EDUSKUNTA **ASIAKIRJAVIHKf**

VALIOKUNNAT

C./Ö.Q.COS -9 U ' Z 9-

Tallennetaan
konttle tiedot:
→
E 139/2004 vp
PeVP 35/2005 p

E 139/2004 vp
PeVP 35/2005 vp

VK-FAKTA
PERUSTUSLAKIVALIOKUNTA

DIAARIOTE
19.03.2007

DIAARIOTE

PERUSTUSLAKIVALIOKUNTA **E**

139/2004 vp
komission tiedonannosta perusoikeuksien virastosta

Saapunut : Mahdollisia toimenpiteitä varten

Mietintövk: Suv Suv
Lähettäjä: 18.01.2005
Saapumispvm:

Ministeriö: OM
Lähetyspvm:
14.01.2005 Käsittely päättynyt
Tilakoodi:

Eutori-nro: EU/2004/1669
KOM-nro: KOM(2004) 693 lopullinen
SEK(2004) 1281

1. 06.10.2005	*Jatkettu I käsittely*		
		Muuttunut U-asiaksi	U 27/2005 vp
1. 03.05.2005	*Jatkettu I käsittely*		
		Asiakirja merk. saapuneeksi	EN:n parlamentaarisen yleiskokouksen presidentin René van der Lindenin kirjelmä professori Martin Scheininin 11.3.2005 kokoukseen antaman kirjallisen lausunnon liite.
1. 29.03.2005		Kirjallinen lausunto merkitty saapuneeksi	
	Jatkettu I käsittely		
1. 29.03.2005		Asiantuntijakuulemisen päättäminen	
1. 11.03.2005		Kirjallinen lausunto merkitty saapuneeksi	professori Martin Scheinin kirjallinen lausunto.
	Jatkettu I icäsittely		
1. 11.03.2005		Asiantuntijoiden kuuleminen -erityisasiantuntija Anna-Elina Pohjolainen oikeusministeriö (K) -lainsäädäntösihteeri Janina Hasenson ulkoasiainministeriö -professori Tuomas Ojanen (K) Asian ottaminen käsiteltäväksi Asia ilm. vkaan s aapuneeks i (mahd. tp.)	
1. 03.02.2005	**I** *käsittely Kirjaus*	Saap. mahd. tp. varten	

1.

03.02.2005

1.
14.01.2005

VK-FAKTA
PERUSTUSLAKIVALIOKUNTA

DIAARIOTE
19.03.2007

DIAARIOTE

PERUSTUSLAKIVALIOKUNTA

U 27/2005 vp
ehdotuksesta neuvoston asetukseksi ja päätökseksi (Euroopan unionin perusoikeusvirasto)

Saapunut : Mahdollisia toimenpiteitä varten

Mietintövk: SuV **Lähettäjä:**
Puhemies **Ministeriö:** OM
Saapumispvm: 07.10.2005 **Lähetyspvm:**
Tilakoodi: Käsittely päättynyt
Lopputoimi: PeVL 57/2005 vp, PeVP 102/2005 vp 5 §, PeVP 30/2006 vp 5 § **Lopputoim.pvm:** 02.12.2005, 09.12.2005, 18.04.2006

KOM-nro: KOM(2005)280 lopull.

18.04.2006	*Käsittely*	Ei ryhdytä tp:iin SuV	01.12.2005 Päätettiin perustuslain 50 §:n 3 momentin nojalla, että valiokunnan jäsenten ja asian käsittelyyn osallistuvien erikoisvaliokuntien on noudatettava vaiteliaisuutta jatkokirjelmän sisällöstä. PeVL 57/2005 vp
18.04.2006	*Asian ilmoittaminen*	Jatkokirj. ilm. vkaan saapuneeksi	
07.04.2006	(mahd.tp)		
09.12.2005	*Kirjaus* (jatkokirjelmä)	Saapunut mahd. tp. varten *J käsittely*	Ei
09.12.2005	ryhdytä tp:iin	SuV Jatkokirj. ilm. vkaan saapuneeksi (mahd.tp)	PeVL 57/2005 vp
			lausuntoluonnos
			ulkoasiainministeriön muistio 16.11.2005
	J käsittely		
07.12.2005			professori Martin Scheininin kirjallinen lausunto
	Saapunut mahd. tp. varten (jatkokirjelmä)		
02.12.2005			
		Lausunto lähetetty SuV	
02.12.2005		Valmistunut	
		Yksityiskohtainen käsittely	
	Jatkettu *I käsittely*		
02.12.2005		Yleiskeskustelu	
	Jatkettu I käsittely		
22.11.2005		Asiakirja merk. saapuneeksi	
	X *käsittely*		
17.11.2005		Asiantuntijakuulemisen päättäminen	
16.11.2005		Kirjallinen lausunto merkitty saapuneeksi	
	3. OM 04.04.2006		
	3. OM 04.04.2006		
	3. OM 04.04.2006		
	2. OM 01.12.2005		
	2. OM 01.12.2005 Suuri valiokunta on päättänyt perustuslain 50 §:n 3 momentin nojalla, että valiokunnan jäsenten ja asian käsittelyyn osallistuvien erikoisvaliokuntien on noudatettava vaiteliaisuutta jatkokirjelmän sisällöstä. 2. OM		

~ Ennakkokäs i 11 e 1 y ~

Asiantuntijoiden kuuleminen -yksikön johtaja Jaana Jääskeläinen oikeusministeriö (K)
-erityisasiantuntija Anna-Elina Pohjolainen oikeusministeriö (K)
-lainsäädäntösihteeri Janina Hasenson ulkoasiainministeriö
-hallintotieteiden tohtori Jukka Viljanen (K) - professori Tuomas Ojanen (K) Jatkokirj. ilm. vkaan 1. OM 02.11.2005 saapuneeksi (mahd.tp)
Käsittelyyn osallistuvien valiokuntien jäsenten on noudatettava vaiteliaisuutta kirjelmän liitteenä olevasta muistiosta

Kirjaus

Saapunut mahd. tp. 1. OM 02.11.2005 varten (jatkokirjelma)
Käsittelyyn osallistuvien valiokuntien jäsenten on noudatettava vaiteliaisuutta kirjelmän liitteenä olevasta muistiosta
Ilm. vkaan saapuneeksi (lausunto)

K "irj aus

Saap. lausuntoa varten

käsitelty aiemmin E 139/2004 vp - tunnuksella

E 139/2004 vp
PeVP 35/2005 vp/A 135

EDUSKUNTA

Kansainvälisten asiain yksikkö

22.4.2005

asia: Euroopan neuvoston parlamentaai:sen yleiskokouksen presidentin kirjelmä EU:n perusoikeusvirastosta

Perus tuslakival iokunnalle,

Pyydän kunnioittaen saada toimittaa perustuslakivaliokunnalle tiedoksi EN:n parlamentaarisen yleiskokouksen presidentin René van der Lindenin EU:n perusoikeusvirastoa koskeva kirjelmä liitteineen (PACE:n päätöslauselma 1696 (2005) sekä *draft interinstitutional agreement on the operating framework for the European regulatory agencies).*

Gunilla Carlander
kv.as.neuvos
EN:n Suomen valtuuskunnan sihteeri

Tiedoksi: EN-valtuuskunta (5+5)

Postiosoite:
00102
Eduskunta

Käyntiosoite:
Aurorankatu 6
Sähköposti:
int.dep@eduskunta.fi

Internet:
www.eduskunta.fi

Puhelin: (09)
4321 Fdksi"
(09) 432 3529

Council of Europe

Parliamentary Assembly

The President

18 April 2005

Dear Speaker,

I have pleasure in transmitting to you herewith copies of Resolution 1427 (2005) and Recommendation 1696 (2005) on *plans to set up a Fundamental Rights Agency of the European Union,* unanimously adopted by the Standing Committee of the Parliamentary Assembly at its meeting in Paris on 18 March 2005.

The Council of Europe's pre-eminence in the promotion and protection of human rights in Europe is universally recognised. A mere multiplication of European human rights institutions could lead to a dilution and weakening of the authority of each of them, to the detriment of the protection of the human rights of individuals all over Europe.

Yet regrettably the *Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies* [COM (2005) 59 final] recently presented by the European Commission appears to make no allowance for the participation of organisations such as the Council of Europe in the management structures of the planned Agency.

Therefore, I appeal to you to bring these texts to the attention of the appropriate committees in your Parliament with a view to giving strong support to the Assembly's position on this issue.

Yours sincerely,

René van der Linden

Mr Paavo LIPPONEN
Speaker of the Parliament of Finland
Eduskunta
FIN - 00102 HELSINKI

àf-67075

(Se/. .-+33 (0) 3 88 ti20,M (¿Fia: .+33 (0) 388¿ti2796 yene. vanderlínden @coe .¿nt

Parliamentary **Assembly**
Assemblée parlementaire

Provisional edition

Plans to set up a Fundamental Rights Agency of the European Union

Recommendation 1696 (2005)[1]

1. The Parliamentary Assembly refers to its Resolution 1427 (2005) on the plans to set up a Fundamental Rights Agency of the European Union.

2. The Assembly accordingly recommends that the Committee of Ministers:

i. see to it that, notably in the context of the Third Summit, the pre-eminent role of the Council of Europe in the European institutional architecture in matters concerning the promotion and protection of human rights is reaffirmed and the foundations are laid for a stronger, more structural and better defined relationship with the European Union which:

a. recognises the role of the Council of Europe, also in relation to the EU, as an institutional framework for external supervision of respect for human rights as set out in its instruments as well as its role as a pan-European framework for co-operation, notably in matters concerning human rights, democracy and the rule of law;

b. anchors the EU more firmly to Council of Europe structures and instruments to that effect, bearing in mind the increased relevance of the work of the Council of Europe to the activities of the EU as a result of the expansion of the EU/EC areas of competence;

ii. draw the attention of the EU to the need, when drawing up the mandate for the Agency and defining its organisational structures and *modus operandi,* to avoid any duplication with the Council of Europe and its mechanisms operating in the human rights field, as set out in more detail in the above-mentioned Resolution.

Parliamentary **Assembly**
Assemblée parlementaire

Provisional edition

[1] Text adopted by the Standing Committee acting on behalf of the Assembly on 18 March 2005 (see Doc. 10449, report of the Committee on Legal Affairs and Human Rights, rapporteur. Mr McNamara).

F - 67075 Strasbourg Cedex, tei: +33 3 88 4120 00, fax: +33 3 88 41 27 02, http://assembty.0De.int, e-mail: assembly@coe.int

Plans to set up a Fundamental Rights Agency of the European Union

Resolution 1427 (2005)[2]

1. At the European Council meeting in Brussels on 12 and 13 December 2003, the representatives of the member states of the European Union (EU) *"stressing the importance of human rights data collection and analysis with a view to defining Union policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia and to extend its mandate to become a Human Rights Agency to that effect."*

2. On 25 October 2004, the Commission of the European Communities (EC) published a Communication containing a public consultation document on the establishment of a Fundamental Rights Agency of the EU (document COM(2004)693 final), setting out detailed ideas, options and questions regarding the field of action of such an agency, the tasks to be entrusted to it, its relations with civil society, the Council of Europe and other bodies and its operational structures.

3. The Parliamentary Assembly, as the parliamentary organ of a European organisation with a statutory mission and unparalleled expertise in the area of the promotion and protection of human rights, the rule of law and pluralist democracy, owes it to itself to make a timely and substantial contribution to the debate on the definition of the EU Agency's remit, tasks, *modus operandi* and working structures.

4. In stating its views on this subject, the Assembly is mindfui of the considerable human rights acquis developed by the Council of Europe over the past fifty-five years, encompassing not only *standards* on civil and political rights, social rights, minority rights, treatment of persons deprived of their liberty and the fight against racism, but also active European *monitoring* of respect of these standards by its member states. Such monitoring is carried out by several well-established independent human rights bodies with recognised expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically. Through these mechanisms, the Council of Europe monitors respect for the whole range of human rights obligations of its member states (including the 25 member states of the European Union), identifies issues of non-compliance and addresses recommendations to member states and, in the case of the European Court of Human Rights, issues judgments binding on States Parties whenever these standards are not respected.

5. The Assembly also recalls the important volume of intergovernmental work carried out by the Council of Europe on various human rights themes, leading to the adoption of reports and new legal instruments (treaties, recommendations, guidelines, etc.) by the Committee of Ministers, as well as the tetter's political monitoring procedure. In addition, there are significant human rights achievements resulting from the practical assistance work designed to facilitate attainment of the requisite standards as well as from the work of Council of Europe institutions with a broader remit. Linked to this are numerous activities in the field of human rights education and awareness-raising which seek to develop a genuine human rights culture in European societies.

6. The Assembly itself attaches the highest importance in its own work to human rights questions -both thematic issues and country-specific questions - as is witnessed by the frequent resolutions and recommendations adopted on such questions. Finally, the Congress of Local and Regional Authorities of the Council of Europe and the European Commission for Democracy through Law (Venice Commission) also regularly address human rights-related issues.

7. In no small part thanks to the effectiveness of its human rights mechanisms, the work of the Council of Europe results in innumerable practical improvements in the respect for human rights in its member states, including in the member states of the European Union. AH these achievements and the underlying statutory mission of the Organisation demonstrate the pre-eminence of the Council of Europe as regards the protection and promotion of human rights in Europe.

8. As regards the European Union, the Assembly considers that, given the supra-national nature of EC/EU integration and EC/EU law and the expansion of EC/EU competencies in recent times also 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 are given their rightful place in the EU's legal order.

9. The various steps taken so far to strengthen human rights protection within the EU - notably the incorporation of the Charter of Fundamental Rights in the Constitutional Treaty and the tatter's provisions committing the EU to accession

[2] Text adopted by the Standing Committee acting on behalf of the Assembly on 18 March 2005 (see Doc. 10449, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr McNamara).

F - 67075 Strasbourg Cedex, tel.: +33 3 88 41 20 94, fax +33 3 88 41 27 96, http://assembly.coe.int e^:assemWy@coe.im

to the European Convention on Human Rights - are therefore welcomed by the Assembly as is, by the same token, any further step that presents added value by contributing to ensuring respect for human rights in the EU's decision-making processes.

10. Against this background, the Assembly considers that the creation of a Fundamental Rights Agency within the EU could make a helpful contribution, provided that a useful role and field of action is defined for it - one which genuinely "fills a gap" and which thus presents added value and complementarity in terms of promoting respect for human rights. Defining such a role presupposes careful reflection within the EU about the aims, content, scope, limits, and instruments of its own internal human rights policy. Conversely, there is no point in re-inventing the wheel by giving the Agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers' money.

11. Avoiding 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 a better protection of those rights. On the contrary, creating institutions with mandates which overlap with those of existing ones can in practice easily lead to a dilution and weakening of the authority of each of them, which in turn will mean a lesser, not a stronger, protection of human rights to the detriment of the individual.

12. Finally, the existence of such parallel mechanisms (one for the 25 member states of the Union and one for the 46 member states of the Council of Europe) would be a serious blow to the principle that there should be no dividing lines in Europe, especially in an area - human rights - where, more than anywhere else, Europe should be united by the same common standards and values. All this militates in favour of giving the EU Agency a well-defined, focused and complementary role.

13. Bearing in mind, on the one hand, the significant development and substantive expansion of the legal order of the EU and, on the other, the broad arsenal of existing human rights mechanisms of the Council of Europe and the need to avoid overlap with their roles and competences, the Assembly takes the view that the role of the Agency should be that of an independent institution for the promotion and protection of human rights within the legal order of the EU, along the lines of similar national institutions that exist in several member states. The Agency should collect and provide to the EU institutions information, relevant to their activities, about fundamental rights and thus contribute to mainstreaming human rights standards in the EU decision-making processes.

