhance the functioning of the European Arrest Warrant and similar instruments of judicial co-operation, common minimum standards on the rights of suspects and defendants in criminal proceedings, the conduct of police co-operating across borders and alternatives to pre-trial detention. It is impossible to divorce these developments from the actual practice in Member States. The "Area of Freedom, Security and Justice" is built upon mutual trust between Member States in each other's justice systems. Yet there is no body responsible at EU level for ensuring that this trust is solidly founded in the protection of individual rights in all Member States. Failure to secure that trust will effectively hamper the EU's capability to combat serious transnational crimes such as terrorism.

### Double standards

A further consequence of the EU's minimalist conception of its internal human rights policy is the impact on its external credibility. A double standard arises from imposing persistent scrutiny on human rights compliance in countries wishing to join the EU, while exhibiting utter complacency as regards human rights compliance in countries that are inside the EU. Similarly, the EU shows little readiness to honour what is a reciprocal commitment in the human rights clauses in agreements with third countries. The lack of clear policy, monitoring and assessment, and the taboo on questioning offending practices in or by Member States continue to contrast sharply with the way the EU addresses such practices in candidate and third countries.

### *The EU's internal human rights policy—a need for careful reflection*

The proposals for the Agency have been and continue to be discussed in the context of what is still an *ad hoc* approach to human rights policy in the EU, when what is needed is a fundamental rethink of the way in which the EU deals with the promotion and protection of human rights within its own borders. As noted by the Commission, the creation of the Agency is "a basic element of the EU policy to respect and promote fundamental rights"<sup>7</sup>. The Agency should not be the end of the road, but one step on the way to a real and effective human rights policy for the EU.

Amnesty International makes the following recommendations with regard to the EU's internal human rights policy:

1. The individual must be placed at the heart of the EU's human rights policy.
2. The EU must proceed to a careful reflection on the aims, content, scope, limits, and instruments of the EU's internal human rights policy, taking into account the role played by Council of Europe and the OSCE, as well as the UN.
3. A rethink is needed to ensure a comprehensive approach by the Agency drawing on and complementing the work of the Group of Commissioners, the Network of Independent Experts, and the European Institute for Gender Equality.
4. The Council must respond to the Commission Communication on Article 7 TEU.
5. The Council must establish a permanent and dedicated structure to deal with fundamental rights in the EU.

### *The Fundamental Rights Agency—a positive step?*

In view of the concerns highlighted above, Amnesty International welcomes the Commission proposals as a step towards remedying the deficiencies of the EU's domestic human rights policy, and agrees that the geographical remit for the Agency is focused on the EU itself and on candidate countries. At the same time, the proposals as they stand do not go far enough as its substantive mandate is limited to the Community and

<sup>7</sup> Text accompanying the proposal on the Commission's website:  
<http://www.europa.eu.int/comm/justice—home/fsj/rights/fsj—rights—agency—en.htm>

Member States applying Community law—ie excluding Member States’ human rights observance generally. There is only a small window left open in that the Agency will be allowed to pursue its activities in areas referred to in Title VI TEU; that is police and judicial co-operation in criminal matters. An even smaller window is offered by the possibility that the Council may make a request of the Agency’s technical expertise in connection with Article 7 TEU.

6. Amnesty International holds that what is needed is an agency that is empowered to identify weaknesses in the way human rights are observed in the EU, not only at EU level but also throughout the Member States. There is already plenty of monitoring by the Council of Europe, by UN treaty bodies, by the EU Network of Independent Experts, by national human rights institutes and by NGOs. What is lacking is a body to analyse and shape all that information into remedial action and translate it into the EU framework. It is precisely that function that is missing in the system, and it is precisely that function that Amnesty International believes the Agency should fulfill.

## II. THE COMMISSION PROPOSAL FOR A COUNCIL REGULATION

### *Objective and Scope*

Article 2 of the draft Regulation confines the objective of the Agency to providing agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights. The Council, as one of the addressees, should once again be urged to create a dedicated structure for fundamental rights within the EU, which would become a key interlocutor for the Agency (see recommendation 5 above).

### “When implementing Community law”

Amnesty International regrets that the scope of the Agency’s activities is restricted to the situation of fundamental rights in the EU and its Member States when implementing Community law<sup>8</sup>, and based on the EU Charter, for a number of reasons.

Firstly, not all rights in the EU Charter are regarded as rights, some are “principles”. The distinction is vague, yet crucial, as normally only “rights” may be relied upon by individuals. Secondly, Amnesty International is concerned that the phrase “when implementing Community law” will lead to further confusion and “muddying of the waters” in relation to the work of the Agency. The phrase is notoriously difficult to pin down, and may be subject to different interpretations by the institutions, the Member States and the European Court of Justice. Individuals and NGOs wishing to participate in the work of the Agency will first need to understand when Member States are implementing Community law, and when they are not. They will no doubt be bemused to learn that rights which everyone considers absolutely fundamental will not be covered by the work of the Agency.

By way of example, according to the case law of the European Court of Justice, while it will consider the fundamental rights arguments in the situations below<sup>9</sup>:

- the right of an EU citizen to have recourse to judicial process before s/he is deported from a Member State<sup>10</sup>;
- relying on freedom of expression and assembly to demonstrate and block a motorway, thereby restricting the free movement of goods<sup>11</sup>;

it will not review the following situations:

- detention of an EU citizen under national law in the own Member State<sup>12</sup>;
- deportation of a non-EU citizen relying on the right to family life to remain with her family in a Member State<sup>13</sup>; or
- arguing that freedom of expression prohibits a Member State from blocking the sale of videos, thereby restricting the free movement of goods<sup>14</sup>.

<sup>8</sup> Draft Regulation, Article 2 and 3(3).

<sup>9</sup> Leaving aside arguments that “when implementing Community law” is already narrower than the protection afforded by the European Court of Justice, which also scrutinizes Member State actions for compliance with fundamental rights when they derogate from Community law. Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>10</sup> Case 48/75 *Royer* [1976] ECR 497.

<sup>11</sup> Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-05659.

<sup>12</sup> Case C-299/96 *Kremzow v Austria* [1997] ECR I-2629.

<sup>13</sup> Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

<sup>14</sup> Joined Cases 60 & 61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605.

As the breadth of Community law expands, in particular in fields such as asylum, immigration and criminal matters, so does the possibility of bringing new situations within the remit of the Agency. Indeed, it seems impossible to assess the impact of EU immigration policies without due regard to existing national immigration policies. The current discrepancy between the EU creating a “Fundamental Rights” Agency, and the reality of excluding much of what is generally understood as fundamental rights from its remit, will do little for the credibility and legitimacy of the Agency or the EU.

#### Title VI (police and judicial co-operation in criminal matters)

Amnesty International supports the proposed application of the work of the Agency to Title VI. As noted above, the “Area of Freedom, Security and Justice” is built upon mutual trust between Member States in each other’s justice systems, in light of new instruments and procedures such as the European Arrest Warrant and the conduct of police co-operating across borders. The role of the Agency in monitoring EU and Member States’ practice in the field of police and judicial co-operation in criminal matters is therefore crucial to the realisation of a genuine “Area of Freedom, Security and Justice”.

#### Article 7 TEU

The Commission proposal envisages a limited role for the Agency in the obligations contained in Article 7 TEU. While acknowledging that it may not be efficient for the Agency to engage in systematic and permanent monitoring of the Member States, Amnesty International is concerned that the Council is under no obligation to make use of the Agency’s resources, and conversely that the Agency is not empowered to initiate review or comment on situations in Member States raising Article 7 TEU concerns.

#### Third countries

Amnesty International welcomes and supports the possibility that the Agency may provide information and analysis on fundamental rights issues regarding third countries with which the Community has concluded or will conclude, association agreements, or agreements containing a human rights clause<sup>15</sup>. It questions why only the Commission may request such information and analysis, and recommends that the European Parliament be empowered to request the Agency’s assistance as well.

