

**Preliminary position of the Government of the Netherlands
on the Fundamental Rights Agency, December 2004**

A contribution to the public debate

Introduction

The Netherlands attaches great importance to effective monitoring of respect for human rights within the European Union (EU) and prevention of breaches of those rights. Not only is respect for human rights and fundamental freedoms a major criterion for accession to the EU; it is also crucial to *continue* protecting human rights and fundamental freedoms throughout the Union. Moreover, effective monitoring of respect for human rights within the Union will strengthen the credibility of the EU's external human rights policy.

The Dutch parliament, too, has made it clear that it attaches great importance to effective monitoring of respect for human rights within the EU. It has asked the government to support the development of an effective mechanism that can contribute to promoting human rights within the EU. But, it has also emphasised the need to avoid unnecessary overlap with existing Council of Europe mechanisms.

Main elements of the Netherlands' position

With regard to the questions the Commission poses in its Communication, the Netherlands supports the proposal to confine the geographic scope of the Agency's human rights monitoring activities to the European Union. This implies that the Agency should monitor observance of fundamental rights by both Member States and EU institutions.

The Netherlands also advocates defining the field of action of the Agency broadly; a narrow definition of the field of action would impair the EU's credibility in the area of human rights. Article 7 of the Treaty on European Union (TEU) is broadly formulated and authorises – though only in the most extreme cases – sanctions. The Netherlands thus favours working on the basis of this article. Article 7 TEU refers to the principles of the

Union mentioned in Article 6 TEU, which include human rights and fundamental freedoms. The precise nature of these principles should be determined on the basis of the human rights conventions to which the Member States and the EU are or will be party. For Member States, these are above all the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the protocols thereto, and the European Social Charter (ESC). As far as respect for human rights by EU institutions is concerned, the Charter of Fundamental Rights may serve as a reference point at such time as the Constitutional Treaty enters into force.

With regard to the tasks of the Agency, the Netherlands' main concern is to avoid unnecessary overlap with activities within existing frameworks, particularly the Council of Europe (CoE). It should be ensured that the Agency will not duplicate instruments that are already available and working satisfactorily within other frameworks and function adequately. The EU may not withdraw itself from the tasks or monitoring of the CoE, in particular where the protection of human rights (also in other Member States of the CoE) is concerned.

The Netherlands believes that, as far as possible, the Agency should draw on CoE frameworks and instruments. While acknowledging the potential problem of overlap, the Netherlands sees the establishment of the Agency as an opportunity to fulfil the often-expressed wish to create much-needed synergy between the EU and CoE. The tasks proposed by the Commission – collecting and analysing available data and, on that basis, drafting and publishing opinions and reports – would not lead to unnecessary overlap in the view of the Netherlands, provided the Agency uses data from the CoE and other organisations (such as the OSCE and the commissions under the various UN-human rights treaties). The Agency will also have to maintain relationships with other organisations and exchange information and expertise, in order to avoid duplication of effort and secure sufficient relevant information. What is most important is for the Agency ultimately to be able to arrive at objective conclusions based on the available data. To that end, it must be able to operate independently.

Although the Netherlands believes that the field of action of the Agency should include a broad range of fundamental rights, it would be preferable for it to draft focused opinions on specific themes, addressing each Member State individually and devoting special

attention to Member States with problems in that thematic field. Opinions of a general nature covering a broad human rights field throughout the EU entail the risk of a less effective monitoring of compliance with human rights obligations.

The Netherlands believes that the opinions drafted by the Agency should not be the end of the line; effective monitoring of compliance with human rights obligations will require further steps. A peer review system could be part of these further steps. For that reason, the Netherlands believes it will be important to discuss the independent opinions and reports drafted by the Agency within the EU structures, preferably in the Council. This will amount to a built-in mechanism for placing moral pressure on Member States, one which can be expected to achieve faster and better results than existing human rights mechanisms. It will allow the EU to identify and discuss breaches of fundamental rights at an early stage. It will thereby be important for the Agency not to concentrate exclusively on serious and persistent breaches but also, guided by the provisions of Article 7 TEU, to monitor impending breaches.

Very special attention needs to be given to cooperation with the Council of Europe, as the EU Member States form a majority in the Council and must be in the vanguard in recognising and enforcing human rights. The Commission repeatedly calls for attention to be given to this point. It is for this reason that the Netherlands would like to see the Council of Europe participate in the Agency's management bodies – possibly through a construction of the type now used by the European Monitoring Centre in conjunction with the Council of Europe's European Commission against Racism and Intolerance (ECRI). But the Commission rightly also calls for attention to be paid to the Commissioner for Human Rights. It is important that the respective authorities of the Human Rights Agency and the Council of Europe have complementary responsibilities and that EU and Council of Europe instruments are mutually reinforcing.

The Netherlands, finally, supports making the Agency a fairly lightweight structure in terms of staff and budget, as the Commission has proposed.