14. The Assembly therefore recommends that the European Union and its member states:

i. proceed, before setting up the Agency, to a careful reflection about the aims, content, scope, limits, and instruments of the EU's own internal human rights policy, taking into account the role played by the Council of Europe in the promotion and protection of human rights in Europe and considering the need for a stronger, more structural and better defined relationship between the two Organisations, bearing in mind the forthcoming Third Summit of the Council of Europe;

ii. give the future Agency a weil-defined mandate which presents added value in terms of promoting respect for human rights within the legal order of the European Union and at the same time avoids any duplication with the competences of the human rights mechanisms and institutions of the Council of Europe, in particular by:

a. determining that the field of action of the Agency should be that of the scope of Community/EU law, giving it a role in promoting compliance with fundamental rights of both Community law and policies and implementation of the latter by the EU member states but not as regards areas outside Community/EU competence, where its member states act autonomously - subject to supervision by the European human rights bodies set up by the Council of Europe;

b. determining that the Agency should, following the model of the current European Monitoring Centre on Racism and Xenophobia, work on a thematic, not a country-by-country, basis, focusing on certain specified themes having a special connection with the policies of the Community or the Union;

c. providing, in order to ensure that the information given by the Agency is coherent with existing European instruments in the field of human rights and with a view to the future accession of the EU to the European Convention on Human Rights (ECHR), that both the EU Charter of Fundamental Rights and the ECHR are among the main reference instruments to be used by the Agency, along with the European Social Charter, the European Convention for the Prevention of Torture and the Framework Convention for the Protection of National Minorities;

d. bearing in mind that action by EU member states at the national level in areas within the scope of EU law is already covered by the human rights monitoring conducted by the Council of Europe bodies the findings of which are addressed directly to those member states individually and, consequently, providing that the Agency's thematic reports shall be addressed to the relevant institutions of the Union only (Commission, Council, Parliament);

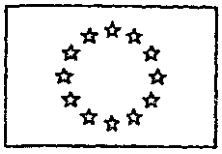
e. determining that the Agency shall be independent and that its tasks will be to collect, record and analyse information about human rights issues and to provide such information to the EU institutions with a view to mainstreaming and promoting human rights in EU decision-making; this task will be especially useful in the context of assisting those institutions in examining the compatibility of draft EU legislation with human rights standards;

iii. ensure, building on the example of the provisions of the regulation setting up the European Monitoring Centre on Racism and Xenophobia, that the future regulation setting up the Agency shall also provide that the activities of the Agency shall not duplicate those of the Council of Europe but, on the contrary, be conducted in close co-ordination and co-operation with the Council of Europe, in particular by:

a. including provisions establishing the rule of non-duplication with the role, functions and activities of the institutions and mechanisms of the Council of Europe and setting out a duty of co-operation and co-ordination with the Council of Europe, notably as regards the drawing up and implementation of the Agency's programme of activities;

b. making mandatory provision for the full participation of the Council of Europe in the management structures of the Agency;

c. providing that the Community shall enter into an agreement with the Council of Europe for the purpose of establishing close co-operation between the latter and the Agency.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.02.2005
COM(2005)59 final

Draft

INTERINSTITUTIONAL AGREEMENT on the operating framework for the European regulatory agencies

(presented by the Commission)

EN

EXPLANATORY MEMORANDUM

1. CONTEXT AND OBJECTIVES

The European agencies have been set up in successive waves in order to meet specific needs on a case-by-case basis. They are typified by their diversity. If these agencies are set up in an uncoordinated manner, without a common framework having been defined, this is likely to result in a situation which is rather untransparent, difficult for the public to understand, and, at ail events, detrimental to legal certainty.

In its White Paper on European Governance ('), the Commission proposed that, in accordance with the principles of good governance a framework should be established setting out the conditions relating to the creation, operation and control of "regulatory" agencies ("), which help to improve the implementation and application of Community legislation.

Coherence: By adopting a horizontal approach, the aim is to ensure compliance with a minimum common core of principles and rules on the creation, operation and control of these agencies. Their involvement in exercising executive powers must be organised in a coherent and balanced way which takes account of the need to preserve the unity and integrity of this function at Community level.

Effectiveness: The credibility of these agencies rests largely on their effectiveness. They must be organised in such a way that they can perform the tasks devolved on them effectively. The principle of effectiveness essentially involves simplifying the decision-making process, cutting costs and giving these agencies a certain degree of organisational, legal and financial autonomy.

Accountability: The independence of these agencies goes hand in hand with an obligation to meet their responsibilities. In order to strengthen the legitimacy of Community action, it is important to establish and delimit the responsibilities of the institutions and agencies. The decision to set up these agencies must be taken prudently on the basis of an impact assessment conducted by the Commission. This impact assessment must be as thorough and rigorous as possible. Moreover, the principle of accountability requires that a clear system of controls be put in place.

Participation and openness: The agencies must also be organised internally in such a way as to guarantee the participation of interested parties and a high level of transparency. The acts establishing these agencies must stipulate that, like the European institutions, they will be subject to the requirements of good administration.

2. CONSULTATION OF THE OTHER INSTITUTIONS AND OTHER INTERESTED PARTIES

In December 2002, the Commission adopted a Communication which, on the basis of these principles, paves the way for a future operating framework for the European regulatoryagencies ([3]). It was welcomed by the Parliament ([4]) and the Council ([5]). The directors of the existing

(') COM(2001) 428, OJ C 287 of 12.10.2001, p. **1.**

([2]) A framework regulation has already been adopted for "executive" agencies which are responsible for management tasks, i.e. helping the Commission to implement financial programmes (Council Regulation (EC) No 58/2003 of 19.12.2002, OJL 11 of 16.1.2003).

([3]) Communication from the Commission of 11.12.02 on the operating framework for the European regulatory agencies (COM(2002)718).

([4]) Resolution of 13.01.04, P5_TA(2004)0015.

([5]) Conclusions of 28.06.04, Doc. 17046/04.

agencies were also consulted.

3. CHOICE OF LEGAL INSTRUMENT: INTERINSTITUTIONAL AGREEMENT

The Commission has proposed an interinstitutional agreement to ensure that the three institutions are involved from the outset in establishing the basic conditions to be met when acts are subsequently adopted to set up sectoral agencies. Under the case law of the Court of Justice, it will be possible for the interinstitutional agreement to be binding insofar as its content shows that the three institutions intend to enter into a commitment towards each other ([6]).The fact that this type of legal instrument has been chosen does not rule out the possibility of more detailed arrangements subsequently being concluded as part of a framework regulation.

4. SCOPE

Because of the diversity of the tasks and the structures of the existing agencies, the Commission proposed in its Communication that an operating framework should initially be established for those European regulatory agencies which are set up in future under the EC Treaty. It would be difficult, if not impossible, to incorporate both the future agencies and the diverse range of agencies already in place within a common operating framework from the outset. The risk would be that this would considerably slow down the adoption process and would undermine legal certainty, particularly for the agencies set up recently. For the same reasons, the agreement is not meant to apply from the outset to agencies created outside the framework of the EC Treaty.

The Council and the Parliament have given their support to the use of a selective time frame. The Parliament has pointed out that discussions should also be held concerning the existing agencies and the EU agencies and proposals put forward as to how they could be altered.

The interinstitutional agreement therefore also stipulates that, as a second step, the institutions will explore under what arrangements its scope could be extended to existing European regulatory agencies and, where necessary, to other agencies. In the meantime, there is no reason why any future revision of each basic act should not be guided by, or even incorporate, some of the principles, rules and procedures in the operating framework.

5. LEGAL BASE

Given that the European regulatory agency is an instrument for implementing a particular Community policy, its basic act must be built on the provision of the EC Treaty which forms the specific legal basis of the policy in question. This is the approach adopted with respect to the agencies set up most recently.

However, the agreement also makes provision for Article 308 of the EC Treaty to be used as a legal base in exceptional cases.

6. SEATS OF THE AGENCIES

([6]) Judgment of 19.03.96, Commission -v- Council, case C-25/94, ECR1-1469.

The Council, while referring in its conclusions to the practical application of the agreement by all the Member States at the level of the Heads of State and Government, acknowledged that the agency's seat should be chosen at the earliest opportunity.

So far, almost all the decisions concerning the seats of the agencies have been taken en bloc, at ten year intervals, by the Heads of State and Government at the occasion of European Council meetings. Negotiations of this kind on "packages" of issues have led to serious delays in the effective establishment of a number of agencies, which have been set up temporarily in Brussels for an *a priori* indefinite period. This approach is at the root of a number of administrative and practical problems which have arisen during the start-up phase: problems concerning the recruitment of staff, additional costs, practical problems with moving to another location, difficulties of access, etc.

Like the Parliament, the Commission also feels that the agency's seat is a constituent element of the basic act and should therefore be included in it.

Without denying the Member States the right to decide the agency's seat at the highest political level, the Commission therefore proposes that this decision be taken in time so that it can be incorporated into the basic act. Failing that, the Commission proposes that a decision be taken within six months at the latest.

7. DEFINITIONS AND TASKS

A number of different factors must be taken into account in order to establish a working definition of regulatory agencies:

7.1 THE "REGULATORY" CONCEPT

A distinction must be made between "regulatory" activities and the adoption of legal rules or binding legal norms which are applicable across the board. Regulatory activities do not necessary involve the adoption of legal acts. They may also involve measures of a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules, etc. It therefore follows that a European "regulatory" agency does not necessarily have the power to enact binding legal norms.

7.2 TASKS DEVOLVED ON THE AGENCIES

In keeping with the regulatory concept defined above, these agencies may be assigned one or more of the following tasks:

a. adopting individual decisions which are legally binding on third parties;

b. providing direct assistance to the Commission and, where necessary, to the Member States in the interests of the Community, in the form of technical or scientific advice and/or inspection reports;

c. creating a network of national competent authorities and organising cooperation between them in the interests of the Community with a view to gathering, exchanging and comparing information and good practice.

Each European regulatory agency will also be responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information concerning its area of activity.

7.3 EXECUTIVE RESPONSIBILITIES

By accomplishing these tasks, the agencies will take an active part in exercising executive powers at Community level:

The agencies which adopt individual decisions will be given the power to implement laws. However, this power will be limited to applying the rules of secondary legislation to specific cases, in accordance with the institutional system and the case law of the Court of Justice ([7]).

The other tasks allocated to the agencies must allow them to provide the Commission, in particular, with the experience and expertise it needs so that it can fully meet its responsibilities as the Community executive.

7.4 Structural autonomy

The autonomy of European regulatory agencies is the key to their effectiveness and credibility in the long term. It must allow them to take account of all the information concerning their environment while freeing themselves as far as possible from external influence. Particularly with regard to the technical and scientific assessments they must make, it is important that they be given a significant degree of autonomy in their dealings not only with the EU institutions but also with the Member States and the operators themselves.

7.5 Conclusion

A European regulatory agency may therefore be defined as an independent legal entity created by the legislator in order to help regulate a particular sector at European level and help implement a particular Community policy. By performing its tasks, it helps to improve the way in which the rules are implemented and applied throughout the EU. It thus plays an active role in exercising executive powers at Community level.

8. AUTONOMY AND CONTROLS

The provisions of the interinstitutional agreement are based on a delicate balance between the need for autonomy and the need for controls.

8.1 Autonomy

The need for autonomy (see point 7.4) takes several forms: granting of legal personality, budgetary autonomy, collective responsibility and own powers of the administrative board (hereinafter referred to as the "AB"), the independence of the director, of the members of the scientific committees and of the boards of appeal, etc.

8.2 Evaluations and controls

The autonomy of these agencies goes hand in hand with an obligation to meet their responsibilities. These agencies which exercise autonomous responsibility in the executive sphere are therefore directly accountable to the institutions, the Member States and European

(') Judgment of 13.06.58, in case 9/58, Meroni, ECR 1958, p. 11; judgment of 14.05.81, in case 98/80, Romano, ECR 1981, p. 1241.

citizens. Thus the principle of accountability demands that these agencies are subject not only to *ex ante* and *ex post* evaluations but also to clear control mechanisms.

Evaluations

The Commission will justify any proposal to set up one of these agencies on the basis of a rigorous impact assessment. All possible alternatives must first be explored: the Commission could take responsibility for the activities envisaged, the tasks of an existing agency could be extended, an office or executive agency could be set up and/or individual tasks could be subcontracted.

Once the agency has been set up, both it and the Commission will carry out regular evaluations of its activities and operations. On this basis, the Commission may propose revising or, where appropriate, repealing the basic act.

Controls

Budgetary control, internal audits, annual reports by the Court of Auditors, the annual discharge for the execution of the Community budget and the investigations conducted by OLAF will make it possible to ensure, in particular, that the resources allocated to the agencies are put to proper use.

Administrative control will ensure that a number of procedural safeguards are put in place so that account is taken of the interests of interested parties and the quality of output.

Political control will be exercised both by the legislative authority and by the Commission.

Judicial control will be exercised by the Court of Justice (after any internal remedies have been exhausted — see point 9.4).

9. STRUCTURE

The structure of the agencies must allow them not only to perform the tasks devolved on them effectively but also to respect the delicate balance between autonomy and control.

9.1 Administrative board

The tasks of the AB will be those which are traditionally assigned to the programming and monitoring body.

It emerged from the discussions with the Parliament and Council on the basis of the Communication that there could not be a single formula for the composition of the **ABs.** However, it is imperative that the principles of good governance are applied:

1. The principles of accountability and coherence demand that the composition of the AB reflects the agency's position with regard to the distribution of powers between the executives at Community and national levels.

2. The principle of effectiveness and cost reduction calls for an AB with a limited number of members.

3. The principles of participation and openness require the involvement of interested parties.

Parity of executives

The agency's involvement in exercising executive powers at Community level calls for the equal representation of the two branches of the Community executive within the AB. The aim of equal representation is to struck a proper balance between pursuing Community objectives and taking account of national interests.

Representation of the Member States

The tasks devolved on the agency do not, in principle, mean that all the Member States should be represented on the AB. However, this may be justified if the agency, in the interests of the Community, is also involved in the exercise of executive powers by the Member States. The agency will thus enable the Member States to fulfil the obligations arising from Community law in accordance with Article 10 of the EC Treaty

In this case, the Council will designate a representative from each Member State. Each of whom will have one vote. In order to maintain parity of the executives within the AB, the institutions agree to grant an equal number of votes in total to the members designated by the Council and to those designated by the Commission.

Parliament

On the other hand, it is not envisaged that members designated by the Parliament should participate in the AB because this would cast doubt on the Parliament's ability to perform external controls objectively, particular in its capacity as the discharge authority.

Participation of interested parties

In order to guarantee a high level of transparency, the interested parties may be authorised to participate as members, but without the right to vote, in deliberations of the AB.

9.2 Executive board

In order to enhance the agency's effectiveness, an executive board with a limited number of members may be created in cases where the size of the AB does not allow it to perform the tasks devolved on it effectively. In that case, the delegation of tasks to the executive board will be strictly defined in the basic act.

93 **Director**

In order to ensure the effectiveness and independence of the agency in its day-to-day-management and in its activities, the director will assume full responsibility for the operational tasks assigned to the agency and will be the agency's legal representative.

As already mentioned, the composition of the AB will reflect the agency's position with regard to the distribution of powers between the Community and national executives. In this connection, provision may be made for a single procedure for appointing the director, with the AB appointing the director on the basis of a list of candidates proposed by the Commission.

Before being appointed, the candidate selected by the AB may be asked to attend a hearing before the competent committee of the Parliament.

9.4 Other bodies

If the agency is to perform the tasks devolved on it effectively, other bodies, such as a coordinating body or bodies, scientific cornmittee(s) and/or committee(s) of experts and board(s) of appeal, may need to be set up.

Draft

INTERINSTITUTION AL AGREEMENT on the operating

framework for the European regulatory agencies

THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Community,

Bearing in mind the Commission White Paper of 25 July 2001 on European Governance ([8]) and the Communication from the Commission of 11 December 2002 on the operating framework for the European Regulatory Agencies ([9]),

Having taken note of the European Parliament's resolution of 13 January 2004 ([10]) and the Council's conclusions of 28 June 2004 ('*),

Whereas:

(1) In accordance with the White Paper on European Governance, the European regulatory agencies help to implement and apply Community law. Their creation, operation and control are therefore of major political and institutional importance.

(2) Without a common framework, the proliferation of designations, tasks, structures and control arrangements for these agencies has resulted in a situation which is rather untransparent, difficult to understand and detrimental to legal certainty. Greater transparency and coherence are therefore needed in order to prevent the legislative authority from setting up agencies which are increasingly diverse, thereby undermining the unity of the executive function.

(3) As a first step, the operating framework should apply to future initiatives to set up European regulatory agencies under the EC Treaty and should promote their coherence. As a second step, the institutions will undertake to explore under what arrangements the operating framework could be extended to European regulatory agencies set up beforehand under the EC Treaty and, where necessary, to other agencies.