Furthermore, Amnesty International notes that the inclusion of third countries in the Agency’s work in this way will highlight, once again, the EU’s double standards in terms of human rights. While the Agency’s work as regards the EU and the Member States is limited to Community law, there is no such limitation in relation to third countries. Article 27 of the draft Regulation states that the Agency will concern itself with the situation of fundamental rights “to the extent it is relevant for the respective association agreement”.

Accession negotiations are based on compliance with the Copenhagen criteria, which include respect for the rights of minorities, while there is no scrutiny by the EU of its own Member States’ conduct. Similarly, in relation to agreements in which a human rights clause has been inserted, the EU is failing to keep its side of the bargain: it demands respect for human rights externally, yet does not impose this very obligation internally.

#### Tasks

Amnesty International welcomes the scope of tasks and areas of activity entrusted to the Agency in Articles 4 and 5 of the draft Regulation, and agrees that the fight against racism and xenophobia be maintained as a priority under the multi-annual framework.

The exclusion of individuals as sources of information and data must be questioned. For the Agency to be seen as adding value to the already numerous human rights bodies in Europe, it should engage not only with civil society, but also be open for interaction with individuals, at least to the extent that they should have a right to submit information to the Agency. This is in line with the Paris Principles that ensure that such agencies should be entitled to hear any person and obtain any document necessary for assessing situations falling within its competence.

Amnesty International supports the Commission retaining primary responsibility for ensuring that legislation complies with human rights. It suggests however that a provision be inserted in the draft Regulation permitting the Agency to conduct a human rights assessment where concerns arise in relation to Council redrafting of proposed legislation, or where a Member State puts forward a legislative proposal. This would comply with the Paris Principles’ call for institutions to examine legislation in force, as well as bills and proposals.

---

<sup>15</sup> Draft Regulation, Article 3(4).

---

*Co-operation with other bodies***The Council of Europe**

Amnesty International welcomes the proposal in Article 9 of the draft Regulation for the Community to enter into a co-operation agreement with the Council of Europe for the purpose of establishing close co-operation between the latter and the Agency. The importance of such an agreement is evident and it should be concluded immediately upon the creation of the Agency.

**The European Institute for Gender Equality**

Amnesty International welcomes the suggestion that the Director of this new body may attend meetings of the Management Board of the Agency<sup>16</sup>, but regrets the lack of clear delineation between the work of the two entities.

**The Network of Independent Experts in Fundamental Rights**

There is no reference to the Network in the Commission's proposals. In the Impact Assessment Report<sup>17</sup>, the Commission suggests that the expertise of the Network would not be lost if it were incorporated into the structure of the Agency by becoming one of its "networks". Amnesty International is concerned that this would result in the Network losing its broad mandate to review and comment upon human rights generally in the Member States, in favour of a narrower remit. It is crucial that the Network, as one of the few bodies with a broad human rights mandate, retain its current remit.

**National human rights institutes**

Amnesty International considers the establishment of the Agency should give an impetus to the establishment of a national human rights institute or commission, in accordance with the UN Paris Principles<sup>18</sup>, in each Member State and candidate country where such an entity does not yet exist. Such institutes would serve as members of the Agency "network".

*Independence, Accountability and the Paris Principles*

The Paris Principles refer to the composition of human rights institutions with guarantees of independence and pluralism. In particular, the Principles state that in order to be independent, agencies must receive adequate funding, have their own staff and premises, and not be subject to financial control which might affect their independence.

Applying these principles to the Agency, Amnesty International is concerned that the draft Regulation may not confer the required degree of independence and pluralism to the Agency, which are essential for its legitimacy and success. As detailed further below, the current provisions see the Commission exert tight control over work programmes and priorities as well as the appointment and dismissal of the public face of the Agency, the Director, while the European Parliament is granted a very limited role. Therefore, the Preamble to the Regulation could usefully make reference to the Paris Principles as a guide for the Agency.

**Management Board**

Article 11 of the draft Regulation provides that the Management Board is composed, *inter alia*, of one independent person appointed by each Member State. Amnesty International welcomes the criteria highlighted by the Proposal for choosing those persons, in particular encouraging the recommendation of persons with links to national human rights institutions.

In order to reinforce the Agency's commitment to independence and accountability, Amnesty International recommends that the European Parliament have a right to review the composition of the Management Board of the Agency. The Agency will enjoy greater legitimacy if its management is in some form answerable to the European Parliament.

---

<sup>16</sup> Draft Regulation, Article 11(8).

<sup>17</sup> Commission Staff Working Paper, Annex to the Proposals, SEC(2005) 849, Brussels, 30.06.2005, p 17.

<sup>18</sup> UN Principles relating to the Status of National Institutions, adopted by General Assembly resolution 48/134 of 20 December 1993.

## Executive Board

Some serious questions arise with regard to the Executive Board of the Agency<sup>19</sup>. As currently proposed, it will be composed of two representatives from the Management Board (the Chairperson and Vice-Chairperson) and two Commission representatives. As there are also two Commission representatives on the Management Board, there is a possibility that the Executive Board will be composed entirely or in majority by Commission representatives. This is unacceptable for an independent institution. An express provision prohibiting either of the Commission representatives from being elected Chairperson and Vice-Chairperson of the Management Board, and therefore sitting on the Executive Board must be included. Alternatively, if the intention is that the same two Commission representatives sit on the Management and the Executive Boards, this should be clarified in the wording of Article 12(1) of the draft Regulation.

Furthermore, as the decisions of the Executive Board will be adopted by simple majority, there is a risk of stalemate, with a board membership of four. This should be addressed in the draft Regulation.

## Director

The role of the Director of the Agency will be a crucial one. He or she will be the public face of the Agency, recognisable throughout the EU and its Member States as the principal person responsible for advising the EU on fundamental rights. It is therefore absolutely crucial that he or she is and appears to be totally independent from the institutions and the Member States.

Amnesty International welcomes Article 15 of the draft Regulation which recognises the need for the Management Board, the Director and members of the Forum to act independently. Nonetheless, Amnesty International is concerned that other provisions in the draft Regulation do not reflect this crucial need for independence.

Firstly, the Director will be appointed by the Management Board on the basis of a list of candidates proposed by the Commission<sup>20</sup>. Amnesty International strongly suggests that the list of candidates include possible recommendations by national human rights commissions and prominent NGOs throughout the EU. Furthermore, Amnesty International supports the involvement of the European Parliament in the vetting of the Director, on a compulsory and not on a (as currently drafted) discretionary basis.

Secondly, it is again the Commission that will recommend the Director's continued employment, and institute possible dismissal. These clear and direct links between the appointment, terms of employment and dismissal of the Director of an independent Agency and the Commission are inappropriate.

Amnesty International makes the following recommendations with regard to the establishment of the Agency:

7. The scope of activities by Member States that are to be considered as falling within the sphere of "implementing Community law" should be clarified.
8. The Council should set out the criteria it will use when deciding whether to consult the Agency in its role under Article 7 TEU.
9. The European Parliament should be granted the right to request the assistance of the Agency regarding third countries.
10. The Agency should be open for interaction with individuals, at least to the extent that they should have a right to submit information.
11. The Agency should be mandated to conduct a human rights assessment where concerns arise in relation to Council redrafting of proposed legislation, or where a Member State puts forward a legislative proposal.
12. The Commission should clarify the interconnections between the Agency and the European Institute for Gender Equality.
13. The Network of Independent Experts in Fundamental Rights should be enabled to continue as an autonomous entity, retaining its current remit, and as such also serve as a "network" member for the Agency.
14. The Agency should recognise as one of its aims the establishment in each Member State and candidate country of a national human rights institute or commission, in accordance with the UN Paris Principles, which would also serve as a "network" member for the Agency. The Preamble to the Regulation could also refer to the Paris Principles as a guide for the Agency itself.

---

<sup>19</sup> Draft Regulation, Article 12.

<sup>20</sup> Draft Regulation, Article 13.



15. The independent and pluralism of the Agency must be guaranteed through the appointment, terms of employment and dismissal of the Director, the Management Board and the Executive Board.

5 October 2005

### Memorandum by the Commission for Racial Equality (CRE)

1. *All Member States of the European Union are members of the Council of Europe and have signed the European Convention on Human Rights. Is the creation of a European Union FRA dealing with fundamental rights a useful initiative? Can you provide any examples of where the FRA might fill a gap in fundamental rights protection in the European Union?*

In principle, the CRE endorses the proposal to establish an EU Fundamental Rights Agency (hereafter referred to simply as FRA), which aims to address human rights and equality and discrimination issues for race, sexuality, religion or belief, age and disability. In it a useful initiative in so far as the future FRA has the potential to consolidate the EU's work on anti-discrimination and it will secure a more integrated approach to the European Union's work in this area. It should be noted however, that the creation of a separate EU institute for gender equality undermines this overall aim.

Several existing EU directives and regulations relating to anti-discrimination and equality, such as the Race and Employment Directives, give a strong legal backing and reference point to the FRA's future activities. In terms of fundamental rights protection *within* in the EU, the future FRA could exercise a very powerful role. The FRA could substantiate and facilitate the role of the European Commission in monitoring the full and timely transposition and implementation of EU legislation based on article 13 of the Treaty of the European Union. As it stands, the Race Directive is not transposed in all EU member states. This is lamentable given that it is now five years since the Directive was adopted by the Commission. This lag in transposition constitutes a gap in fundamental rights protection in the European Union and the future FRA should focus its efforts on filling this gap first and foremost.

The FRA would constitute a "one stop shop" for five of the six strands of discrimination and this will provide much needed clarity for EU citizens as to what the role the EU plays in the field of human rights and anti-discrimination. Indeed, raising public awareness about the EU's role in the field of anti-discrimination and about the existing Directives constitutes a huge "information" gap and the future FRA could redress this situation with effective communication.

2. *The Commission has proposed that the remit of the FRA should extend beyond the EU and encompass non EU-Member States in circumstances outlined in Articles 3 and 27 of the proposal. Should the FRA have a mandate to act outside the boundaries of the Union?*

The role of the future FRA should be restricted to the EU. An extra-EU remit for the FRA would direct resources away from its primary function: to ensure better fundamental rights in the European Union. Given that across the European Union there does not even exist a harmonised minimum level of protection against discrimination, it is critical that the FRA focuses its attention on this issue with a view to redressing the situation as soon as possible.

There is no substantial or compelling need for the future FRA to have this external remit given that the EU *already* exercise an *de facto* external human rights policy to third countries:

- Before the EU enlarged to ten new member states from central Europe in 2004, it required accession member states to adhere to the "Copenhagen Criteria" which stipulates a respect for human rights and the rule of law. These accession criteria represent a powerful incentive for countries to adhere to human rights standards and have changed the culture and law relating to human rights in many of accession countries. Moreover, candidate countries Romania, Bulgaria, Turkey, Croatia and Macedonia are all awaiting EU membership and so long as they remain EU hopefuls, the EU wields this powerful foreign policy tool and compels those member states to make critical changes to their human rights and anti discrimination legislation.
- Respect for human rights are integral to the EU's aid and trade policies and. They offer a great incentive to third countries to co-operate in the field of human rights.
- Finally, the Council of Europe *already* plays a significant human rights role in Europe and there would no doubt be serious duplication should the EU begin to play a human rights function in wider Europe. Not only then does the issue of duplication arise, but also one of value for money and using the EU budget in a resourceful way.

3. *The FRA would be competent to provide assistance and expertise to institutions and bodies of the Community and of the Member States. Do you consider that this would in practice give rise to an overlap between its activities and those of the Council of Europe? What measures might be taken to limit or avoid such overlap?*

There is no automatic overlap given that the future FRA will have expert staff trained in matters relating to EU anti discrimination and human rights which would make them very qualified and suitable to provide assistance and expertise to institutions and bodies of the Community and of the Member States. The Council of Europe does not necessarily have the same expertise in EU competence in the field, such as the race and Employment Directives, and the Council of Europe also operates its own similar framework, albeit non binding, on anti discrimination in the framework of ECRI.

#### THE EUROPEAN INSTITUTE FOR GENDER EQUALITY

4. *A proposal for the creation of a European Institute for Gender Equality has recently been adopted by the Commission. Should the protection of gender rights be separated from other fundamental rights through the creation of two separate agencies? What are the advantages and disadvantages of this approach?*

(See paragraph 1, question one)

5. *How might the two bodies work together to ensure that overlap is avoided and that co-operation is maximised to improve their effectiveness?*

#### GENERAL

6. *Are you aware of the existence of other bodies, at national, European or international level, which perform activities similar to those which would be carried out by the FRA? How might the FRA affect the work of these bodies?*

There are several bodies at national European and international level which perform work similar to that of the FRA. For example, in the UK, separate Commissions work on different strands of equality, such as race, gender, disability, age and sexual orientation. The FRA has the potential to affect the work of those bodies in a positive way. For example, many European member states face similar challenges, such as social unrest and rioting. In this respect, it could be useful for bodies working in a national context to be aware of how other equality bodies deal with these issues. The FRA could play a co-ordinating role and collate comparative information about legal and policy developments in European member states and highlight examples of good practice. Moreover, it would be very beneficial if the FRA could play a proactive role in communicating developments in member states as events take place. For example, in the case of recent social unrest and rioting in the UK and France, a comparison of reactions in the media and by politicians and policy makers would have been very beneficial and it is fitting that the FRA plays a role.

Whilst the FRA will formally cover five strands of discrimination (see above), it could also play an effective role in monitoring integration and cohesion in member states. There is very little comparative data relating to integration in EU member states and if the FRA could begin to fill in this gap in information, it would provide real added value. Indeed, integration is a topic moving rapidly up the political agenda in many member states and in the European Union and EU policies in the field would benefit greatly from hard statistics on this topic and this information would facilitate the work equality bodies.

January 2006

### **Memorandum by the Council of Bars and Law Societies of Europe (CCBE)<sup>21</sup>**

#### INTRODUCTION

1. The Council of the Bars and Law Societies of Europe (CCBE), which through the national Bars and Law Societies of the Member States of the European Union and the European Economic Area represents more than 700,000 European lawyers, is responding in this paper to the Commission's proposal for a Council Regulation Establishing an EU Agency for Fundamental Rights<sup>22</sup>.

<sup>21</sup> This position paper, although already circulated to CCBE's member delegations for comment, will be submitted for final approval to a CCBE meeting in late February. If there are substantive changes to CCBE's position at that time, it will communicate to the House of Lords.

<sup>22</sup> COM(2005) 280 final, Brussels, 30.06.2005.

2. In December 2003, the European Council agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia (EUMC) and to extend its mandate to become a Human Rights Agency. This idea was included in “the Hague Programme; strengthening freedom, security and justice in the European Union”, adopted on 4–5 November 2004.
3. The European Commission responded to the Council proposal by issuing a Communication on the Fundamental Rights Agency in October 2004, thereby launching a public consultation on the remit, rights and thematic areas, tasks and structure of an agency.<sup>23</sup> During the public consultation procedure, the CCBE expressed its support for the creation of a Fundamental Rights Agency and issued a number of recommendations to the Commission.
4. In June 2005, the Commission presented its formal proposal for a Council Regulation Establishing an EU Agency for Fundamental Rights, to become operative in January 2007. This paper presents the CCBE’s position on the proposed Regulation, together with an overview of the existing framework of human rights protection in Europe.