(4) The operating framework must comply with the principles of good governance proposed in the White Paper: openness, participation, accountability, effectiveness and coherence. The objectives of openness and participation call for the application of the conditions referred to in Article 255 of the EC Treaty for public access to documents held by these agencies and the representation of interested parties within them. The objective of

O COM(2001) 428, OJC 287 of 12.10.2001, p. 1.
(") COM(2002) 718.
([10]) Doc. P5_TA(2004)0015.
(") Doc. 17046/04.

effectiveness makes it is necessary, in particular, to simplify the decisionmaking processes, reduce costs and give these agencies autonomy of action. With such autonomy goes the obligation for them to exercise clearly defined responsibilities, while respecting the unity of the executive function. The objective of accountability therefore calls for a simple and effective system of controls. Coherence depends on a system in which the responsibilities between institutions and agencies, on the one hand, and between the agencies themselves, on the other, are clearly separated in order to guarantee an integrated approach.

(5) Any proposal for the creation of a European regulatory agency must be the subject of a rigorous impact assessment which not only applies the principles of subsidiarity and proportionality but also includes an *ex ante* evaluation which is as thorough as possible.

(6) It is important to note that the present agreement lays down a minimum common core of principles, rules and procedures to be adhered to in the legislative act setting up a European regulatory agency, without prejudice to what might have to be added on a case-by-case basis, depending on the objectives, responsibilities and specific tasks assigned to each agency,

HAVE ADOPTED THIS AGREEMENT:

1. PURPOSE

The purpose of this agreement is to establish a horizontal framework for the creation, structure, operation, evaluation and control of European regulatory agencies.

The European Parliament, the Council of the European Union and the Commission of the European Communities agree to respect the principles, rules and procedures set out in this agreement when adopting legislative acts to set up European regulatory agencies (hereinafter referred to as "basic acts").

2. SCOPE

The three institutions agree that the present agreement will apply to the European regulatory agencies proposed after it enters into force.

The institutions agree that the present agreement is aimed at all the European regulatory agencies which will be set up under the EC Treaty.

The three institutions undertake to explore, as soon as possible after the entry into force of the present agreement, under what arrangements the scope of this agreement could be extended to European regulatory agencies set up beforehand under the EC Treaty and, where necessary, to other agencies, without prejudice to the gradual adaptation of the latter agencies in accordance with the revision procedure provided for in the basic acts.

3. DEFINITION

For the purpose of the present agreement, the term "European regulatory agency" (hereinafter referred to as "agency") shall mean any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy.

The agency shall be invested with a public service role. It shall help to improve the way in which Community legislation is implemented and applied throughout the European Union.

This definition shall not include the so-called "executive" agencies set up by the Commission to carry out, under its control and responsibility, certain tasks relating exclusively to the management of Community programmes. The executive agencies are the subject of Council Regulation (EC) No 58/2003 of 19 December 2002 ([11]), which lays down their statute.

4. TASKS

An agency may be entrusted with one or more of the following tasks:

a) applying Community standards to specific cases. To this end, the agency shall be given the power to adopt individual decisions which are legally binding on third parties;

b) providing direct assistance to the Commission and, where necessary, to the Member States in the interests of the Community, in the form of technical or scientific opinions and/or inspection reports;

c) creating a network of national competent authorities and organising cooperation between them in the interests of the Community with a view to gathering, exchanging and comparing information and good practice.

Each agency shaii also be responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information concerning its specific area of activity. The nature of this information and its recipients shall be specified in the basic act.

5. EXECUTIVE RESPONSIBILITIES

By accomplishing these tasks, the agency shall take an active part in exercising executive powers at Community level.

(1) For the tasks provided for in point 4(a), the agency shall exercise direct executive responsibility within the scope of the powers conferred on it by secondary legislation and in accordance with the provisions of the EC Treaty.

In particular, when carrying out these tasks, agencies may not:

a) adopt general regulatory measures;

b) have decision-making powers conferred on them in areas in which they would be required to arbitrate in conflicts between public interests or exercise political discretion;

c) have responsibilities entrusted to them with respect to which the EC Treaty has conferred direct decision-making powers on the Commission.

Any powers delegated by the legislative authority must be strictly defined and subject to rigorous controls.

([12]) OJL 11 of 16.1.2003, p. 1.

(2) For the tasks provided for in points 4(b) and (c), the agencies shall provide the Commission, in particular, with the expertise it needs in order to meet its responsibilities as the Community executive.

6. LEGAL STATUS

The agency shall have legal personality. In each Member State, it shall exercise the widest possible legal powers accorded to legal persons under national legislation. In particular, it may acquire or dispose of immovable or movable property and be a party to legal proceedings. It shall be represented by its director for this purpose.

I. CREATION

7. IMPACT ASSESSMENT

The Commission undertakes to justify any proposal to set up an agency on the basis of an impact assessment, which will not only apply the principles of subsidiarity and proportionality but also include an *ex ante* evaluation which is as thorough as possible. This impact assessment shall take several factors into account, including the following:

a) the problem which must be resolved and the need which must be met in the short or long term;
b) the added value of Community action;
c) alternatives to the creation of a European regulatory agency, such as responsibility being taken by the Commission for the activities envisaged, extending the tasks of an existing agency, setting up an office or executive agency, and/or subcontracting individual tasks;
d) the objectives to be met at general, specific and operational levels and the indicators necessary for evaluating them;
e) any inadvertent repercussions and mutual concessions to be considered;
f) the tasks to be allocated;
g) any benefits in terms of expertise, visibility, transparency, flexibility and timeliness, coherence, credibility and effectiveness of public action;
h) the costs generated by control, coordination and the impact on human resources and other administrative expenditure;
i) the lessons learned from previous similar exercises;
j) the system of monitoring and periodic evaluation to be established.

The Commission shall draw the conclusions from its impact assessment in the explanatory memorandum to its proposal.

The European Parliament and the Council undertake to have evaluations carried out before adopting any substantial amendment to the Commission's proposal.

8. LEGAL BASE

The three institutions agree that the basic act shall be based on the provision of the EC Treaty which forms the legal basis of the policy envisaged.

The institutions agree that Article 308 of the EC Treaty will serve as a legal base only in cases where no other provisions of the EC Treaty allow Community competence to be exercised.

9. OBJECTIVES AND MANDATE

The three institutions shall ensure that the objectives and mandate of the agency are clear and precise and are in keeping with the general policy guidelines of the European Union and the strategic objectives of the Commission.

10. SEAT

The three institutions acknowledge that the seat is one of the constituent elements of the agency. In the interests of effectiveness and transparency, the seat should be known when the basic act is adopted. The three institutions agree that a provision concerning the seat will be included in the act. If the seat is not known when the basic act is adopted, a decision in this regard must be taken within six months at the latest.

II. STRUCTURE AND OPERATION

It is particularly important that the involvement of the institutions in the structure and operation of the agency reflects their role in the institutional system of the European Union.

STRUCTURE

11. ADMINISTRATIVE BOARD

11.1. Tasks of the administrative board

The administrative board shall ensure that the agency performs the tasks entrusted to it under the basic act. It shall be the agency's planning and monitoring body. In particular, it shall be responsible for:

a) appointing and, where necessary, dismissing the director of the agency and the members of certain bodies within the agency, in accordance with the procedures laid down in points 13(2) and 14;
b) exercising disciplinary authority over the director;
c) adopting the agency's annual work programme on the basis of a draft submitted by the director and after the Commission has delivered an opinion, in accordance with the conditions laid down in point 20;
d) drawing up an annual estimate of expenditure and revenue for the agency and sending it to the Commission;
e) adopting the definitive budget of the agency and the list of posts following completion of the annual budget procedure, in accordance with the conditions laid down in point 28(2);
f) adopting the agency's annual activity report, in accordance with the conditions laid down in point 21, and sending it to the institutions and the Member States;
g) adopting the agency's rules of procedure on the basis of a draft submitted by the director and after the Commission has delivered an opinion;

h) adopting the financial rules applicable to the agency on the basis of a draft submitted by the director after the Commission has delivered an opinion, in accordance with the conditions laid down in point 28(1);

i) adopting the procedures for applying Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ( ), in accordance with the conditions laid down in point 16(6).

11.2. Composition and designation of the administrative board

(1) The three institutions agree that there cannot be a single formula for the composition of the administrative board.

The three institutions undertake, however, to limit the size of the administrative board in such a way as to promote highly effective decision-making and minimise operating costs.

(2) The institutions acknowledge, moreover, that the agency's involvement in exercising executive powers at Community level calls for the equal representation of the two branches of the Community executive within the administrative board. The Commission and the Council should therefore designate an equal and limited number of members within the administrative board.

(3) The tasks devolved on the agency shall not mean that each Member State should be given a seat on the administrative board, unless the agency also plays a part, in the interests of the Community, in the Member States exercising executive powers with respect to the policy envisaged. In such cases, the agency shall allow the Member States to ensure that the obligations arising from the EC Treaty or from secondary legislation are fulfilled, in accordance with Article 10 of the EC Treaty.

In this case, the Council shall designate a representative from each Member State. Each of these representatives shall have one vote. In order to maintain parity of the executives within the administrative board, the institutions agree to grant an equal number of votes in total to the members designated by the Council and to those designated by the Commission.

([13]) OJL 145 of 31.05.2001, p. 43.

(4) In the interests of transparency, the institutions agree that the Commission will also designate representatives of interested parties as members of the administrative board. These representatives shall sit on the board without having a right to vote. The sectors concerned shall be clearly identified in the basic act.

(5) All the members of the administrative board shall be appointed on the basis of their experience in the sector concerned. The Commission and the Council shall ensure that men and women are represented equally on the administrative board. The members of the board shall be appointed for a five-year term, renewable once.

(6) The institutions shall ensure that the composition of the administrative board is reviewed periodically in light of how the agency is operating, its objectives and the development of the powers and tasks attributed to it, in accordance with the review procedure provided for in point 27(2).

12. EXECUTIVE BOARD

Where the size of the administrative board is such that it cannot effectively fulfil the tasks devolved on it, an executive board may be set up. In this case, the administrative board shall meet only once a year, without prejudice to a special supplementary meeting.

The executive board shall be responsible for certain tasks associated with the preparation and follow-up of meetings of the administrative board, without prejudice to the tasks of the director referred to in point 13(1).

The executive board shall be composed of an equal number of representatives of the Council and of the Commission. The representatives of the interested parties designated by the Commission shall also sit on the board without the right to vote. The size of the executive board shall under no circumstances exceed eight members.

13. DIRECTOR

In order to ensure the independence of the agency in its day-to-day management and activities, the director must assume full responsibility for the operational tasks conferred on the agency.

13.1. Tasks of the director

The director's main responsibilities are:

a) preparing the annual work programme, the draft estimate of expenditure and revenue for the agency, its rules of procedure and those of the administrative board, its financial rules and the meetings of the administrative board;
b) taking part, without the right to vote, in meetings of the administrative board;
c) implementing the agency's annual work programme and responding to requests for assistance from the Commission;
d) performing the duties of authorising officer, in accordance with Articles 33 to 42 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ([12]);
e) implementing the agency's budget;
f) putting in place an effective monitoring system to allow the regular evaluations referred to in point 27(1) to be carried out and, on this basis, preparing a draft annual report of the agency's activities;
g) presenting this report to the European Parliament;
h) managing all staff-related matters, and in particular exercising the powers provided for in point 23(2);
i) defining the agency's organisational structure and submitting it to the administrative board for approval;
j) taking any other action necessary to ensuring that the agency operates in accordance with its basic act; k) representing the agency before both the European Parliament and the Council,

([14]) OJL357of31.12.2002,p.72.

in accordance with the conditions laid down in point 29(1).

13.2. Appointment and dismissal of the director

(1) The director shall be appointed by the administrative board on the basis of a list of candidates proposed by the Commission. Before being appointed, the candidate selected by the administrative board may be asked to make a declaration before the competent committee(s) of the European Parliament and answer questions from its(their) members.

(2) The director shall be appointed on the basis of merit, administrative and management skills and expertise and experience in the field concerned. The director shall be appointed in principle for a five-year term. At the proposal of the Commission and following an evaluation, the director's tenure may be extended once for a period not exceeding the duration of his first term of office.

In its evaluation, the Commission shall take account of the following points in particular:

a) the results obtained during the first term of office and the way in which they were obtained;
b) the objectives and requirements of the agency over the next few years.

(3) The administrative board may remove the director from his duties before his term of office has expired, on the basis of a proposal from the Commission.

14. OTHER BODIES

14.1. Coordinating bodies between national competent authorities

The agencies responsible for coordinating and creating a network of national competent authorities (task referred to in point 4(c)) must be provided with one or more coordination bodies composed of representatives of these entities.

14.2. Scientific committees and/or committees of experts

The agencies which provide technical and scientific advice to the Commission and, where necessary, to the Member States (task referred to in point **4**(b)) must be provided with one or more scientific committees and/or committees of experts.

The members of the scientific committees must be independent scientists appointed by the administrative board on the basis of an open invitation to tender. The members of the committees of experts shall be appointed by the administrative board on the basis of a clear and transparent procedure laid down in the basic act.

14.3. Boards of appeal

The agencies which adopt individual decisions which could give rise to complaints from third parties (task referred to in point **4**(a)) must be provided with one or more boards of appeal whose role will be to check that the agency has applied the implementing rules correctly, within the scope of the tasks devolved on it and the responsibilities assigned to it.

The members of the boards of appeal shall be appointed by the administrative board for a period of five years on the basis of a list of candidates proposed by the Commission.

OPERATION

15. PUBLIC INTERESTS AND INDEPENDENCE

The members of the administrative board, the director, the members of the coordinating bodies between the competent national authorities, the members of the scientific committees and of the boards of appeal shall undertake to act in the public interest.

The director, the members of the scientific committees and of the boards of appeal shall also undertake to act independently of any external influence. To this end, they shall make a written declaration of commitment and a written declaration of interests every year.

16. TRANSPARENCY

(1) The agency shall ensure that its activities are conducted with a high level of transparency and, in particular, that they comply with the following provisions.

(2) It shall make public without delay:

a) its own rules of procedure and those of the administrative board;
b) its annual activity report.

(3) The administrative board may, at the proposal of the director, authorise representatives of the interested parties, in appropriate cases, to attend meetings of the agency's bodies in the capacity of observers.

(4) Without prejudice to paragraph **6,** the agency shall not divulge to third parties confidential information it has received for which confidential treatment has been requested and is justified.

The members of the administrative board, the director, the members of the coordinating body between the national competent authorities, the members of the scientific committees and of the boards of appeal shall be subject to the confidentiality requirement referred to in Article 287 of the EC Treaty.

(5) The information gathered by the agency in accordance with its basic act shall be subject to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ([f5]).

(6) Regulation (EC) No 1049/2001 shall apply to the documents held by the agency.

The administrative board shall adopt the practical arrangements for applying Regulation (EC) No 1049/2001 no later than six months after the agency has been set up.

17. LANGUAGE RULES

The administrative board shall establish the internal language rules for the agency.

The provisions of Regulation No 1 of 15 April 1958 determining the languages to be used by the European Atomic Energy Community ([6]) shall apply to the external language rules.

Translation work required for the operation of the agency shall be carried out by the Translation Centre for the Bodies of the European Union.

18. OBLIGATIONS REGARDING GOOD ADMINISTRATION

The basic act must guarantee that the agency upholds the principles and rules of good public administration, such as the right of the operators concerned to be heard and consulted, the obligation to justify any acts, language rules, access to documents, the protection of personal data and of business confidentiality, rules on sound financial management, action to combat fraud and the protection of the Communities' financial interests.

19. REVENUES OF THE AGENCY

The agency may be financed through:

a) a subsidy from the general budget of the European Communities (hereinafter referred to as "Community subsidy"), and/or

b) payment and fees for services provided to operators. The basic act shall specify the services concerned.

([15]) OJL 8 of 12.01.2001, p. 1.
([16]) OJ17of06.10.1958,p.385.

In certain cases in which the agency assists the Member States directly, a contribution from them may also be considered. Similarly, the basic act may make provision for a contribution from non-Community countries taking part in the agency's work, in accordance with the conditions laid down in point 24. These contributions shall supplement the revenue referred to in points (a) and/or (b).