#### EU’S EXISTING APPROACH TO HUMAN RIGHTS

5. Beyond the EU level, the Council of Europe (COE)—which comprises 46 Member States, including the 25 EU Member States—is the main organisation promoting and protecting human rights and the rule of law in Europe through education, monitoring and direct enforcement of the obligations found in the European Convention on Human Rights (ECHR) and other COE treaties. Within the COE, the European Court of Human Rights is the judicial organ that decides on disputes concerning non-compliance with human rights obligations under COE treaties. The COE also includes a number of bodies that actively monitor respect for European human rights standards. The work of the European Commission against Racism and Intolerance (ECRI) covers all the necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Committee of Social Rights have specific mandates to monitor implementation of the COE treaties that address specific issues on torture and degrading treatment and economic and social rights. The Commissioner for Human Rights promotes education, awareness and respect for human rights in member states through visits, dialogue and the preparation of reports, opinions and recommendations. In addition, the Parliamentary Assembly, the Committee of Ministers and the Congress of Local and Regional Authorities of the COE carry out political monitoring, both thematic and country-specific, mainly on issues relating to human rights.
6. Within the EU legal system, the European Court of Justice recognised the existence of fundamental rights at Community level at an early stage, and has steadily extended them. Under the Court’s continuing case-law, fundamental rights form part of the general principles of Community law and are equivalent to primary law in the Community legal hierarchy.
7. Over the past decades, the EU has gradually undertaken various efforts to create a framework of human rights protection within its institutional system. A noticeable milestone in this respect was the creation in 1992 of what is now Article 6(2) of the EU Treaty, which commits the EU to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The Treaty of Amsterdam introduced a provision in Article 7 of the EU Treaty giving the Council a discretionary power to determine the existence of a serious and persistent breach by a Member State of fundamental freedoms. In this case, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaty to the Member State in question. The Treaty of Nice supplemented this mechanism with a new procedure relating to a clear risk of a serious breach by a Member State of these principles (Article 7(1) TEU).
8. A significant step forward was made with the creation in 2000 of a European Charter of Fundamental Rights and the proposal to give it full legal effect by incorporating it into the EU Constitution. Although the Charter was solemnly proclaimed by the Commission, Parliament and Council and was politically approved by the Member States, it still lacks official legal status. More recently, a series of developments took place in the area of human rights, including the establishment of an EU Network of Independent Experts in Fundamental Rights in 2002, the Commission communication on the possible application of Article 7 of the EU treaty in 2003 regarding human rights compliance by EU Member States, and the establishment of a Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities, headed by Commission President Barroso, in 2004.

<sup>23</sup> All documents relating to the consultation, including the written replies, a report analysing them as well as a report on the hearing were posted on the European commission’s Freedom, Security and Justice website and are accessible at: <http://europa.eu.int/comm/justice—home/news/consulting—public/fundamental—rights—agency/index—en.htm>.

9. However, despite these efforts, the European Union human rights system continues to be too heavily dependent on judicial remedies, and fundamental rights are still being granted somewhat indirectly to citizens without being immediately visible. While effective judicial protection is one of the fundamental requirements in a democratic society, it does not guarantee that rights will not be violated. Therefore, more pro-active and preventive mechanisms are necessary in the EU legal space to ensure more legal certainty and coherence in fundamental rights protection. The CCBE believes that the Agency, if equipped with a sufficiently substantive mandate, could play a role in this regard.

#### ABOUT THE COMMISSION'S PROPOSAL

##### *The remit of the Agency*

10. The Agency's main activities will be the EU-wide collection and analysis of information, opinions and the dissemination of information, helping the EU itself to fully respect fundamental rights in its action. The terms of reference for the Agency are the Charter of Fundamental Rights and the fundamental rights defined in Article 6(2) of the EU Treaty. The inclusion in the terms of reference of the rights guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, seems sensible since it allows the Agency to give its opinion on the basis of human rights standards which go beyond the rights of the Charter. Moreover, it still remains to be seen if and when the Charter becomes legally binding, and, in relation to third countries, it would also be necessary to apply the more universal human rights regime of the Council of Europe.

11. The Agency's substantive mandate is in principle limited to the Community and to the Member States when applying Community law, thus excluding Member States' human rights observance generally. Besides concerning itself with the situation of fundamental rights at the EU level and in those candidate countries and potential candidate countries which participate in the Agency, the Commission may ask the Agency to submit information and analysis on third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements. Through the parallel Council Decision, the Agency will also be allowed to pursue its activities in areas referred to in Title VI of the EU Treaty; that is, police and judicial cooperation in criminal matters.

12. While on the one hand the Agency's mandate should be sufficiently broad to carry out its tasks effectively, its mandate should also be adequately focussed and coherent in order to allow the Agency to develop realistic and achievable goals. Collection and analysis of human rights data at Member State level is already ensured by existing instruments such as the Network of Independent Experts, national ombudsmen and human rights institutes, the OSCE and various Council of Europe human rights bodies which monitor the situation in EU Member States irrespective of whether a specific matter can be regarded as implementation of EU law or as an autonomous, domestic issue. The CCBE agrees, therefore, with the Commission's proposal to limit the remit of the Agency's mission to fundamental rights protection within the scope of EU competences and not to include human rights observance in general.

13. The CCBE also welcomes the Commission's proposal in Article 4(e) that the Council may exploit the expertise of the Agency if it finds it useful when acting on a proposal by one third of the Member States, by the European Parliament or by the Commission during the procedure under Article 7 TEU. A systematic and permanent monitoring of the Member States for the purposes of Article 7 would not be practical as it could overload the Agency with work. A special competence in this respect would also be unnecessary since extremely serious human rights violations would also be observed when the Agency monitors how Member States apply EU law.

14. As to the partial extension of the Agency's remit to third countries, it would be useful—as the Commission proposes in Article 3(3)—to task the Agency with providing, upon request, information and analysis on fundamental rights issues in third countries that have or are about to have an association agreement with the EU. Since the early 1990s the EU has more or less systematically included a human rights clause in its association agreements with third countries and it would be appropriate to allow a body to verify objectively whether these clauses are being executed. It would, however, also be useful if the agency could be invoked to supply information and recommendations on major human rights concerns which may arise outside Europe, in countries not covered by such an agreement. The CCBE, therefore, proposes an extension of the remit of the Agency to the effect that it may also be called upon to supply information and recommendations on fundamental rights issues in third countries where major human rights concerns arise.

*The tasks of the Agency*

15. In order for the Agency to bring added value and fill in existing gaps in the EU's human rights system and avoid duplicating the work of other organisations, the Agency's main task should be promoting human rights in EU decision and policy making and providing advice at pre-legislative stage. As such, the Agency could usefully contribute in highlighting and mainstreaming human rights issues when EU legislation and policies are being developed and prevent the adoption of measures that might run counter to fundamental rights.

16. In the Commission's proposal, one of the tasks of the agency mentioned in Article 4 (d) is to "formulate conclusions and opinions on general subjects for the Union institutions and the Member States when implementing Community law". The second paragraph of the same Article further states that these conclusions and opinions "shall not concern questions of the legality of proposals from the Commission under Article 250 of the Treaty, positions taken by the institutions in the course of legislative procedures or the legality of acts within the meaning of Article 230 [on judicial proceedings] of the Treaty". The words "on general subjects" together with the second paragraph of Article 4 might give rise to doubts as to whether the Agency could express its views on the compatibility of certain provisions within legislative and policy proposals with human rights standards. Although the Agency should not have the legal competence to hinder or interfere with the legislative and judicial procedures established in the EU, it should be able, in an advisory capacity, to assess the human rights implications of policy and legislative initiatives, and give its opinion on their compliance with human rights norms. This would also be necessary to achieve the objective set out in Article 2, which provides that the aim of the agency is to support the EU when it takes measures or formulates courses of action to fully respect fundamental rights. The CCBE proposes, therefore, a stipulation in the Regulation making more explicit the Agency's advisory capacity at the early stages of policy and decision making that impact human rights.

17. An important task of the Agency will be to gather objective, reliable and comparable information on the development of the situation of fundamental rights. Crucial to this task is the capacity and right to access information and hear relevant persons. In order to gain an objective and unbiased understanding of the human rights situation, the Agency should be allowed to collect information in an active fashion through its own data collection mechanisms. If the agency were to rely solely on passive data collection, it could be prevented from discovering human rights infringements and its independent character could be put into question. Article 4 (a) of the Regulation provides that the Agency is to collect information "communicated to it" by Member States, EU institutions and other relevant (inter)national bodies and organisations. Article 6 complements this by providing that the Agency "shall set up and coordinate the necessary information networks" for data collection. Thus, the Regulation seems to endow the Agency with a combination of active and passive data collection methods. However, the Regulation itself fails explicitly to ensure the Agency's right to access information and to hear relevant persons. Moreover, there is no provision requiring Member States to send regular reports to the agency. The CCBE proposes, therefore, to include a provision obliging Member States to send relevant human rights data to the Agency in the form of regular reports and to ensure explicitly the Agency's right to hear persons and obtain information necessary to consider the human rights situation in a particular Member State or Member States.

**CONCLUSION**

18. The EU has gradually but steadily committed itself to human rights in both its internal and external affairs. The creation of a human rights Agency would constitute another step forward that could significantly contribute to the development of a more integrated and preventive approach to human rights protection. However, in the Commission's proposal the Agency still lacks a number of attributes in order for it to play such a role and to usefully complement the existing mechanisms of fundamental rights observation at European and national level.

19. The CCBE considers that the main added value of the Agency would be its advisory capacity at the early stages of decision and policy making in order to assist the EU fully to comply with fundamental rights standards when it develops policies and legislation. The current text of the Commission's proposal is not sufficiently clear about this. Moreover the proposal fails to allow the Agency to be called upon for advice on major human rights concerns which may arise in third countries, and it omits a provision requiring Member States to regularly report to the agency and giving the Agency active research powers.

20. The CCBE accordingly proposes the following:

- to stipulate in the Regulation more explicitly the Agency’s advisory capacity at the early stages of policy and decision making that impact human rights;
- to extend the remit of the Agency to the effect that it may also be called upon to supply information and recommendations on fundamental rights issues in third countries—which are not covered by an association agreement—where major human rights concerns arise; and
- to include a provision obliging Member States to send relevant human rights data to the Agency in the form of regular reports and to ensure explicitly the Agency’s right to hear persons and obtain information necessary to consider the human rights situation.

*January 2006*

### **Memorandum by the Dutch Senate**

The Dutch Senate firmly opposes the establishment of the FRA. The arguments are:

- The existence of other bodies at national, European and international level that perform the exact activities as foreseen to be also carried out by the FRA. The FRA will unnecessarily double these activities.
- The risk of weakening all these organisations and their activities by establishing the FRA.
- The non compliance with the principle of subsidiarity: the EU should only perform those activities that can not be better or more efficiently performed on another level and/or by any other organisation.
- The risk of an undesired distinction (new dividing lines) between the EU25 and the other 21 European countries.
- The loss of priority for the fight against xenophobia and racism.
- The proposal goes beyond the scope of European jurisdiction and European competencies.

In order to answer the specific questions asked by the House of Lords, the arguments of the Senate are amplified below.

#### **COUNCIL OF EUROPE**

1. The Dutch Senate does not regard the creation of a European Union FRA a useful initiative due to the fact that other international organisations and institutions like the Council of Europe, its European Court of Human Rights and the Organisation for Security and Co-operation in Europe, already efficiently fulfil the task of protecting fundamental rights. When the principle of subsidiarity will be applied also in the context of international organisations and institutions, the proposal to establish a FRA will not be in compliance with this principle. Furthermore, the protection of fundamental rights is also a national responsibility. The Senate therefore is of the opinion that the FRA does not fill a gap in the protection of fundamental rights since there is no real gap. The Senate is of the opinion that duplicating the work of other organisations, especially the Council of Europe, will weaken both the EU and the Council of Europe.

2. The possibility of an extended mandate for the FRA to act outside the EU boundaries should not even be considered. The scope of the European jurisdiction does not go beyond the borders of the EU and neither should go beyond these borders. In general, the EU has to be careful not to become a “big brother watching”. Extending the mandate for the FRA in geographical terms means a undesired distinction between especially the EU 25 and the other 21 European countries; It holds the potential risk of new dividing lines in Europa. The same risk will become apparent if the mandate of the FRA will be limited to the EU 25 and the tasks of the FRA will not be limited to only gathering and analysing information. Both options will work out badly for the relationship of the EU 25 and the other European countries. This “catch 22” as regards the mandate of the FRA is enough argument to oppose a FRA.

In addition, the criteria proposed by the European Commission for conducting research in a non EU country are not exclusive. In practice, every country that has or is about to conclude an agreement with the EU regarding human rights can become subject of EU interference. A notable aspect is that the European Commission does not substantiate in her memorandum why the geographical scope should be extended.

3. The establishment of the FRA will definitely give rise to overlap between the (intended) FRA activities and those of the Council of Europe. If in the end a FRA will be established the absolute pre-conditions are (1) the only task should be to gather and analyse information and even this should be done in

cooperation with the Council of Europe since the experiences and capacities of the Council of Europe in this field are not to be neglected. Otherwise it takes away from the merits of the Council of Europe; (2) a constructive co-operation agreement between the two organisations to be concluded before the actual establishment of the FRA and (3) an arrangement for the Council of Europe's participation in the agency's Management and Executive Bodies (including voting rights) similar to the current arrangement regarding the Centre for Racism and Xenophobia.

#### THE EUROPEAN INSTITUTE FOR GENDER EQUALITY

The Senate is not an advocate of the European Institute for Gender Equality from the point of view that he is not an advocate of the (undesired) increase in European agencies in general. The Senate has asked the "Dutch Council of State: advisory body and administrative court" to report on the development of European agencies in general. Specific attention in this report will be (among others) paid to the criteria for creating a new agency, the democratic control and the efficiency of agencies.

Creating the Institute for Gender Equality and the FRA will underline the Senate's point of view that there is an undesired increase in European agencies.

*January 2006*

#### Letter from the Equal Opportunities Commission

I would like to thank you for the opportunity offered by the European Union Committee Sub-Committee E to provide additional evidence regarding the establishment of a European Fundamental Rights Agency in relation to the European Equality Institute.

In relation to the Institute the Sub-Committee has formulated two questions:

- *Should the protection of gender rights be separated from other fundamental rights through the creation of two separate agencies? What are the advantages and disadvantages of this approach?*

As stated in our submission to the EU Sub-Committee G regarding the European Gender Institute, the EOC would have preferred one integrated European body covering all equality strands including gender. Our experience as an equal opportunities body working on equality between women and men is that it is vital not to disassociate gender from the rest of the equality strands. The EOC therefore, especially with the creation of the Commission for Equality and Human Rights in mind, has been arguing for more co-ordination and co-operation at a European level regarding promoting equality and fighting discrimination.

The advantages and disadvantages of setting up one integrated body or two separated bodies are discussed in our written evidence to the EU Sub-Committee G, and I do not think that we have any further points to make to that earlier evidence.