The term "self-financed" agency shall be understood to mean any agency not in receipt of a Community subsidy.

20. ANNUAL WORK PROGRAMME

(1) The annual work programme must comply with the objectives, mandate and tasks of the agency as defined in the basic act.

The institutions recommend that the presentation of the annual work programme be based on the methodology developed by the Commission as part of Activity-Based Management (ABM).

(2) The annual work programme shall be adopted by the administrative board on the basis of a draft submitted by the director and after the Commission has delivered an opinion.

The institutions agree that the legal scope of the Commission's opinion on the annual work programme must reflect the agency's contribution to exercising executive responsibility.

With respect to the agencies which assist the Commission directly, the Commission must be able to ascertain that the annual work programme is consistent with its executive responsibility. Where the Commission expresses its disagreement with the annual work programme, the administrative board shall re-examine and adopt it, with amendments where necessary, by an enhanced majority to be determined in the basic act.

21. ANNUAL ACTIVITY REPORT

The annual activity report shall describe the way in which the agency has implemented its annual work programme.

The report shall outline the activities conducted by the agency and evaluate the results with respect to the objectives and timetable set, the risks associated with the activities carried out, the use of resources and the general operation of the agency.

The report shall be prepared by the director of the agency and adopted by the administrative board.

22. PRIVILEGES AND IMMUNITIES

The Protocol on Privileges and Immunities of the European Communities of 8 April 1965 ( ) shall apply to the agency's staff.

23. STAFF

(1) The Staff Regulations of officials of the European Communities, the Conditions of employment of other servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these staff regulations and conditions of employment shall apply to the staff of the agency. The administrative board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations of officials of the European Communities and of the Conditions of employment of other servants of the European Communities. The administrative board may adopt provisions to allow national experts from other Member States to be employed on secondment at the agency.

(2) The agency shall exercise, with regard to its staff, the powers which are devolved on the appointing authority.

24. PARTICIPATION OF THIRD COUNTRIES

The agency shall be open to the participation of third countries which have concluded agreements with the European Community which provide for the adoption and application by these countries of Community law in the area covered by the basic act. Under these agreements, arrangements shall be made specifying, in particular, the nature and the manner in which these countries will participate in the agency's work, including provisions on participation in certain internal bodies, financial contributions and employment of staff. These agreements may not,

however, make provision for these countries to be represented on the administrative board with the right to vote and must, at all events, be in accordance with the Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities.

25. COOPERATION WITH OTHER AGENCIES

Under the working agreements concluded with other agencies, the agency may cooperate with them in the areas governed by the basic act, in order to avoid any duplication of work and create synergies.

26. INTERNATIONAL ACTIVITIES

(1) Where the tasks conferred on the agency call for it to operate at international level, the basic act may make provision (with respect to all or certain tasks) for the agency

([n]) Protocol annexed to the Treaties establishing a Single Council and a Single Commission of the European Communities, OJ 152 of 13.07.1967, p. 13.

to cooperate with the competent authorities of non-Community countries and with international organisations which have similar tasks, on the basis of working arrangements concluded with the aforementioned authorities and organisations.

(2) These working arrangements must comply with Community law and shall be adopted by the administrative board on the basis of a draft submitted by the director and after the Commission has delivered an opinion. Where the Commission expresses its disagreement with these arrangements, the administrative board shall re-examine and adopt them, with amendments where necessary, by an enhanced majority to be determined in the basic act.

m. EVALUATIONS AND CONTROLS

27. EVALUATIONS AND REVISION

27.1. Evaluation by the agency

In accordance with Article 25(4) of Financial Regulation (EC, Euratom) No 2343/2002, the agency shall regularly carry out *ex ante* and *ex post* evaluations of its programmes or activities when these necessitate significant expenditure. The administrative board shall be notified of the results of these evaluations.

The agency shall take all appropriate steps to remedy any problems which may come to light.

27.2. Evaluation by the Commission and revision

The Commission undertakes to carry out periodic evaluations of the implementation of the basic act, of the results obtained by the agency and of its working methods, in line with the objectives, mandate and tasks defined in the basic act and the indicators established by the *ex ante* evaluation and set out in the agency's annual work programme.

Following this evaluation, the Commission shall present, where necessary, a proposal for the revision of the provisions of the basic act. If the Commission feels that the very existence of the agency is no longer justified with regard to the objectives assigned to it, it may propose that the act in question is repealed.

The European Parliament and the Council shall use the Commission's proposal as a basis for examining whether the basic act should be amended or repealed.

28. BUDGET CONTROLS, FINANCIAL CONTROLS, AUDITS AND ACTION TO COMBAT FRAUD

28.1. Financial rules

Each agency must adopt its financial rules.

If the agency is in receipt of a Community subsidy, Article 185(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ( ), shall apply. The agency's financial rales must, in this case, comply with Financial Regulation (EC, Euratom) No 2343/2002. They may not depart from this Regulation unless their specific operating requirements so demand and the Commission has given its prior consent.

If the agency is self-financed, its financial rules shall be based on the aforementioned Financial Regulations, while respecting the specific nature of the agency.

28.2. Budget

In the case of agencies which are in receipt of a Community subsidy, a list of posts for staff covered by the Staff Regulations shall be drawn up each year by the budgetary authority as part of the budgetary process, pursuant to Article 46(3)(d) of Financial Regulation (EC, Euratom) No 1605/2002. The budgetary authority shall also authorise appropriations for the subsidy to be granted to the agency.

In the case of each agency, the administrative board shall adopt the definitive budget and the list of staff every year.

28.3. Accounting rules

By virtue of Article 185(4) of Financial Regulation (EC, Euratom) No 1605/2002, the agency shall apply the accounting rules adopted by the Commission's accounting officer, in accordance with the procedure set out in Article 133 of the said Regulation, so that its accounts can be consolidated with those of the Commission.

28.4. Audits

By virtue of Article 185(3) of Financial Regulation (EC, Euratom) No 1605/2002, the Commission's internal auditor shall exercise the same powers over the agency in receipt of a Community subsidy as he does in respect of the Commission.

28.5. External audit and discharge

In accordance with Article 248 of the EC Treaty, the Court of Auditors shall examine the accounts of all agencies in receipt of a Community subsidy.

By virtue of Article 185(2) of Financial Regulation (EC, Euratom) No 1605/2002, discharge for the implementation of the agency's budgets shall be given each year by the European Parliament on the recommendation of the Council.

If the agency is self-financed, discharge shall be given to the director by the agency's administrative board. The administrative board shall then inform the European Parliament, the Council, the Commission and the Court of Auditors of its decision giving discharge.

The director shall take all appropriate steps to act on the observations accompanying the decision giving discharge.

O OJ L 248 of 16.09.2002, p. 1.

28.6. Action to combat fraud and protect the Communities' financial interests

With a view to combating fraud, corruption and other illegal acts, Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ([13]) shall apply to the agency in its entirety.

The basic act shall stipulate that, upon its establishment, the agency will accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) ([14]). The administrative board shall formalise this accession and adopt the necessary measures to help OLAF carry out internal investigations.

29. POLITICAL CONTROLS

29.1. European Parliament and Council

Without prejudice to the controls referred to above and, in particular, the budgetary and discharge procedures, the European Parliament or the Council may ask at any time, and, in particular, upon publication of the agency's annual activity report, for a hearing with the director on a subject relating to the agency's activities.

29.2. Commission

The Commission shall exercise control using its prerogatives:

(1) In accordance with point 27(2), the Commission shall exercise its power of initiative by proposing, where necessary, that the basic act be revised or repealed.

By virtue of point ll(l)(d), the Commission shall also propose to the budgetary authority each year the amount of the subsidy for the agency and the number of staff it considers the agency needs, on the basis of the estimate of expenditure and revenue drawn up by the administrative board.

O OJL 136 **of** 31.05.1999, **p.** 1.

([20]) OJL 136 **of** 31.05.1999, **p.** 15.

(2) The Commission shall exercise its executive responsibility:

a) through its representatives on the administrative board;
b) by drawing up a list of candidates for appointing the director and the members of the boards of appeal, in accordance with points 13(2)(1) and 14(3);
c) by proposing to extend the mandate of the director depending on his evaluation in accordance with point 13(2)(2);
d) by delivering opinions on the annual work programme in accordance with point 20(2), on the rules of procedure in accordance with point 1 l(l)(g) and on any working arrangements concluded with the competent authorities of non-Community countries and/or international organisations with similar tasks, in accordance with point 26(2).

30. ADMINISTRATIVE CONTROLS

In accordance with Article 43 of the Charter of Fundamental Rights of the European Union, the institutions agree that the agency will be subject to the administrative control of the European Ombudsman, pursuant to the conditions set out in Article 195 of the EC Treaty.

31. JUDICIAL CONTROLS

Actions may be brought before the Court of Justice for the annulment of acts carried out by an agency which are legally binding on third parties, for failure to act and for damages caused by any agency in the course of its activities.

Actions for the annulment of acts adopted in connection with the tasks laid down in point 4(a) may be brought before the Court of Justice only after all the appeal procedures within these agencies, provided for in point 14(3), have been exhausted.

IV. ENTRY INTO FORCE, IMPLEMENTATION AND MONITORING OF THE AGREEMENT

32. ENTRY INTO FORCE

The present agreement shall enter into force on the day following its publication in the *Official Journal of the European Union.*

Upon its entry into force, it shall apply to all proposals to set up a European regulatory agency.

33. IMPLEMENTATION AND MONITORING

The three institutions agree to take all the necessary steps to ensure coordination and due regard of the present agreement by their respective departments.

The implementation of the present agreement shall be monitored by the *High Level Technical Group for Interinstitutional Cooperation.*

For the European Parliament For the Council *For the Commission*

The President	The President	The President

«P^P OIKEUSMINISTERIÖ

Lainvalmisteluosasto
Erityisasiantuntija Anna-Elina Pohjolainen

LAUSUNTO

11.3.2005

Perustuslakival io kunnalle

KOMISSION TIEDONANTO EUROOPAN PERUSOIKEUSVIRASTOSTA (E 139/2004 vp)

Komissio on antanut 25. lokakuuta 2004 tiedonannon (KOM(2004) 139 lopullinen) Euroopan perusoikeusvirastosta julkista kuulemista varten. Kyseessä on ensimmäinen perusoikeusvirastoa koskeva asiakirja, jossa hahmotellaan erilaisia vaihtoehtoja viraston toiminta-alaksi, tehtäviksi, rakenteeksi sekä viraston ja muiden relevanttien ihmisoikeustoimijoiden yhteistyön järjestämiseksi.

Tiedonanto perustuu Brysselissä 12-13. joulukuuta 2003 järjestetyssä Eurooppa-neuvoston kokouksessa jäsenvaltioiden edustajien tekemään päätökseen, jonka mukaan Euroopan rasismin ja muukalaisvihan seurantakeskuksen (EUMC) pohjalle perustetaan laajempialainen Euroopan perusoikeusvi-rasto.

Oikeusministeriö on toimittanut tiedonantoa koskevan selvityksen eduskunnan suurelle valiokunnalle 20. joulukuuta 2004.

1 Komission näkemys perusoikeusvirastosta

Komissio esittää tiedonannossaan, että perusoikeusvirastosta tulisi itsenäinen oikeushenkilö, joka toimisi muista unionin toimielimistä erillisenä yksikkönä. Virastolle ei annettaisi jäsenvaltioita tai unionin toimielimiä sitovaa päätöksentekovaltaa, vaan sen tehtävänä olisi toimia perus-ja ihmisoikeusasiantuntijaelimenä ja tukea toimielinten ja jäsenvaltioiden toimintaa perus-ja ihmisoikeuskysymyksissä. Komissio sulkee tiedonannossaan pois mahdollisuuden, että viraston toimivalta ulottuisi unionin ulkopuolisiin maihin. Sen sijaan viraston toiminta keskittyisi unioniin ja sen jäsenvaltioihin. Viraston tehtäviksi esitetään tietojen keruuta ja analysointia sekä lausuntojen esittämistä unionin toimielimille ja jäsenvaltioille.

Edellä esitettyjä seikkoja lukuun ottamatta tiedonanto jättää pääosin avoimeksi viraston toiminta-alaan, tehtäviin ja rakenteeseen liittyvät yksityiskohdat. Nämä liittyvät erityisesti seuraaviin seikkoihin:

- viraston tarkempi toiminta-ala
- viraston toiminta-alaan kuuluvat oikeudet
- viraston tarkemmat tehtävät
- viraston yhteistyön järjestäminen muiden alan toimijoiden kanssa
- viraston rakenne
- viraston perustamisen oikeusperusta
- virastolle annettavat voimavarat

2 Asian käsittely tiedonannon julkistamisen jälkeen

Komissio järjesti perusoikeusvirastosta julkisen kuulemistilaisuuden 25. tammikuuta 2005 Brysselissä. Tilaisuus osoitti, että osallistujat olivat jokseenkin yksimielisiä siitä, että Euroopan perusoikeus viraston perustaminen on tarpeen, syrjintäkysymysten tulee olla keskeinen osa myös uuden toimielimen työtä, uuden viraston yhteistyö muiden toimijoiden (erityisesti Euroopan neuvoston) kanssa tulee turvata ja että viraston riippumattomuus tulee turvata. Valtaosa tilaisuuden osallistujista oli myös sillä kannalla, että viraston tulisi keskittyä pääasiassa unionin toimielinten ja jäsenvaltioiden toimintaan. Virastoon liittyvistä yksityiskohdista, kuten sen rakenteesta ja toiminta-alasta, esitettiin erilaisia näkemyksiä.

Viimeisimpien tietojen mukaan komissio tulee esittämään ehdotuksensa viraston perustamista koskevaksi asetukseksi toukokuun loppupuolella. Asetusehdotuksen työryhmäkäsittelyn aloittamisen aikataulusta ei ole toistaiseksi tietoa. Neuvoston nykyisen ja tulevan puheenjohtajavaltion suhtautuminen perusoikeusviraston perustamiseen on lähtökohtaisesti myönteinen.

3 Suonien alustava kanta perusoikeusviraston perustamiseen

Euroopan perusoikeusviraston perustamista voidaan pitää tervetulleena aloitteena. Se on sopusoinnussa Suomen tavoitteen kanssa vahvistaa unionin toimintakykyä ihmis-ja perusoikeuskysymyksissä.

Komission kantaa, jonka mukaan viraston tulisi keskittyä Euroopan unioniin voidaan pitää perusteltuna. Sen sijaan unionin ulkosuhteisiin keskittyvän viraston perustamista ei voida pitää tarkoituksenmukaisena ottaen huomioon tällä alueella jo olemassa olevat järjestelyt sekä viraston toiminnan tehokkuus.

Viraston toiminta-alan tulisi kattaa yhtälailla kaikki yhteisöoikeuden suojaamat ja perusoikeuskirjassa luetellut oikeudet. Viraston päämääränä tulisi olia vahvistaa näiden oikeuksien toteutumista unionin alueella. Euroopan rasismin ja muukalaisvihan seurantakeskuksen työn jatkuvuus tulisi tässä yhteydessä turvata.

Viraston toimenkuvan perustana voisi olla nykyisen Euroopan rasismin ja muukalaisvihan seurantakeskuksen toimenkuva eli tietojen kerääminen, analysointi sekä erityisten- ihmisoikeuskysymysten esiin nostaminen raporttien ja lausuntojen muodossa.

Viraston tehokas toiminta edellyttää, että virastolle annetaan itsenäinen ja riippumaton asema. Samanaikaisesti tulisi kuitenkin varmistaa, että se toimii läheisessä yhteistyössä muiden perus-ja ihmisoike-ustoimijoiden kanssa niin kansallisella kuin kansainväliselläkin tasolla. Tämä koskee erityisesti Euroopan neuvostoa sekä jäsenvaltioiden hallituksia.

Sopivaa yhteisöoikeudellista oikeusperustaa viraston perustamiselle tulee tutkia huolellisesti ottaen huomioon sekä jäsenvaltioiden yhteisölle antamat toimivaltuudet että unionin perus- ja ihmisoikeus-ulottuvuuden kehittyminen.

4 Alustava arvio perusoikeusviraston perustamisen vaikutuksista Suomessa

Asian valmistelun tässä vaiheessa ei näytä siltä, että perusoikeusviraston perustamisella olisi Suomen kannalta merkittäviä välittömiä lainsäädännöllisiä tai taloudellisia vaikutuksia.

Suomen tehokas osallistuminen perusoikeusviraston työhön edellyttää kuitenkin todennäköisesti Suomen ihmisoikeustoimielinten keskinäisen yhteistyön ja koordinaation kehittämistä, koska perusoikeusviraston toiminta-alaan kuuluvien oikeuksien edistäminen ja valvonta on nykyisessä järjestelmässämme hajautettu useammalle eri toimielimelle. Nykyisen Euroopan rasismin ja muukalaisvihan seurantakeskuksen laajentaminen Euroopan perusoikeusvirastoksi edellyttää, että vähemmistövaltuutetun lisäksi myös Suomen muut ihmisoikeusvalvojat, kuten Eduskunnan oikeusasiamies, tasa-arvovaltuutettu ja lapsi asian valtuutettu, voivat myötävaikuttaa perusoikeusviraston työhön. Tällaisen yhteistyön järjestäminen saattaa edellyttää lainsäädäntötoimenpiteitä. Asia vaatii kuitenkin lisäselvitysten tekemistä yhteistyössä relevanttien perus- ja ihmisoikeustoimijoiden sekä vastuuministeriöiden kanssa.

11.3.2005/Tuomas Ojanen

Eduskunnan perustuslakivaliokunnalle

E 139/2004vp komission tiedonannosta perusoikeuksien virastosta

Yleisarvio

Komission tiedonanto perusoikeuksien virastosta on pääpiirteittäinen asiakirja, jossa on hahmoteltu ehdotonta ja lopullista kantaa ottamatta erilaisia mahdollisuuksia järjestää viraston mandaatti, tehtävät ja toiminta sekä rakenne. Näin ollen tiedonanto jättää monia olennaisia kysymyksiä enemmän tai vähemmän auki.

Yleisellä tasolla ehdotusta perusoikeusviraston perustamiseksi voidaan kuitenkin pitää tervetulleena. Perus- ja ihmisoikeusrakenteiden vahvistaminen EU:ssa nimenomaan unionin tasolla - on yleisesti tärkeää. Unionissa on tarvetta perus- ja ihmisoikeuksien parissa tehtävän työn ja toiminnan koordinoinnille ja siitä tiedottamiselle. Myös perus-ja ihmisoikeuksien noudattamisen valvonnasta vastaaville EU:n toimielimille- ja kenties myös jäsenvaltioiden vastaaville elimille - voisi olla hyötyä siitä, että unionin tasolla olisi keskitetty "tietopankki'" perus- ja ihmisoikeuskytkentäisestä tutkimuksesta, selvityksistä, tapahtumista, hankkeista, jne. Samoin on tärkeää koettaa edistää ja vahvistaa jäsenvaltioiden ja unionitasoisten perus- ja ihmisoikeusrakenteiden välistä vuorovaikutusta ja koordinaatiota.

Perusoikeusviraston perustaminen voisi siis ***parhaimmillaan*** lisätä tietoa, tietoisuutta ja koordinaatiota perus- ja ihmisoikeuksista ja tällä tavoin kartuttaa perus-ja ihmisoikeuksien suojelua unionissa. Viraston perustaminen olisi mahdollista ymmärtää yhtenä uutena askeleena prosessissa, jossa vähitellen koetetaan luoda entistä parempia edellytyksiä perus- ja ihmisoikeuksien toteutumiselle unionissa sekä kehittää EU:n toimintakykyä perusoikeus- ja ihmisoikeuskysymyksissä. Viraston perustaminen ei kuitenkaan poista tarvetta kehittää erilaisia muita mekanismeja perusoikeuksien ja ihmisoikeuksien takaamiseksi EU:ssa. Tällöin erityisen tärkeätä on kiinnittää huomiota sellaisten mekanismien kehittämiseen, jotka takaisivat nykyistä kattavammin ja tehokkaammin EU:n toiminnan ulkoisen valvonnan perusoikeusnäkökulmasta. Perusoikeusviraston perustaminen ei siis poista tarvetta EU:n liittymiselle Euroopan ihmisoikeussopimukseen tai sitä, että kansainvälisten ihmisoikeussopimusten asemaa EU:ssa pitäisi merkittävästi vahvistaa nykytilaan verrattuna.

Perusoikeusviraston perustaminen ei välttämättä ole ongelmatonta. Ensinnäkin se voi tuottaa esimerkiksi tarpeettomia jännitteitä, ristiriitoja, päällekkäisyyttä ja sitä kautta tehottomuutta, *jos* sen toiminnan yhteensovittaminen ja koordinaatio eivät onnistuisi.

Yhtenä uhkakuvana voi myös olla "perusoikeuksien lokeroituminen". Tällä tarkoitan perusoikeuskysymysten eristämistä ja eristäytymistä EU:n muista toiminnoista erilliseksi tehtäväksi. Perusoikeuksien pitäisi kuitenkin suunnata EU:n kaikenlaista toimintaa ja määrittää konkreettisia toimenpiteitä yksittäisillä politiikkalohkoilla (läpäisyperiaate).

Mandaatti, tehtävät ja toiminta

Kuten valtioneuvoston kirjelmässä selostetaan, viraston perustamisen oikeusperusta on yksi avainkysymyksistä, koska oikeusperusta vaikuttaa merkittävästi viraston mandaattiin, tehtäviin ja

toiminta-alaan. Kysymys viraston toimialasta määrittyy seuraavien, toisiinsa läheisesti liittyvien kysymysten kautta:

(i) Määräytyykö perusoikeuksien viraston toiminta-ala EU:n toimivallan mukaan perusoikeuskirjan 51 artiklassa ilmaistujen periaatteiden mukaisesti vai EU:n perustamissopimuksen 6 ja 7 artiklan mukaan?

(ii) Kattaako viraston mandaatti kaikki EU:n perusoikeuskirjassa tunnustetut oikeudet vai keskittyykö se vain tiettyihin, EU:n toimivaltaan kuuluviin oikeuksiin? (On huomattava, että perusoikeuskirjassa tunnustetaan osin sellaisia oikeuksia, joiden suhteen EU:lla on vain vähän, jos ollenkaan, toimivaltaa).

(iii) Onko viraston toiminnassa kysymys perusoikeusasioita koskevan informaation keräämisestä, perusoikeusasioista tiedottamisesta, jne.? Vai sisältyykö viraston toimintaan perusteiltaan ***oikeudellinen*** (normatiivinen) elementti, jolloin viraston toiminnassa on tiedonkeruun ja välittämisen lisäksi myös kysymys oikeudellisten johtopäätösten, suositusten, lausuntojen tms. tekemisestä ja ylipäätään perus- ja ihmisoikeuksien noudattamisen ***valvonnasta!***

(iv) Mikä on mandaatin maantieteellinen ulottuvuus? Rajautuuko mandaatti vain EU:n sisälle? Vai ulottuuko se myös unionin ulkosuhteisiin?

Aloitan kysymyksestä iv ja siirryn sen jälkeen tarkastelemaan kysymyksiä i-iii, jotka liittyvät läheisesti toisiinsa.

(IV) Yhdyn valtioneuvoston kirjelmässä esitettyyn kantaan, jonka mukaan perusoikeusviraston mandaatin maantieteellinen ulottuvuus olisi hyvä olla siinä mielessä suppea, että se ei kattaisi EU:n ulkosuhteita. Tähän näyttäisi sitä paitsi viittaavan myös komission tiedonanto, jonka otsikossa viraston nimi on muodossa, joka näyttäisi ***a priori*** sulkevan ulkosuhteet viraston mandaatin ulkopuolelle: "Fundamental Rights Agency". Tämän nimikkeen sijasta on nimittäin ajoittain käytetty ilmaisua "Human Rights Agency", joka viittaa enemmän EU:n ulkosuhteisiin viraston mandaatissa.[1] Mandaatin rajaaminen unionin sisäisiin kysymyksiin saattaa olla perusteltua työekonomisistä syistä, mutta se on myös ongelmallista siitä

[1] Esimerkiksi Eurooppa-neuvosto on kaksi kertaa käyttänyt ilmaisua "Human Rights Agency", kerran päätelmissään Brysselin Eurooppa-neuvoston kokouksessa 13.12.2003, ja kerran 4-5.11.2004 päätelmissään ns. Haagin toimintaohjelmassa, jossa neuvosto "welcomes the Commission's Communication on the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Human Rights Agency ." Presidency Conclusions, Brussels, 5 November 2004, 14292/04, CONCL 3, s. 14. - Käsillä olevassa tiedonannossa viitataan myös kantaan, jonka komissio esitti käsitellessään EU:n roolia ihmisoikeuksien ja demokratian edistämisessä kolmansissa maissa (KOM(2001) 252 final, 8.5.2001). Sen mukaan komissio ei tule ehdottamaan erityisen ulkosuhteisiin keskittyvän ihmisoikeusviraston perustamista. Yleisten asioiden neuvosto yhtyi tähän kantaan 25.6.2001.

näkökulmasta, että kansainvälisten ja unionin sisäisten ihmisoikeuskysymysten pitäminen erillään on varsin keinotekoista.

(I-IJI) Tiedonannon valossa virastolle kaavailtaisiin tavalla tai toisella sellaisia tehtäviä, joissa olisi ***pääosin*** kysymys tiedonkeruusta ja -välittämisestä sekä vuoropuhelusta kansalaisyhteiskunnan kanssa. Sitä vastoin virastoin toiminta ei näyttäisi missään mallissa olevan erityisen ***normatiivista*** - oikeudellista - sillä tavoin kuin esimerkiksi monien ihmisoikeussopimusten valvontaelinten toiminta on. Virasto voisi joissain malleissa antaa lausuntoja ja laatia raportteja, mutta tiedonanto jättää käytännössä jokseenkin avoimeksi sen, voisiko virasto esittää oikeudellisia kannanottoja keräämistään tiedoista siten kuin esimerkiksi useat kansainväliset ihmisoikeusopimusten valvontaelimet tekevät raporteissaan tms. asiakirjoissa esimerkiksi sellaisten otsikoiden kuin "positive developments"', "good practices"' ja "reasons of

concern" alla. Tiedonannossa jätetään myös avoimeksi se, mitkä olisivat viraston toiminnan ydinalueen - tiedonkeruun - muodot ja keinot.

Jos - ja kun viraston - mandaatti ja tehtävät olisivat luonteeltaan pitkälti ei-normatiivisia, tällöin on huomattava, että viraston perustamiseen ei oikeastaan liity erityisen merkittäviä näkökohtia esimerkiksi perusoikeuksien ja ihmisoikeuksien valvontajärjestelmien tai EU:n ja jäsenvaltioiden välisen toimivallanjaon kannalta. Tähän liittyen olisi ensisijaisesti tarkoituksenmukaisuuskysymys ja siten esimerkiksi työekonomisin ja muiden resurssinäkökohtien valossa arvioitava asia, rajoitetaanko viraston toiminta-ala EU:n toimivaltaan vai määritelläänkö se laajemmin EU:n perustamissopimuksen 7 artiklan perusteella.

Nähdäkseni voidaankin yhtyä siihen valtioneuvoston kirjelmässä esitettyyn kantaan, jonka mukaan "Suomi katsoo, että perusoikeuksien viraston toiminta-alan tulisi kattaa kaikki yhteisöoikeuden suojaamat ja perusoikeuskirjassa luetellut oikeudet ja että virastolle annettujen tehtävien tulee vahvistaa entisestään näiden oikeuksien toteutumista unionin alueella." Korostan myös, että unionin toimivallan ala on vaikeasti määriteltävissä ja että jo mandaatin rajaaminen siihen merkitsisi myös jäsenvaltiotasoisen toiminnan tulemista varsin kattavasti tavalla tai toisella mandaatin piiriin.

Lähinnä kysymys viraston oikeusperustasta onkin oikeudellisesti huomionarvoinen siitä näkökulmasta, että tiedonannossa kaavaillaan viraston perustamista nimenomaan ***asetuksen*** muotoisella säädöksellä. Nähdäkseni viraston perustamiselle ei ole osoitettavissa mitään erityisen yksiselitteistä oikeusperustaa perustamissopimuksista. Kun kysymykset perusoikeuksien ja ihmisoikeuksien suojelun oikeusperustasta ovat aina olleet unionissa arka ja kiistanalainen asia, on kuitenkin ennakoitavissa, että mandaatti koetetaan määritellä unionin toimivallan mukaan siten kuin tiedonannossa hahmotellaan.

Mielestäni viraston tehtävät ja sen toiminnan luonne olisi paras määritellä siten, että tehtävien ja toiminnan painopiste olisi selvästi tiedonkeruussa, tiedottamisessa ja koordinoinnissa sekä foorumin tarjoamisessa eri tahojen väliselle

" Sitä vastoin kysymykset viraston mandaatin ja tehtävien suhteesta muihin perus- ja ihmisoikeuksien valvontajärjestelyihin EU:ssa monimutkaistuisivat kertaheitolla, mitä enemmän perusoikeusviraston tehtäväkuvassa olisi kysymys aidosta perusoikeuksien valvontaelimestä. Tällöin muodostuisi huomattavasti tärkeämmäksi kysymys siitä, miten viraston toimivaltuudet ja tehtävät sovitetaan yhteen muiden valvontaelinten tehtävien ja toimivaltuuksien kanssa jännitteiden ja ristiriitojen välttämiseksi. Sama koskisi kysymystä siitä, onko viraston toiminta-alan ja toimivaltuuksien viiteasiakirjana koko perusoikeuskirja vai keskittyykö virasto vain tiettyihin aihealueisiin. - Kuten jo totesin, tiedonannon valossa viraston toiminnassa näyttäisi kuitenkin olevan pääosin kysymys muusta kuin perusoikeuksien toteutumisen valvonnasta, joten vaara oikeudellisesti relevanteista päällekkäisyyksistä ja ristiriitaisuuksista ei näytä olevan järin suuri.

vuoropuhelulle. Sitä vastoin varoisin määrittämästä mandaattia, tehtäviä ja toimenkuvaa tavalla, jossa viraston toiminta alkaisi saada ihmis-ja perusoikeuksien valvontaelimen piirteitä.

Viraston suhteet muihin toimijoihin

Tiedonannossa korostetaan voimakkaasti viraston tehtävien ja toimintamuotojen yhtenä ydinalueena vuoropuhelua kansalaisyhteiskunnan ja ylipäätään muiden toimijoiden kanssa. Nähdäkseni tässä pitäisikin olla yksi viraston toiminnan ydinalue.

Yksi erityiskysymys viraston suhteissa muihin toimijoihin koskee perusoikeusviraston suhdetta riippumattomien perusoikeusasiantuntijoiden verkostoon ***(the EU Network of independent experts on fundamental rights).*** Tämä erityiskysymys jää sekä tiedonannossa että valtioneuvoston kirjelmässä lähinnä muutamien yleisluontoisten mainintojen varaan.

Komissio perusti perusoikeuksien asiantuntijaverkoston Euroopan parlamentin aloitteesta vuonna 2002. Verkosto koostuu 26:sta perusoikeuksien riippumattomasta erityisasiantuntijasta.[15] Verkoston tehtävänä on valvoa perusoikeuksien toteutumista Euroopan unionissa, jäsenvaltiot mukaanlukien. Valvontamekanismeina ovat maaraportit yhteenvetoraportteineen, temaattiset raportit sekä pyynnöstä annetut mielipiteet ja suositukset. Verkoston toiminnassa on siis kysymys perusteiltaan oikeudelliseksi luonnehdittavasta toiminnasta, koska verkoston tehtävänä ei ole vain

[1] Olin vuosina 2002-2003 verkoston suomalainen asiantuntijajäsen. Tällä hetkellä verkoston suomalaisjäsenenä toimii prof. Martin Scheinin, jonka "varamiehenä" - "suppleant"7"substitute" - olen tällä hetkellä.

tiedon keruu perusoikeustilasta EU:ssa ja sen jäsenvaltioissa, vaan myös oikeudellisten kannanottojen, suositusten, yms. esittäminen riippumattomien asiantuntijoiden keräämien tietojen perusteella.[16]

Komission tiedonannossa todetaan viraston ja verkoston suhteista lähinnä se, että verkosto voisi olla "tärkeä tiedonlähde virastolle" (jakso 5.1). Lisäksi tiedonannossa painotetaan, että on pohdittava, miten virasto voisi lisätä synenergiaa verkoston kanssa ja merkitsisikö kahden rakenteen - viraston ja verkoston säilyttäminen - todellista selkeää lisäarvoa perusoikeuksien edistämiseen ja suojelemiseen.