- *How might the two bodies work together to ensure that overlap is avoided and that co-operation is maximised to improve their effectiveness?*

Given that a decision has been made to have two separate bodies it is crucial that duplication is avoided. Both Institutes could for example work together to carry out EU-wide research on the specific barriers faced by women with disabilities or the position of BME women on the labour market and suggest possible solutions or provide examples of best practices. Joint planning and close co-operation have to be ensured. Perhaps the European Commission can incorporate this need for joint planning and close co-operation into the statutes establishing both bodies? The two bodies can also work together on an operational level. Practical solutions could for example be secondments of staff between the bodies, shared training programmes for staff, joint research projects, joint planning, gender mainstreaming the work of the Fundamental Rights Agency and establishing both bodies in the same location. The Fundamental Rights Agency is currently located in Vienna. The new Gender Institute should ideally be located near to this location to promote close co-operation if the European Commission chooses to create of two separate organisations.

Please find attached a copy of our submission of 14 December 2005 to the European Commission's consultation regarding the establishment of a European Fundamental Rights Agency, for ease of reference (*not printed with this Report*).

*21 December 2005*

## Memorandum by the Registrar of the European Court of Human Rights

### THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS<sup>24</sup>

1. Initiatives designed to reinforce the protection of fundamental rights in Europe are in principle to be viewed favourably and so is the creation by the European Union of a Fundamental Rights Agency (FRA), especially to the extent that it can be expected to effectively contribute to alleviating the Court's workload by ensuring and/or improving compliance by the EU with fundamental rights in general and the European Convention on Human Rights ("the Convention") in particular.
2. In keeping with the principle of subsidiarity underlying the Convention, the Court and the Council of Europe have always stressed the need to ensure compliance with the Convention at domestic level, notably as a means to prevent the Strasbourg machinery from being overburdened with (repetitive) well-founded applications. In this connection, it is to be kept in mind that when they apply EU law the contracting States remain responsible under the Convention and thus answerable before the Strasbourg Court<sup>25</sup>. Moreover, in the event of the EU acceding to the Convention, the Strasbourg Court will have jurisdiction over EU institutions. For these reasons, the idea of having a specialised EU institution to anticipate and prevent fundamental rights violations at EU level is to be welcomed.
3. Yet it would appear that for the FRA to have a positive impact in practice, the following conditions and modalities, relating both to the mandate and the structure of the FRA, should be fulfilled.
4. First of all, the Convention should be formally included in the list of relevant legal instruments to be referred to by the FRA in carrying out its tasks (see Article 3 § 2). Even though, strictly speaking, the Convention is not part of EU law, it is now widely accepted as the pan-European *ius commune* of fundamental rights, being referred to by national and EU institutions alike, including the European Court of Justice<sup>26</sup>. Thus it represents the foundation stone on which every other set of fundamental rights in Europe is built. A reference to the Convention in Article 3 § 2 would therefore be a necessary and important signal to the effect that action by the FRA will seek to comply with Convention standards. Such a step would appear all the more logical since (a) member States remain responsible under the Convention when applying EU law (see § 2 above) and (b) accession to the Convention is being contemplated by the EU itself<sup>27</sup>.
5. Secondly, any overlap or duplication of activities already carried out by the Council of Europe should be avoided, in order to prevent a waste of resources and ensure the efficiency of actions undertaken by preventing conflicting results or standards. The frequently heard call for a better coordination between the international organisations operating in Europe should also be kept in mind in this respect. Thus the creation of a new international body with a mandate largely overlapping that of other institutions would appear questionable, especially against the background of scarce public money and decreasing funding of international organisations.
6. In this connection, it may be recalled that the Court's budget, being part of the budget of the Council of Europe, is particularly affected by the "zero growth policy" which has been applied for roughly the last 10 years by Member States in respect of the Council of Europe. From this perspective, it seems doubtful whether it is appropriate to spend large sums duplicating activities which—with fewer financial means, though, but with the benefit of more than half a century's expertise—are already carried out by the Council of Europe.
7. The specificity and added value of the FRA mandate (Articles 3-4) would appear to reside in its impact on EU law and EU institutions. For other matters, close cooperation with the Council of Europe would be called for as a matter of good governance, with a view to enhancing efficiency by harmonising standards and avoiding duplication of work. Synergies thereby achieved should be used to help ease the current pressure on the Council of Europe's and the Court's budget. In short, in a scenario like this more could be achieved with the same budget through an effective co-ordination between the FRA and the Council of Europe.
8. Such co-operation should go beyond what is provided for in Article 9 and entail participation of Council of Europe representatives in all relevant decision bodies of the FRA, as suggested by the Council of Europe in its Memorandum of 11 January 2006, to which general reference is made here.

14 March 2006

<sup>24</sup> As outlined in COM(2005) 280 final, 30.6.2005. Relevant provisions will be referred to as they appear in this document.

<sup>25</sup> See, as the latest reference authority, *Bosphorus v Ireland* [GC], no 45036/98, 30.6.2005.

<sup>26</sup> See, among many other authorities, ECJ 17.12.1998, *Baustahlgewebe*, C-185/95 P; ECJ 6.3.2001, *Connolly*, C-273/99 P and C-274/99 P; ECJ 10.4.2003, *Steffensen*, C-276/01; ECJ 16.6.2005, *Pupino*, C-105/03.

<sup>27</sup> See Articles I-9 § 2 of the EU Constitutional Treaty and 59 § 2 of the Convention (as amended by Protocol no. 14), not yet entered into force.



### Memorandum by the UK Information Commissioner's Office

The Information Commissioner enforces and oversees the Data Protection Act 1998 and Freedom of Information Act 2000 within the United Kingdom, and participates in European work on data protection. Our concern is with good information handling, and does not extend to fundamental rights in general. For this reason most of the questions asked do not relate to issues within our area of expertise.

The Information Commissioner's Office does experience a certain degree of overlap between its work and that of other sector-specific ombudsmen, when a complaint cuts across the domains of two such regulatory bodies, but this has never presented a significant problem. While a similar overlap of concern might arise between the ICO and the FRA, the FRA's lack of a complaint resolution mechanism would make any difficulty still less likely.

*January 2006*

### Memorandum by The Law Society of England and Wales

#### GENERAL REMARKS

1. The Law Society of England and Wales ("the Society") is the regulatory body for more than 121,000 solicitors in England and Wales. It also represents the views and interests of solicitors in commenting on proposals for better law and law making procedures in both the domestic and European arenas. The Society welcomes this opportunity to submit comments on the proposed European Union Agency for Fundamental Rights.
2. The Society supports the Commission's proposal for a "Council Regulation establishing a European Union Agency for Fundamental Rights" and the accompanying 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."
3. The Society considers this is a useful initiative. Overall, the solution proposed by the European Commission seems to achieve a good balance between ambition and realism: ambition for creating a far-reaching EU fundamental rights agency but realism in terms of the capacity such an Agency could have—legally, practically, and taking into account political realities.

*Added value?*

4. It is hoped that the establishment of the Agency will bolster fundamental rights protection in the European Union and will foster a culture of fundamental rights throughout the EU legislative process. As the Agency's remit will be based both on the European Convention on Human Rights and the Charter of Fundamental Rights the remit will be broader than if solely based on the former. As draft Recital 2 acknowledges, the Charter enshrines rights already binding on the Member States through national constitutions, international obligations or European instruments. It is important that in its activities the Agency has regard to guarantees contained in international human rights instruments to which Member States are party. Furthermore we hope that the Agency will encourage the effective domestic implementation of UN human rights treaties in force in those Member States.
5. We welcome the advisory role of the Agency in terms of supporting EU institutions and offering expertise and information. This should ensure that where measures are proposed at European Union level, they are fully compliant with fundamental rights standards—recital 7. The Agency should assist with impact assessments in relation to the proposed fundamental rights proofing of future legislative proposals. The ability of the Agency to offer technical expertise in terms of proceedings under Article 7 Treaty on European Union is an important new development in terms of fundamental rights protection over and above current practice—article 4(e).

*Geographical scope*

6. The Society believes that the Agency should primarily monitor human rights in the EU, given the vast array of issues to be tackled within the EU's borders and the work of other international monitoring bodies in other areas. In view of the human rights monitoring that is undertaken in the course of accession negotiations, it is logical that candidate countries will be able to participate in the Agency (Article 27).

7. It may be helpful for the Agency to provide information on a specific theme relating to the fundamental rights situation in a third country, where the EU has an agreement with that country which includes a human rights clause or where negotiations for such an agreement are under way (Article 3(4)). It is not clear why only the Commission should be permitted to make requests to the Agency regarding third countries and not the Council or the Parliament.

*Relationship with other organisations*

8. The European Union Agency for Fundamental Rights will make up just one part of the EU's framework for promoting and monitoring fundamental rights. It will sit alongside the EU institutions, the European Ombudsman, the European Data-protection Supervisor and its work will closely mirror that of external organisations providing advice and expertise—principally the Network of Independent Experts on Fundamental Rights, the Network of Legal experts in the non-discrimination field and the Legal Experts' Group on Equal Treatment of Men and Women. It goes without saying therefore that the work of the Agency must be closely co-ordinated not only with work undertaken by the EU institutions but with the Council of Europe as well. Systematic and regular contact is necessary to ensure expertise is pooled and work is not duplicated. The Society considers that the provisions laid down in articles 6, 8 and 9 of the draft Regulation should lead to effective co-operation with other organisations.

9. We welcome in particular the intention that the EU and the Council of Europe sign a bilateral co-operation agreement (article 9) and note that discussion has already taken place between EU and the Council of Europe representatives. The EU and Council of Europe must continue to strive to interpret fundamental rights guarantees in the same way and the Agency could provide an invaluable channel to this end. The appointment of a Council of Europe representative on the management board of the Agency could also serve to ensure co-operation and co-ordination.

10. We are concerned however, that the proposed Regulation does not refer to the Network of Independent Experts on Fundamental Rights, leaving it unclear whether this Network will continue to exist alongside the Fundamental Rights Agency or not. The Network of Independent experts is a valuable source of information and expertise and served to raise awareness of fundamental rights issues in Europe and at European level.<sup>28</sup>

11. The relationship between the Agency and national human rights institutions is also an important one. The knowledge and experience held by the national human rights institutions will be instrumental to the success of the Agency. Where such organisations do not exist in Member States, the Agency could be charged with assisting their development. The work of the Agency should be in addition to, and not a substitute for, national human rights institutes.

12. Co-operation must also be sought with national equality bodies. Indeed, given that national gender equality bodies and national racial equality bodies are a requirement of European law, these merit mention in the proposed Regulation.

13. As regards the proposed European Institute for Gender Equality, the Society is not convinced that there is a need for a separate agency. Most of the issues that are considered as gender equality issues are also fundamental rights issues; indeed it is wrong to have to put some issues into one box or the other. The proposed tasks of the Institute for Gender Equality are essentially among those proposed for the Fundamental Rights Agency. If it is to be created, we agree with the European Parliament that the Institute for Gender Equality could be part of the Fundamental Rights Agency, working under its own name but sharing the resources of the parent Agency.<sup>29</sup> If it is to be established as an independent entity, Article 7 of the proposed Regulation establishing an EU Agency for Fundamental Rights, which deals with relations with relevant Community bodies, offices and agencies, will be helpful in delineating the work of the two similar agencies.

10 January 2006

**Memorandum by the President of the Parliamentary Assembly of the Council of Europe**

**INTRODUCTION**

The President of the Parliamentary Assembly of the Council of Europe welcomes Sub-committee E's initiative in calling for evidence on the issue of overlap between the proposed agency and the Council of Europe and other agencies in the field of fundamental rights and is grateful for the opportunity of making the following comments.

<sup>28</sup> <http://www.europa.eu.int/comm/justice—home/cfr—cdf/index—en.htm>

<sup>29</sup> European Parliament Resolution of 26 May 2005, paragraph 38

<http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//NONSGML+TA+P6-TA-2005-0208+0+DOC+WORD+V0//EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y&LSTDOC=N>

These comments are based on Assembly Resolution 1427 (2005) on “plans to set up a fundamental rights agency of the European Union”, which was adopted as a contribution to the European Commission’s consultation procedure. The Assembly maintains serious reservations towards the Commission’s current proposals, which fail to satisfy the Assembly’s concerns.

In the Assembly’s view, if the creation of an EU Agency for Fundamental Rights is found to be absolutely necessary, then the only acceptable role for such a body would be to gather and analyse information on fundamental rights, in co-operation with the Council of Europe. It is essential that this role be determined in a precisely formulated mandate before any decision is taken to establish the Agency.

What follows takes the form of responses to the points raised in the call for evidence (other than those relating to the European Institute for Gender Equality, which has not been the subject of consideration by the Assembly), followed by observations on other relevant issues.

#### COUNCIL OF EUROPE

1. *All Member States of the European Union are members of the Council of Europe and have signed [and ratified] the European Convention on Human Rights.*

- (a) *Is the creation of a European Union agency dealing with fundamental rights a useful initiative?*
- (b) *Can you provide any examples of where the FRA might fill a gap in fundamental rights protection in the European Union?*

#### Response of the Parliamentary Assembly

(a) The Assembly considers that, given the supranational nature of EC/EU integration and EC/EU law and the recent expansion of EC/EU competencies including in such broad and human rights-sensitive areas as justice and home affairs, it is not only legitimate and understandable but also desirable and necessary that human rights be given their rightful place in the EU’s legal order.

The creation of a fundamental rights agency within the EU could, therefore, make a helpful contribution, provided that a useful role and field of action is defined for it. The mandate of any Agency must be limited to filling a genuine lacuna and ensure that it represents irrefutable added value and complementarity in terms of promoting respect for human rights. Defining such a role presupposes careful reflection on the aims, content, scope, limits and instruments of its own internal human rights policy. Conversely, there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe, notably those of the Council of Europe. That would simply be a waste of taxpayers’ money.

(b) A wide range of powers previously exercised by national authorities have now been transferred to the EU. Had these powers remained at national level, they would have fallen within the mandate of independent national human rights commissions or similar institutions. It is appropriate, therefore, for an analogous body to be established at EU-level, so that the EU is assisted in a similar way as national authorities, always bearing in mind the different legal contexts. An agency thus mandated would collect and provide to the EU institutions information about fundamental rights that is relevant to their activities, thereby contributing to the mainstreaming of human rights standards in the EU decision-making processes.

2. *The Commission has proposed that the remit of the FRA should extend beyond the EU and encompass non EU-Member States in circumstances outlined in Articles 3 and 27 of the proposal.*

*Should the FRA have a mandate to act outside the boundaries of the Union?*

#### Response of the Parliamentary Assembly

The Assembly is strongly against the FRA having any role in relation to non-EU Member States. Even if a legitimate role could be found for the Agency, acting within the EU in relation to Community law, this cannot encompass activities outside the boundaries of the Union.

Were the Agency to engage in reporting, monitoring or advisory activities in relation to non-Member States, this would definitely duplicate Council of Europe activities. Avoiding such duplication is not only a matter of upholding the pre-eminent role of the Council of Europe in the protection and promotion of human rights in Europe: it is first and foremost about the vital interest of hundreds of millions of individuals in Europe in the effective enjoyment and protection of human rights. A multiplication of European institutions in the field of

human rights will not necessarily mean better protection of those rights. On the contrary, creating institutions whose mandates overlap with those of existing bodies can easily result in the dilution and weakening of their individual authority, which in turn will mean weaker, not stronger, protection of human rights, to the detriment of the individual.

3. *The FRA would be competent to provide assistance and expertise to institutions and bodies of the Community and of the Member States.*

- (a) *Do you consider that this would in practice give rise to an overlap between its activities and those of the Council of Europe?*
- (b) *What measures might be taken to limit or avoid such overlap?*

#### Response of the Parliamentary Assembly

(a) The only acceptable role for the Agency would be to gather and analyse information, in co-operation with the Council of Europe. The risk of overlap depends on the mandate of the FRA and on the degree of precision with which that mandate is formulated. The Commission's proposals are for an unacceptably extensive mandate and, furthermore, are not drafted with sufficient precision to prevent ever-increasing overlap and competition with Council of Europe activities.