Tätä taustaa vasten on syytä painottaa, että verkosto ja viraston tehtävien ja toimenkuvan välillä on huomattava perusero, koska verkoston toiminnalla on paljon vahvempi normatiivinen (oikeudellinen) perusluonne. Verkoston toiminta rakentuu myös riippumattoman asiantuntijajärjestelmän varaan. Viraston toiminnan organisaatiomalli näyttäisi taas ainakin tiedonannon valossa viittaavan perusteiltaan "virkamies-ja intressitahopohjaisempaan" organisaatioon, vaikka tiedonannossa toki korostetaan viraston asiantuntevuutta sekä itsenäistä ja ulkopuolisista tahoista riippumatonta asemaa.

Näin ollen viraston perustaminen ei nähdäkseni veisi pohjaa pois itsenäisen asiantuntijaverkoston toiminnalta, vaan jälkimmäisen toiminta olisi jatkossakin tarpeen esimerkiksi kerätyn tietomassan oikeudellisessa analyysissa sekä tältä pohjalta esitettävien normatiivisten kannanottojen, suositusten yms. muotoilussa.

Toinen asia on, että asiantuntijaverkoston toiminta saattaa olla mahdollista kytkeä viraston toiminnan yhdeksi ulottuvuudeksi, kunhan tämä vain toteutetaan asiantuntijaverkoston itsenäisyys ja riippumattomuus taaten.

Toinen perusoikeusviraston suhteita muihin tahoihin koskeva erityiskysymys liittyy perusoikeusviraston suhteeseen kansallisiin ihmisoikeusinstituutteihin tms. laitoksiin, etenkin, kun tiedonannossa korostetaan erityisen huomion kiinnittämistä tähän suhteeseen sekä siihen, että virastoja kansalliset ihmisoikeusinstituutit voisivat toimia "verkottuneesti".

Tyydyn toteamaan tästä asiasta vain seuraavan: Läheskään jokaisessa jäsenvaltiossa ei ole kansallisia ihmisoikeusinstituutteja - etenkään siis sellaisia, jotka perustuisivat YK:n hyväksymien standardien - ns. Pariisin periaatteiden - pohjalle. Yksi tällainen maa on Suomi. Tästä syystä perusoikeusviraston mahdollinen perustaminen voi lisätä[17] painetta perustaa kansallisia ihmisoikeusinstituutteja jäsenvaltioihin, Suomi mukaan lukien. Tästä on yksi oire esimerkiksi se. että tasavallan presidentti kytki nämä kaksi asiaa toisiinsa puheessaan eduskunnan oikeusasiamiehen 85-juhlaseminaarissa 8.2.2005.[18]

Nähdäkseni yksi seuraus komission tiedonannosta perusoikeuksien virastosta onkin siinä, että aika on tullut kypsäksi alkaa toden teolla tarkastella erilaisia mahdollisuuksia järjestää kansallisen ihmisoikeusinstituution mandaatti, tehtävät ja toiminta sekä rakenne Suomessa. Näkisin, että Suomessa voisi olla tarvetta perus- ja ihmisoikeuksien parissa tehtävän työn koordinoinnille ja siitä tiedottamiselle sekä jopa tiettyjen nykyisten toimintojen yhdistämiselle. Tähän liittyen instituution perustaminen voisi toteutua verkostomallina, jossa verkoston ytimessä toimisi uusi perustettava elin. Mutta kansallisen ihmisoikeusinstituution perustaminen Suomeen ei tietenkään olisi ongelmatonta: jos sen toimenkuvan määrittäminen epäonnistuu, syntyy helposti sekavuutta, jännitteitä, päällekkäisyyttä ja tehottomuutta. Lisäksi haittapuolena voi olla, että instituutio '"kilpailisi" muiden toimijoiden kanssa voimavaroista yms. ja että sen perustaminen siten olisi "pois" nykyisten toimijoiden -erityisesti ihmisoikeusjärjestöjen - voimavaroista.

Helsingissä 11. päivänä maaliskuuta 2005

"* Tarkempaa tietoa verkoston toiminnasta on saatavissa osoitteesta: http://vvww.europa.eu.int/comm/iustice home/cfr cdf/index en.htm

[17] Paine tähän tulee myös YK:n tasolta, jossa esimerkiksi YK: ihmisoikeusvaltuutettu on korostanut kansallisten ihmisoikeusinstituuttien merkitystä. YK:n yleiskokous on vuonna 1993 hyväksynyt ns. Pariisin periaatteet, jotka toimivat kansallisten ihmisoikeusinstituutioiden normatiivisena mittapuuna.

[18] Åbo Akademin ihmisoikeusinstituutti laati vuonna 2002 selvityksen kansallisen ihmisoikeusinstituution perustamisedellytyksistä Suomessa.

Tuomas Ojanen
OTT, professori
Helsinki

Perustuslakivaliokunnalle

Valiokunnan pyytämänä asiantuntijalausuntona valtioneuvoston E-kirjelmästä koskien komission tiedonantoa perusoikeuksien virastosta (E 139/2004 vp) esitän kunnioittavasti seuraavaa.

Uuden viraston nimi ja maantieteellinen kohde

Valtioneuvoston perusmuistiossa ei kiinnitetä kriittistä huomiota siihen, että komission tiedonanto keskeisesti perustuu eräänlaiseen terminologiseen silmänkääntötemppuun. Tarkoitan komission tiedonannon loppuviitettä nro 2, jonka mukaan asiakirjassa käytetään samassa merkityksessä ilmaisuja perusoikeudet ja ihmisoikeudet. Tällä peitetään näkyvistä se, ettei Eurooppa-neuvosto suinkaan ole vain vuonna 1999 päättänyt ihmisoikeuksia ja demokratiaa käsittelevän viraston valmistelemisesta (ks. komission tiedonannon toinen kappale) vaan että myös ensimmäisessä kappaleessa mainittu Eurooppa-neuvosto 2003 päätti ihmisoikeusviraston (Human Rights Agency) perustamisesta. Muuttamalla ilmaisu ensimmäisessä kappaleessa perusoikeusvirastoksi komissio luo harhaanjohtavan vastakkainasettelun vuosien 1999 ja 2003 päätösten välille ja pohjustaa tiedonannossa myöhemmin esitettävää rajausta, jonka mukaan uusi virasto tulisi kohdistamaan toimintansa vain EU:n toimielimiin ja jäsenvaltioihin, mutta ei EU:n ulkopuolisiin maihin. Valtioneuvoston perusmuistiossa seurataan kritiikittömästi -mielestäni aiheetta - tätä rajausta, eikä tuoda esiin, että sen perustana on Eurooppa-neuvoston päättämän ihmisoikeus viraston keinotekoinen vääntäminen perusoikeusvirastoksi.

Mainittakoon vielä, että Eurooppa-neuvosto on myös marraskuussa 2004 eli komission tiedonannon julkistamisen *jälkeen* nimenomaisesti käyttänyt ihmisoikeusviraston nimeä viitatessaan suunnitelmiin uuden viraston perustamiseksi.[19] Suomen hallituksella tuntuu siis olevan asiassa kaksi kantaa, toinen Eurooppa-neuvostossa ja toinen käsillä olevassa perusmuistiossa.

[19] "... welcomes the Commission's communication on the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Human Rights Agency", Presidency Conclusions, Brussels, 5 November 2004, 14292/04, CONCL 3, s. 14.

Euroopan parlamentin aloitteesta perustetun ja komission kanssa tehdyn sopimuksen nojalla toimivan riippumattomien perusoikeusasiantuntijoiden verkoston (EU Network of Independent Experts on Fundamental Rights) kanta on, ettei ennalta tulisi sulkea pois uuden viraston roolia luotettavan ja objektiivisen tiedon tuottamisessa kolmansien maiden ihmisoikeustilanteesta. Jotta uuden viraston nimen valinnalla ei ohitettaisi tällaisen roolin asiallista arviointia, riippumattomien asiantuntijoiden verkosto pysyttäytyy Eurooppa-neuvoston käyttämässä nimessä ihmisoikeusvirasto. Verkosto on 16.12.2004 antanut oman lausuntonsa komission tiedonannosta. Olen verkoston suomalaisena jäsenenä osallistunut tuon lausunnon laadintaan ja liitän sen tämän asiantuntijalausunnon oheen. Lausunnossa muun muassa käsitellään perustettavan viraston nimeä ja toimialaa sekä viraston suhdetta riippumattomien perusoikeusasiantuntijoiden verkostoon.

Keskeiset tehtävät

Komission tiedonannossa ja sen linjauksia seuraten valtioneuvoston ilmaisemassa Suomen kannassa hahmotellaan uuden viraston keskeisiksi tehtäviksi tiedon kerääminen ja analysointi sekä tärkeiden perusoikeuskysymysten esiin nostaminen lausuntojen muodossa. Sinänsä nämä tehtävät ovat luonnollisia viraston toimialan määrittelyn lähtökohtina. Mutta jälleen valittuihin ilmaisuihin sisältyy tietoisia tai tiedostamattomia valintoja. Mielestäni Suomen tulisi ottaa selvä kanta siihen, tuleeko uuden viraston toimialaan sisältymään normatiivisten (arvottavien) arvioiden tekeminen EU:n toimielinten ja jäsenvaltioiden, mahdollisesti myös kolmansien maiden toiminnan suhteesta EU:n perusoikeuskirjan sisältämiin normeihin ja mahdollisesti myös suhteessa kansainvälisiin ihmisoikeusk~~ysymyksiin~~. Tähän kysymykseen annettavalla vastauksella on olennainen merkitys arvioitaessa uuden viraston tehtäviä, suhdetta muihin toimijoihin, toimielinten kokoonpanoa ja myös tarvetta ylipäätään ylläpitää rinnakkaisia toimijoita perusoikeusarvioinnin alalla.

Komission tiedonannon lähtökohtana tuntuu olevan kieltävä vastaus edellä esitettyyn kysymykseen. Uudesta virastosta kaavaillaan enemmän tilastojen ja muiden objektiivisesti yhteismitallisten faktatietojen tuottamiseen keskittyvää teknokraattista asiantuntijavirastoa kuin perusoikeus- tai ihmisoikeustilanteiden oikeudelliseen arviointiin keskittyvää tulkinnalliseen asiantuntemukseen perustuvaa asiantuntijavirastoa. Tällainen valinta saattaa olla perusteltu, mutta valinta tulisi tehdä avoimesti, ja sen tulisi johtaa pohdintaan siitä, mitkä muut tahot sitten tulevat huolehtimaan arvottavasta asian tuntija-arviosta. Muussa tapauksessa uuden viraston perustaminen voi johtaa riippumattoman ihmisoikeusarvioinnin heikkenemiseen ja oikeudellisten vastuukysymysten hämärtymiseen, mikä tietysti olisi nurinkurinen lopputulos Kölnin Eurooppa-neuvostossa käynnistyneestä prosessista.

Oma kantani on, että tilastoinnille ja muunlaiselle yhdenmukaisen objektiivisen faktatiedon keräämiselle ja analysoinnille on olemassa objektiivinen tarve, ja tämä

tehtävä voi hyvinkin muodostaa uuden viraston ydintoimialan. Tällä valinnalla olisi kuitenkin seurausvaikutuksia, joita tarkastelen seuraavaksi.

Suhde jäsenvaltioihin, toimielimet, voimavarat ja suhde riippumattomien perusoikeusasiantuntijoiden verkostoon

Komission tiedonannossa korostetaan uuden viraston läheistä toiminnallista yhteyttä jäsenvaltioiden hallituksiin, joiden ehdotetaan olevan edustettuina viraston hallintoelimissä. Ei voi välttyä mielikuvalta, että näillä kannanotoilla pyritään alistamaan virasto teknokraattiseksi asiantuntijavirastoksi, jonka toiminta keskittyy faktoihin normien sijasta ja joka silti olisi jäsenvaltioiden valvovan silmän alla. Suomen ei mielestäni tulisi tukea tällaista linjaa, jonka taustalla tulkitsen olevan viime toukokuussa tapahtuneen EU:n laajenemisen 10:llä jäsenvaltiolla ja eräiden uusien jäsenvaltioiden edustaman näkemyksen, jonka mukaan jäsenyyden toteutuminen merkitsee niihin kohdistuvan normatiivisen ihmisoikeusvalvonnan loppumista. Näin ei tietenkään ole eikä saakaan olla. Uuden viraston perustamisen tulee vahvistaa niin EU:n toimielimiin kuin kaikkiin jäsenvaltioihin kohdistuvaa riippumatonta arviointi-ja valvontatoimintaa sen suhteen, miten hyvin ne toiminnassaan onnistuvat toteuttamaan perus-ja ihmisoikeudet.

Osittain tässä on kysymys uuden viraston suhteesta nykyisin toiminnassa olevaan riippumattomien perusoikeusasiantuntijoiden verkostoon. Jos virasto tulee olemaan jäsenvaltioista ja EU:n toimielimistä riippumaton ja jos sillä on selkeä normatiivinen tehtävä suhteessa näihin ihmisoikeus- tai perusoikeusvalvonnan kohteisiin, riippumattomien asiantuntijoiden verkosto voidaan hyvin lakkauttaa. Jos taas virastolle ei olla valmiita antamaan noin haastavaa roolia, sen työnjako perusoikeusasiantuntijoiden verkoston kanssa pitää järjestää mahdollisimman toimivaksi.

Pidän epäonnistuneena komission tiedonannon muotoiluja, joiden mukaan perusoikeusasiantuntijoiden verkosto toimisi jonkinlaisena faktatiedon alihankkijana uudelle virastolle ja että teknokraattisena asiantuntijavirastona profiloituvan perusoikeusviraston perustamisen yhteydessä tulisi sitä paitsi arvioida, jääkö

riippumattomien perusoikeusasiantuntijoiden verkostolle mitään lisäarvoa. Kantani mukaan verkosto muodostuu tarpeettomaksi vain jos uusi virasto todella ottaa verkoston nykyisen tehtävän tuottaa riippumattomia normatiivisia asiantuntija-arvioita siitä, miten hyvin EU:n jäsenvaltiot ja toimielimet noudattavat EU:n perusoikeuskirjaa ja kansainvälisiä ihmisoikeussopimuksia. Kun pidän epätodennäköisenä

tuolla tavoin profiloidun viraston perustamista, katson että riippumattomien asiantuntijoiden verkosto tulee säilyttää ja senja uuden viraston välille luoda vahva institutionaalinen yhteys.

Mielestäni uuden viraston hallinto-ja sivuelimet tulisi muodostaa seuraavasti:

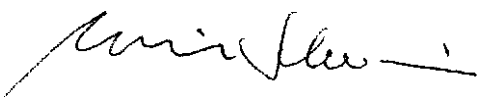
1. Virastolla olisi hallintoneuvosto, jolla olisi kaikupohjaa jäsenvaltioissa mutta joka ei suoraan edustaisi niiden hallitusvaltaa. Sen sijaan hallintoneuvosto muodostuisi ns. Pariisin periaatteita vastaavien kansallisten ihmisoikeusinstituutioiden tai niitä lähinnä vastaavien kansallisten toimielinten edustajista. Suomen osalta hallintoneuvostossa saattaisi olla eduskunnan oikeusasiamies.

2. Virastolla olisi tieteellinen neuvosto, joka edustaisi ensi sijassa empiiristen yhteiskuntatieteiden asiantuntemusta ja huolehtisi viraston kokoamien tilastojen ja muiden faktatietojen yhteismitallisuudesta.

3. Riippumattomien perusoikeusasiantuntijoiden verkostolle luotaisiin asianmukainen säädösperusta virastoa koskevassa asetuksessa tekemällä siitä viraston sivuelin. Verkosto tuottaisi oikeudellisia (normatiivisia) arvioita jäsenvaltioiden ja EU:n toimelinten toiminnan sopusoinnusta EU:n perusoikeuskirjan ja kansainvälisten ihmisoikeussopimusten kanssa. Verkosto hyödyntäisi arvioidensa tietopohjana viraston kokoamia tilastoja ja muuta fakta-aineistoa, ja virasto puolestaan käyttäisi verkoston arvioita hyväksi mm. koulutus-ja tiedostustoiminnassaan. Verkoston tuottamat arviot voisivat nykyiseen tapaan olla yhtäältä kattavia vuosiraportteja, toisaalta tilauksesta tai verkoston omasta aloitteesta laadittavia temaattisia kannanottoja. Verkoston jäsenille säädettäisiin asiantuntemusta ja riippumattomuutta korostavat kelpoisuusvaatimukset sekä näiden toteutumisen turvaava valintamenettely.

Kysymys voimavaroista

Komission tiedonannossa esitetty kanta, jonka mukaan uuden viraston tulisi olla henkilöstörakenteeltaan ja voimavaroiltaan "kevyt", on johdonmukainen suhteessa tiedonannon yleiseen linjaan, jota voisi yleisesti luonnehtia ihmisoikeus- ja perusoikeusvalvonnan vaarattomaksi tekemiseksi. Viraston voimavarojen tulee tietenkin määräytyä viraston merkityksen ja tehtäväkentän mukaan, ja mielestäni tässä vaiheessa tämän toteamisen tulisi riittää Suomen kannaksi.



Martin Scheinin, professori

Turussa 10 päivänä maaliskuuta 2005

E 139/2004 wp
?e i/P 21/2005 wp/A

E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS ***RESEAU U.E. D EXPERTS INDEPENDANTS EN MATIERE DE DROITS FONDAMENTAUX***

POSITION PAPER ON THE HUMAN RIGHTS AGENCY

16 December 2004

Ref. : CFR-CDF.Agencyl6.12.04.doc

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux **a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.**

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lithuanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen. Les documents du Réseau peuvent être consultés via : http://www.europa.eu.int/comm/justice home/cfr cdf/index fr.htm

The EU Network of Independent Experts on Fundamental Rights **has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.**

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoit-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), M. Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Francois Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czeck Republic), Ineta Ziemele (Latvia). The Network is coordinated by 0. De Schutter, with the assistance of V. Verbruggen. The documents of the Network may be consulted on : http://www.europa.eu.int/comm/iustice_home/cfr cdf/index en.htm

I. Introduction

1. The Commission has launched a public consultation document on 25 October 2004 (COM(2004) 693 final) relating to the implementation of the decision by the representatives of the Member States meeting within the European Council in Brussels on 12 and 13 December 2003 to extend the European Monitoring Centre on Racism and Xenophobia in order to convert it into a Human Rights Agency.[20] The following reflects the opinion of the EU Network of independent experts on fundamental rights as to the Human Rights Agency, and as to the relationship between the Agency and the Network.

2. The Network welcomes the decision of the European Council to move towards the Human Rights Agency. It recalls that, in its first report, which concerned the situation of fundamental rights in the European Union and its Member States in 2002,[21] the Network had already drawn the attention on the proposal, made in a report prepared

---

Throughout this paper, the expression «Human Rights Agency » will be used instead of the expression «Fundamental Rights Agency » used in the consultation document of the European Commission. The European Council has referred twice to the « Human Rights Agency », once in conclusions from the Brussels European Council of 13 December 2003, and more recently in the Hague Programme on the strengthening of Freedom, Security and Justice in the Union annexed to the conclusions of the European Council of 4-5 November 2004. The European Council here « recalling its firm commitment to oppose any form of racism, antisemitism and xenophobia as expressed in December 2003, welcomes the Commission's communication on the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Human Rights Agency » (Presidency Conclusions, Brussels, 5 November 2004, 14292/04, CONCL 3, at p. 14). The EU Network of independent experts on fundamental would not exclude a role for the Human Rights Agency in providing reliable and objective data on the situation of fundamental rights in third countries with which the European Community/Union would enter into relationship. As the use of the expression « Fundamental Rights Agency » by the public consultation document of the Commission seems to prejudge the question as to whether the Human Rights Agency should be given any role vis-à-vis third countries, the Network would prefer to remain with the broader expression used by the European Council.

[21] See EU Network of independent experts on fundamental rights, Report on the situation of fundamental rights in the European Union and its Member States in 2002, March 2003, at p. 25.

for the ***Comité des Sages*** responsible for drafting ***Leading by Example: A Human Rights Agenda for the European Union for the Year 2000,*** for the establishment of a monitoring centre for human rights within the European Union.[22] In that initial report, the Network noted that the establishment of a mechanism for the monitoring of fundamental rights in the Union could serve to improve the coordination of the fundamental rights policies pursued by the Member States, and listed a number of conditions which were to be satisfied in order to fulfill that objective.

3. This position paper proposes to locate the future Human Rights Agency in the broader context of the institutional framework for the monitoring of fundamental rights in the system of the European Union. The paper briefly presents the EU Network of independent experts in fundamental rights, recalling the origins of its creation, its tools, and the functions it performs (II.). It then explains why its tasks are complementary to those of the Human Rights Agency, and how it could contribute to the work of the Agency (III.). It notes that, whether the Network or an equivalent group of independent experts in fundamental rights remains distinct from the Agency or is integrated in the Agency, it should be stabilized be provided with an adequate legal framework in 2006 in order to continue to fulfill its missions (IV.). The conclusion of the position paper offers a brief summary (V.).

II. The EU Network of independent experts on fundamental rights

4. In its resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (2000/2231 (INI)) (rapporteur Mr Thierry Comiliet, MEP), the European Parliament recommended "that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable the Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account developments in national laws, the case-law of the Luxembourg and Strasbourg Courts and any notable case-law of he Member States' national and constitutional courts".

5. The EU Network of Independent Experts on Fundamental Rights has been set up in September 2002 by the European Commission (DG Justice and Home Affairs), in response to this request of the European Parliament.[23] The EU Network of Independent Experts on Fundamental Rights currently consists of 26 experts, covering all the Member States and headed by a coordinator. These experts are required to have an experience of at least ten years at a high level in the field of fundamental rights, and to present qualities of integrity and independence usually required for such positions. In the fulfilment of their mission, they undertake to receive no instruction from any organisation, either public or private. The Network monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. It currently holds three meeting sessions each year.[24]

6. The Network has no specific budget allocated for the dissemination of its reports and opinions. It may be justified in the context of this position paper to recall its tools and the objectives these tools seek to achieve. The EU Network of Independent Experts on Fundamental Rights prepares reports regarding the situation of fundamental rights in the European Union and in the Member States, on the basis of which the Network drafts a Synthesis Report identifying the conclusions and recommendations. The Network also prepares Thematic Comments on certain specific issues. Finally, it may also be called upon to deliver specific information and opinions on fundamental rights issues. These different tools may be described thus :

a) Annual Reports on the Situation of Fundamental Rights in the Union and Its Member States

7. ***National Reports*** **-** Each expert prepares a Report on each Member State, fully independently, under his/her own responsibility and according to common guidelines which ensure the comparability of the data from the different Member States (the national reports cover 12 months from December to December). Each expert is requested, for each provision of the Charter, to examine the findings of international jurisdictions and the observations of experts' committees released during the period under scrutiny as well as the follow-up given to these findings and observations by the State concerned; to report on the developments within the domestic legislation and case law which may

[22] P. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in P. Alston, with M. Bustelo and J. Heenan (eds.), *The European Union and Human Rights*, Oxford, Oxford University Press, 1999, p. 3.
[23] Since it has been enlarged to include experts covering the new Member States of the European Union, the annual budget of the Network is of 659.000 euros.
[24] For general information on the Network, see http://europa.eu.int/comm/iustice home/cfr cdf/index en.htm

affect fundamental rights; and to examine the practices of national authorities. They are encouraged to consult broadly in the preparation of these reports, in particular with national administrations, national

inrl inforriQliAnpl n nn ^crr^^r&mTTiPmtr* 1 Arconicatinnc irn/At* nniAno rplM/Qiit inf/>rfrn\rArtitYipnfQl CHIVI IIIIVI IIUWV/UUI UV/U CU V VIIUIIVIIIUI VI fLCi.I.ilOt*\.I\JHJ} V I UU^ WX-II V/IIIJ . * VIV * UIII IJU.LW tV V VI IIIIIVIIvCi*.

organisations, and national institutions for the promotion and protection of human rights.[25]

8. These reports do not simply collect data relating to the situation of fundamental rights in the country under scrutiny. They also offer a normative evaluation of that situation : using the rights, freedoms and principles of the Charter as their reference, the independent experts identify for each State "positive developments" (in particular changes in response to concerns expressed previously by international courts or expert bodies), "good practices" (innovative solutions to problems which other member States may face and from which therefore inspiration may be sought), and "reasons for concern" (where the problem identified in legislative or jurisprudential developments or in the practices of the national authorities have not been adequately addressed by the national authorities).

9. ***Report on the activities of the Union*** - The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. The Report takes as reference the EU Charter of Fundamental Rights and examines, in the light of the provisions of the Charter, the initiatives taken by the institutions of the Union or by the Member States acting in common in the framework of the Union.

10. The screening of the Union's laws and policies is an important function of the Network of independent experts in fundamental rights. It may be recalled that, for the moment, there is no external control exercised on the institutions of the Union, comparable to the monitoring exercised on the Member States of the Union by United Nations and Council of Europe bodies. On the other hand, the institutions of the Union are of course required to act in conformity with the Charter of Fundamental Rights. Indeed, the Commission has rightly taken the approach that this required to preventively anticipate the risk that the Charter might be violated by its proposals, which led in March 2001 the Presidency of the Commission and Commissioner Vitorino to require that the services of the European Commission accompany all their legislative proposals which could have an impact on fundamental rights with an indication that these proposals are compatible with the requirements of the Charter.[26] It is essential that this anticipatory approach to the compliance of the activities of the institutions of the Union with the Charter of Fundamental Rights be developed further.

11. ***Synthesis Report*** - On the basis of these national Reports and of the Report on the situation of fundamental rights in the activities of the Union, the members of the Network identify, during a meeting organised in Brussels in February of each year, the main conclusions regarding the year under scrutiny. These conclusions are collected into a Synthesis Report, which is sent to the European Commission in March of each year.

12. This synthesis Report containing the conclusions and recommendations of the Network serve three distinct purposes.

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

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

---

[25] The country reports are currently accessible online at www.cpdr.ucl.ac.be/cridho ("documentation online").

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

14. ***Situations of concern.*** - Second, the conclusions of the independent experts may express certain concerns about certain specific situations, which occur in one or more Member States. In excxeptional cases, such situations may constitute serious and persistent violations of fundamental rights as expressed in the Charter of Fundamental Rights - which form part of the catalogue of values on which the Union is based, as expressed in Article 6(1) EU - or create a clear risk of a serious breach of such rights. The Network acts here in accordance with the Communication which the Commission presented to the Council and the European Parliament on Article 7 EU "Respect for and promotion of the values on which the Union is based".[27] Indeed, since the entry into force of the Nice Treaty on 1 February 2003,[28] Article 7 EU gives the Council the possibility to determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based. This preventive mechanism, provided for in Article 7(1) EU, now complements the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously andpersistently breached the principles mentioned in Article 6(1) EU.[29] This improvement of Article 7 EU was proposed by the ***Comité des Sages*** which reported in September 2000 to the European Council on the human rights situation in Austria and the means by which the EU could respond to possible human rights problems in an EU Member State.[30] However, in order to ensure that such a mechanism is used in a non-selective manner, it should proceed on the basis of a systematic monitoring by independent experts, providing comparable data and objective assessments on the situation of fundamental rights in all the Member States of the Union. It is with this objective in mind that the communication which the Commission presented to the Council and the European Parliament on Article 7 EU notes that, by its reports, the Network of independent experts in fundamental rights may help to "detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty"; and that it may "help in finding solutions to remedy confirmed anomalies or to prevent potential breaches".

15. Therefore, while the adoption by the Network of the Charter of Fundamental Rights as the catalogue of rights on which its monitoring should be based was motivated both by the practice inaugurated in 2000 by the annual reports of the European Parliament and by the understanding of the Charter as a codification of the fundamental rights which were considered to be part of the common values on which the Union is based, it is Article 7 EU which explains the reliance on the Charter even with regard to situations which, under Article 51 of the Charter, would in principle not fall under its scope of application. The need for an objective and impartial assessment of the situation of fundamental rights in the Member States of the Union, in order to facilitate the exercise by the institutions of their constitutional functions under this article, has been clearly recognized, and one of the most important functions fulfilled by the Network of independent experts is to offer such an assessment.

16. The Working Document of 25 March 2004 on the proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version) prepared with the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (rapp. J. Swiebel) recalled in this respect that[31]

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

17. ***Identification of issues deserving of attention from the Union institutions.*** - Third, as emphasized again in the communication of the Commission on Article 7 EU "Respect for and promotion of the values on which the Union is based", the monitoring by the Network has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded. As performed by the Network, monitoring thus also fulfill another, non-contentious function : it will serve to identify issues on which it would be justified for the Union to exercise its powers to contribute to the promotion and the protection of

---

[27] COM (2003) 606 final, of 15.10.2003.
[28] OJC 180, of 10.3.2001.
[29] Article 7(2) to (4) EU (Article 1-59 of the Treaty establishing a Constitution for Europe) ("Suspension of certain rights resulting from Union membership") and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC.
[1'] The report was submitted by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, adopted in Paris on 8 September 2000: See http://www.virtual-institute.de/en/Bericht-EU/report.pdf.
[31] Doc. PE 339.635, at p. 4.

fundamental rights, because the decentralized action of the Member States, acting individually, appears incapable of attaining that objective, and because that objective could be better fulfilled by an initiative of the Union.

b) Thematic Comments

18. Each annual Synthesis Report also comprises a Thematic Comment, which examines in greater depth one or more issues selected by the Commission and the European Parliament. The Thematic Observation appended to the 2003 Synthesis Report (covering the year 2002) relates to 'The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats". The Thematic Comment joined to the 2004 Synthesis Report (covering the year 2003) examines "Fundamental Rights in the External Activities of the European Union in the Fields of Justice and Asylum and Immigration". The Thematic Observation appended to the 2005 Synthesis Report (covering the year 2004) will be relating to the protection of minorities in the Union.

c) Opinions

19. Finally, the EU Network of Independent Experts on Fundamental Rights is also regularly requested by the Commission to prepare opinions on issues relating to the protection of fundamental rights in the Union. The opinions of the Network are drafted fully independently and are binding neither on the Commission, nor on the European Parliament. In most cases, they are based on a comparison, as complete as possible, of the situations which exist in the different Member States on a given question. They systematically seek to take into account the state of the international and European law of human rights, rather than only the fundamental rights already explicitly recognized in the legal order of the European Union. By the formulation of such opinions, the Network can contribute to a better taking into account of the requirements of fundamental rights from the initial stages of the legislative process.

III. The Relationship of the Network to the Human Rights Agency

20. The EU Network of independent experts on fundamental rights welcomes the decision of the European Council to recast the European Union Monitoring Centre on Racism and Xenophobia into a Human Rights Agency. The task of the Network is to prepare country reports as well as a report on the activities of the European Union, and legal opinions upon the request of the European Commission on issues relating to fundamental rights.

21. This task is complementary to those the Agency would be called upon to perform in the future. This complementarity results from the fact that the Network is composed of legal experts from the 25 Member States, closely following on a permanent basis the developments in the area of fundamental rights within these States, on the basis of a template which ensures both the comparability of the data collected in each State and that all States will be treated in a non selective manner. A monitoring thus performed complements the collection and analysis of data by a Human Rights Agency whether the remit of the Agency is confined to the scope of Community (or Union) law or whether its remit covers Article 7 EU (a). The complementarity of the monitoring performed by independent experts covering the 25 Member States with data collection and analysis and the formulation of recommendations by a Human Rights Agency does not depend on any particular structure the Agency shall be given (b). The monitoring as practiced by the Network of independent experts should not be confused with data collection and analysis as performed by the Agency, especially if, as decided by the European Council, it build on the EUMC on Racism and Xenophobia and bases its work on the methodology currently developed by the EUMC (c). Finally, the Network constitutes a potentially useful tool in order to contribute to the monitoring of the implementation by the Member States of the instruments adopted for the establishment of an area of freedom, security and justice (d).

a) The monitoring of the situation offundamental rights in the Member States for the use of Article 7 EU or in order to facilitate the exercise by the Union of the powers it shares with the Member States

22. This complementarity exists, in the view of the Network, however the tasks of the Agency are defined in the future and, in particular, whether the remit of the Agency is confined to the scope of Community (or Union) law or whether its remit covers Article 7 EU. Indeed, if the Agency is to act asan early

warning instrument for situations covered by Article 7 EU,[32] it is essential that the Agency may be provided with reliable and objective information concerning the legal situation of all Member States, in order, if issues of concern appear, to react in a timely manner. As already emphasized, if such a mechanism is to be used in a non-selective manner, rather than run the risk of being instrumentalized, it should proceed on the basis of a systematic monitoring by independent experts, providing comparable data and objective assessments on the situation of fundamental rights in all the Member States of the Union.