(b) If such a role is found to be essential, then effective measures must be found to avoid overlap.

- (i) Overlap arising from FRA activities outside the boundaries of the Union would only be effectively avoided by deleting the offending provision, namely Article 3(4). In consequence, Article 27 should also be deleted.
- (ii) Overlap would also occur were the FRA to assess the human rights situation in individual EU-Member States. This would be limited by amending Article 4(1)(d), as follows (new text in bold):

“formulate conclusions and opinions on general **issues of fundamental rights relating to the implementation of Community law**, for the Union institutions and the Member States when implementing **such** law, either on its own initiative or at the request of the European Parliament, the Council of the Commission;”

and Article 4(1)(f), as follows:

“publish an annual report on the situation of fundamental rights **within the legal framework of the European Union**, also highlighting examples of good practice;”

- (iii) A general provision on the avoidance of overlap should be built in to the Agency's Multiannual Framework by amending Article 5(1)(e), as follows:

“include provisions with a view to avoiding thematic overlap with the remit of other Community bodies, offices and agencies, **as well as the Council of Europe.**”

- (iv) An overarching provision requiring the FRA to avoid overlap with Council of Europe activities should be added to Article 9, as follows:

“The Agency shall co-ordinate its activities with those of the Council of Europe, **including** with regard to its Annual Work Programme pursuant to Article 5, **with the aim of avoiding duplication of activities already undertaken by the Council of Europe**. To this end, the Community shall, in accordance with the procedure provided for in Article 300 of the Treaty, enter into an agreement with the Council of Europe for the purpose of establishing close co-operation between the latter and the Agency. This agreement shall include the obligation of the Council of Europe to appoint an independent person to sit on the Agency's Management Board, in accordance with Article 11, **and Executive Board (, in accordance with Article 12 [if amended]).**”

- (v) On an operational level, the Council of Europe should be given an effective voice within the FRA's management structures. This role should be equivalent to that which it currently enjoys on the FRA's forerunner, the European Monitoring Centre on Racism and Xenophobia. Article 11(6) should therefore be amended, as follows:

“Decisions by the Management Board shall be taken by a simple majority of the votes cast, except as regards the decisions referred to in points (a), (c), (d) and (e) of paragraph 4, where a two-thirds majority of all members shall be required. The Chairperson shall have the casting vote. The person appointed by the Council of Europe may **not** vote on decisions referred to in points **(c), (d), (e), (f), (h), (i) and (j)** of paragraph 4.”

and Article 12(1), as follows:

“The Management Board shall be assisted by an Executive Board. The Executive Board shall be made up of the Chairperson and the Vice-Chairperson of the Management Board, **the person appointed to the Management Board by the Council of Europe** and two Commission representatives.”

## GENERAL

6. *Are you aware of the existence of other bodies, at national, European or international level, which perform activities similar to those which would be carried out by the FRA? How might the FRA affect the work of these bodies?*

### Response of the Parliamentary Assembly

This question goes to the heart of the matter. All EU-Member States are also members of the Council of Europe and party to its basic instruments, including the European Convention on Human Rights (ECHR), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Social Charter and (with the exception of Belgium, France, Greece and Luxembourg) the Framework Convention for the Protection of National Minorities, each of which has its own independent control mechanism. The Council of Europe Commissioner for Human Rights produces reports, opinions and recommendations on the full range of human rights issues arising in Council of Europe member States. If the FRA were to monitor, report and advise on the fundamental rights situation in EU-Member States outside the scope of Community law, this would duplicate Council of Europe work, including that of its treaty mechanisms.

On the other hand, any activities of the FRA in Council of Europe Member States that are not members of the EU would certainly duplicate Council of Europe activities, including the Parliamentary Assembly’s own important monitoring work, which covers many of those countries that aspire to EU membership. There is no need for the EU to obtain information on the human rights situation in other Council of Europe Member States beyond that which the Council of Europe itself already freely provides.

Whilst, *ceteris paribus*, these various forms of duplication should not prevent the Council of Europe from continuing its work, any inconsistency and contradiction in results could undermine the credibility of the overall system of human rights protection—including that of the Council of Europe’s mechanisms, despite the organisation’s 55 years of experience and expertise.

Two expressions encapsulate the adverse effects: “dividing lines in Europe”, between those countries represented on the Agency and those which are not; and “double standards,” both in terms of applied legal instruments and assessment of particular human rights situations. These effects would harm not only the Council of Europe and its numerous mechanisms, but also the interests of all those within the jurisdictions of its member States.

## FURTHER COMMENTS

(a) The Assembly’s overriding concern—the effective enjoyment and protection of human rights in Europe—arises in relation not only to overlapping activities but also to inconsistent standards. The Agency should take full account of established Council of Europe instruments, to avoid double standards in human rights protection across Europe as a whole.

Article 3(2) should, therefore, be amended as follows:

“The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union and as set out in particular in the Charter of Fundamental Rights of the European Union as proclaimed in Nice on 7 December 2000, **with due regard to existing international human rights standards, including those set out in the European Convention on Human Rights and its Protocols.**”

(b) Co-ordination of and co-operation with the activities of civil society associations active in the field of human rights is part of the core business of the Council of Europe. Bodies such as the Parliamentary Assembly and the Commissioner for Human Rights have a long record of organising such activities, thus ensuring that civil society in Europe is fully informed of and harmonised around the basic human rights standards set out in Council of Europe instruments and interpreted by the various supervisory mechanisms.

Such activities should remain the task of the Council of Europe, rather than falling within the mandate of an Agency for Fundamental Rights. Indeed, since the Agency should be devoted to gathering and analysing

information in co-operation with the Council of Europe, there is no practical need for it to have an independent role in this respect, although a co-operation with the Council of Europe could be envisaged, including on request by the Agency.

(These comments relate to Articles 4(1)(i) and (j) and 14, in particular.)

20 January 2006

**Letter from the Secretary General of the Council of Europe**

Thank you for your letter of 16 February.

While the proposal to set up a European Union Fundamental Rights Agency is a welcome sign of the commitment of the European Union to human rights, I have expressed my concern about certain aspects of this initiative on a number of occasions. If we are not careful, the proposed Fundamental Rights Agency could lead to duplication of activities already undertaken by the Council of Europe's human rights mechanisms or even contradict the standards established by these mechanisms with the risk of actually undermining the protection of human rights in Europe.

On 19 September, I sent to the European Commission an analysis by the Council of Europe's Secretariat of the proposals contained in the draft Council Regulation establishing the Agency. I have also met representatives of the European Commission on several occasions and have had an exchange of correspondence with them on this subject. However, the proposal, as it stands, for a draft Council Regulation establishing the European Union Fundamental Rights Agency still does not sufficiently address the concerns expressed by the Council of Europe on a number of points.

I have therefore sent specific drafting suggestions for amendments to the draft Council Regulation to Commissioner Frattini. I am enclosing a copy for your information (*not printed with this Report*).

Without these amendments, there is a serious risk of the Agency overlapping Council of Europe activities and falling short of existing arrangements regarding the Monitoring Centre on Racism and Xenophobia.

As for your question about the proposed Memorandum of Understanding (MoU) between the Council of Europe and the European Union, a text for a draft MoU was sent to the Council of Europe by the UK Presidency of the European Union in December, and discussions have now started within the Council of Europe's Committee of Ministers' Deputies. I have made several proposals for amendments as have various delegations. Since this is an ongoing negotiation, I am not in a position to send any draft text to you at this stage, but I will keep you in touch with developments.

1 March 2006

---