23. The information and assessments provided by the Network of independent experts will also be useful if the remit of the Agency is strictly confined to areas of Community (or Union) competence, i.e., to the scope of application of the Charter of Fundamental Rights. Indeed, because there does not exist a strict division of competences between the Member States and the Union in the implementation of the rights covered by the Charter, it is necessary, in order to identify where the Union (or the Community) should exercise certain powers it has been attributed, to screen the developments within the Member States which could lead to new barriers being created in the internal market or which could threaten the mutual confidence on which the area of freedom, security and justice is premised. The monitoring performed by the Network should identify such situations where divergences occur between the Member States which may justify the exercise by the Union of the competences it has been conferred upon, either by the use of the flexibility clause in combination with the objectives of the EC/EU which intersect with fundamental rights recognized in the Charter,[33] or on the basis of specific provisions of the treaties (or of the Treaty establishing a Constitution for Europe) which could lead to the adoption of legislative instruments implementing fundamental rights.

24. Considering the number of such provisions, which now open up for the possibility of a true fundamental rights policy developed by the union by the adoption of legislative instruments,'[3] asystematic and reliable screening of the situation of fundamental rights in the 25 Member States of the Union appears indispensable. Indeed, these clauses may justify the exercise by the Union (or the Community) of its attributed powers, in order to realize fundamental rights, where a comparative overview of the evolution of fundamental rights in the different Member States leads to the conclusion that such an intervention may be required, and would be in conformity with the principles of subsidiarity and proportionality guiding the exercise by the Union of competences it shares with the Member States. It would simply not be credible to set up an Agency entrusted with making recommendations to the EU institutions in the field of fundamental rights, without this agency being provided with an evaluation by a network of legal experts covering all the Member States either with respect to the full Charter of Fundamental Rights or

[15] Examples include, in the Treaty establishing a Constitution for Europe, Article III-124 which provides that the Council acting unanimously may adopt a European law or framework law in order to establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and that it may, acting by qualified majority, establish basic principles for Union incentive measures and define such incentive measures, and support action taken by Member States in order to contribute to combating discrimination. This provision corresponds to Article 13 EC, as revised by the Treaty of Nice. It is on the basis of this article that the Council has adopted Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000, p. 22) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16). Article TIT-125 of the Treaty establishing a Constitution for Europe provides that European laws or framework laws may be adopted in order to facilitate the exercise of the right of every citizen of the Union to move and reside freely and the Constitution. It is on the basis of Article 18 EC, which has inspired Article III-125 of the Constitutional Treaty, that the European Parliament and the Council adopted Directive 2004/3 8/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 , 30.4.2004, p. 77). Articles III-266 and III-267 concern, respectively, the development by the Union of a common policy on asylum, subsidiary protection and temporary protection, and the development of a common immigration policy. The first of these provisions restates Articles 63, al. 1 and 2, EC, and 64(2) EC ; the second provision is a reformulation of Article 63, al. 3 and 4, EC. It is on these bases, that the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3/10/2003, p. 12) and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31 of 6/2/2003, p. 18). Article 11-270(2) of the Treaty establishing a Constitution for Europe provides that, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial

[32] It appears however uncertain whether an adequate legal basis could be identified therefore, especially under the current treaties where the flexibility clause of Article 308 EC does not extend to the Union, and where the creation of an area where the guarantees of the Charter of Fundamental Rights are fully respected is not ranked among the objectives of the EC?

[33] Article 1-18 of the Treaty establishing a Constitution for Europe, in the renumbered version signed in Rome on 29 October 2004 (CIG 87/2/04 REV 2). According to this provision, if action by the Union should prove necessary within the framework of the policies of the Union to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures". This provision retains and somewhat enlarges Article 308 EC (ex-Article 235 of the EC Treaty). Article 1-3 of the Treaty establishing a Constitution for Europe lists among the objectives of the Union "combatfing] social exclusion and discrimination"; promoting "social justice and protection"; pursuing "equality between women and men" and "solidarity between generations"; and protecting children's rights.

with respect at least to the rights of the Charter the Agency must contribute to fulfilling.

b) The structure of the Agency

25. The public consultation document of the Commission presents the Agency as " a crossroads facilitating contact between the different players in the field of fundamental rights, allowing synergies and increased dialogue between all concerned".[34] In the view of the Network, at least three views of the Human Rights Agency deserve close attention.[17]

26. Under a first conception, the Human Rights Agency could be conceived as closely as possible in conformity with the Principles relating to the status of national institutions for the promotion and protection of human rights, as endorsed by the United Nations General Assembly of 20 December 1993 (« Paris Principles »),[ls] and with the Recommendation n° R(97)14 of the Committee of Ministers to member states on the establishment of independent national institutions for the promotion and protection of human rights"[9], with a composition and guarantees ensuring a pluralist representation of the civil society, of diverse trends in philosophical or religious thoughts, of the academic world, and of Parliament, and the independence of this institution, implying for instance that governmental representatives may only take part in the deliberations in an advisory capacity.

27. Under a second conception, the Human Rights Agency could be conceived as composed by the delegates of the national institutions for the promotion and protection of human rights of the Member States, or of equivalent institutions in the Member States which have not currently set up such institutions according to the Paris Principles of 1993. The Member States should be encouraged to establish such institutions where they have not done so yet, in order to develop the Human Rights Agency as based on the cooperation between these national institutions. The independency of the Agency could be derived, under this model, from the independency guaranteed to each national institution in its own Member State. The Network notes, however, the present diversity of the solutions adopted in this regard by the different Member States, and the potential difficulty a Human Rights Agency thus conceived would face when confronted to issues specific to the EU legal order, as distinct from issues faced by all the Member States of the Union and for which certain common answers may be sought.

28. Under a third conception, the Human Rights Agency could be seen as closely replicating the structure of the current European Union Monitoring Centre on Racism and Xenophobia. Its extended mandate would simply translate into a larger staff and more resources, and into the development of further networks covering other areas

cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules which may concern, inter,alia, the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, or the rights of victims of crime. It is on the basis of Article 31 EU, from which Article III-270 is inspired, that the European Commission recently proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 328 final, 28.4.2004).

[17] The Network does not thereby exclude any other models which could be proposed in the course of the public consultation launched by the Communication of the Commission of 25 October 2004. It identifies three possible models among many other conceivable ones.

[18] See UN doc. A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, « National institutions for the promotion and protection of human rights ».

[19] Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies.

[34] At p. 4.

than racism and xenophobia which the EUMC deals with at present.

29. It is clear that, whatever of these or other, competing, models, is proposed at the outcome of the public consultation launched by the public consultation, an independent assessment of the compatibility with the requirements of the Charter of Fundamental Rights of the situation of fundamental rights in the Member States and the Union remains useful and, indeed, necessary, for the Human Rights Agency to perform its functions. Any recommendations made by the Agency or any opinion it delivers must consider that the baseline - the minimum requirement - is compliance with the Charter of Fundamental Rights. In order to ensure that the opinions and policy recommendations adopted by the Fundamental Rights Agency, either in its renewed, pluralistic composition, or after large consultations with stakeholders, will comply with the minimum requirements of the Charter, an independent legal assessment of these requirements is necessary.

c) The need for a legal monitoring feeding into other forms of data collection and analysis as could be performed by the Agency

30. The complementarity between the current work of the EU Network of independent experts in fundamental rights and the Human Rights Agency also results from the distinction between a form of monitoring which examines the compatibility with certain developments with the requirements of the rights, freedoms and principles of the Charter of Fundamental Rights and prepares legal opinions on such compatibility, whether they concern developments within the Member States or within the Union, on the one hand, and data collection and analysis as performed currently by the EUMC and as shall be performed by the Fundamental Rights Agency, on the other hand.

31. In the view of the Network, it is crucial that the former monitoring function, performed on the basis of the EU Charter of Fundamental Rights, be pursued; at the same time, it is highly desirable that such a monitoring be complemented by the setting up of a Fundamental Rights Agency which could, on the basis of the findings of such a monitoring, prepare recommendations following a consultation of all stakeholders, and thus contribute to the development of the fundamental rights policy of the Union.

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

33. Whether these functions are integrated within the remit of the Human Rights Agency or whether they are performed alongside the Agency but providing it with the analyses it will require to prepare recommendations, they can only be performed by a group of independent experts covering the 25 Member States in a decentralized manner, on a systematic rather than on an ad hoc basis. The organisation of such a monitoring under a contractual mode of relationship either with the institutions or with the Human Rights Agency is incompatible, in the long run, with the requirements of independency. The organisation of such monitoring on an ad hoc basis is incompatible with the systematic and non-selective screening which is needed for these functions to be adequately fulfilled.

d) The potential contribution of the Network to monitoring the implementation of Union law

34. The monitoring of the Member States by the EU Network of independent experts on fundamental rights has not, until now, served to verify the implementation of the Union instruments in the creation of the area of freedom, security, and justice. However, this function could be expanded in the future. The expected Framework decision on certain procedural rights in criminal proceedings throughout the European Union in particular may signal the beginning of a systematization of this form of monitoring. In the extended Impact Assessment of the proposal of the Commission on this instrument, the Commission calls for

> a regular monitoring exercise on compliance. This should be on the basis of Member States themselves submitting data or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could use the services of independent experts to analyse the data and assist with the drawing up of reports. One possible team of independent experts is the EU Network of Independent Experts on Fundamental Rights.[35]

35. Indeed, the proposal of the Commission for a Council Framework decision in this area contains a specific clause on evaluating and monitoring the effectiveness of the Framework Decision (Article 15), with one possibility being to be assisted in this by an independent monitoring by the EU Network of Independent Experts in Fundamental Rights.[21] When the Treaty establishing a Constitution for Europe will enter into force, it will contain a clause (Article III-260) according to which

> the Council may, on a proposal from the Commission, adopt European regulations or decisions laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Chapter [Chapter IV, Area of Freedom, Security and Justice] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

36. For such an objective and impartial evaluation to be performed, is will be required to set up a group of legal experts monitoring the implementation by the member States of Union policies adopted in the area of freedom, security and justice. The EU Network of independent experts, if and when it will be confirmed in its existence by an adequate regulatory framework, may be called upon to perform this function.

e) The complementarity of the Network of independent experts and the Fundamental Rights Agency

37. For the reasons exposed above, the Network stresses the importance of the continuation of the specific form of monitoring it performs on the Member States and the institutions of the Union. It believes that, if the establishment of a Human Rights Agency were to lead to abandoning this monitoring - performed by independent legal experts, specialists in the international and European law of human rights, covering all the Member States and the Union, and assessing the situation of fundamental rights on the basis of all the substantive provisions of the Charter of Fundamental Rights -, it would constitute a regression in the framework of fundamental rights protection in the EU, and would be in contradiction with the very aims pursued by the establishment of a Human Rights Agency.

38. On the other hand, the Network notes that it is highly desirable that such a monitoring becomplemented by the setting up of a Human Rights Agency which could, on the basis of the findings resulting from such a monitoring, prepare recommendations following a consultation of all stakeholders, and thus contribute to the development of the fundamental rights policy of the Union. A group of legal experts entrusted with the independent monitoring of the situation of fundamental rights in the Member States and the Union would provide the Agency with its conclusions, and the Agency would be ideally placed to build upon these conclusions and, on this basis,

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

recommend certain initiatives, commission further thematic studies, or organize fora in which all the stakeholders could take part in order to identify what proposals should be made. Conversely, to the extent that the Agency collects certain data of a factual nature, or commissions thematic studies, the Network of independent experts on

[35] SEC(2004) 491, of 28.4.2004, p. 22.

fundamental rights could use this information in performing its monitoring, which would therefore be facilitated by a close cooperation with the Agency.

IV. The establishment of the EU Network of independent experts in fundamental rights

39. The Network currently is created on a purely contractual basis. This may be justified in the short term, for an experimental project, in order to verify the feasibility of a mechanism of monitoring of the situation of fundamental rights in the Union by independent experts. However, the extension of the mandate of the EUMC into a Fundamental Rights Agency should be seen as an opportunity to move beyond this initial phase.

40. Either in the Regulation establishing the Fundamental Rights Agency by building on the EUMC and its instituting Regulation, or in a separate legal instrument,[36] a group of independent experts on fundamental rights should be established on a permanent basis. This group should be asked to submit reports on the situation of fundamental rights in the Member States and in the activities of the Union on a regular basis, preferably an annual basis, using the Charter of Fundamental Rights, as the most authoritative catalogue of rights in the legal order of the European Union, as its reference. It should deliver opinions on legal issues related to fundamental rights, upon the request of the European Cornmission, of the European Parliament, or of the Fundamental Rights Agency. It could also be requested to prepare certain thematic studies, for which comparisons are to be made between the different Member States, for instance in the context of the preparation of a legislative proposal by the Commission.

41. The experts composing this group should present adequate qualifications in international and European human rights law, however, in order to reinforce the legitimacy of this group while preserving its independency, the modes of appointment of its members should be revised. These experts should be lawyers with a minimum of ten years' experience in the field of international human rights and of their protection at national level, and fully independent from the national governments. A regime of incompatibilities could ensure that this requirement of independency is fully complied with. These experts could be proposed by the member States, each of which could present a list of three names of persons meeting these qualifications, with the final selection being made by the European Parliament.

42. The establishment of the EU Network of independent experts in fundamental rights of a group of independent experts in fundamental rights under a different denomination, should also lead to improving the logistical support for such a group.[37]

V. Conclusion

43. Discussing the relationship between the EU Network of independent experts on fundamental rights and the future Human Rights Agency, the Working Document of 25 March 2004 on the proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version) prepared with the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (rapp. J. Swiebel) concluded that

[36] In March 2003 for example, the Commission has set up a consultative group called "Experts Group on Trafficking in Human Beings" (Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings", OJ L 79 of 26.3.2003, p. 25), consisting of twenty individuals specially qualified in this field, proposed by the governments of the European Union Member States, as well as by international, intergovernmental and non-governmental organizations active in preventing and combating trafficking in human beings. The mission of this Group is to issue opinions or reports to the Commission at the latter's request or on its own initiative, taking into due consideration the recommendations set out in the Brussels Declaration that was adopted following the "European Conference on Preventing and Combating Trafficking in Human Beings - Global Challenge for the 21st Century", which was held from 18 to 20 September 2002. One of those recommendations was precisely the setting up of such an experts group. The first task of the experts group will be to submit, on the basis of these recommendations, a report to assist the Commission with a view to launching further concrete proposals at European level. Another example is the "European Group on Ethics in Science and New Technologies", created by a decision of 16 December 1997, which is an indépendant, pluralist and multidisciplinary body (consisting of twelve members appointed by the Commission for their expertise in this field) that advises the European Commission on ethical aspects of science and new technologies in connection with the preparation and implementation of Community legislation or policies.

[37] In its present status, the Network is poorly equipped logistically, and has a budget which represents 1/10 of that of the EUMC on Racism and Xenophobia.

It is important to stress that the analytical, evaluative, and advisory functions of the Experts' Network continue to be fulfilled in an independent way. This should not prevent close links between the Human Rights Agency and the Experts' Network being established.[38]

44. This position paper is fully consonant with this analysis. The role currently fulfilled by the EU Network of independent experts in fundamental rights should continue in the future, both because it includes a form of monitoring which cannot be assimilated to mere data collection and analysis and because the Network covers all the Member States of the Union with respect to which the Network may offer an objective and reliable assessment of the situation of fundamental rights, thus facilitating the exercise by the institutions of the Union of the competences conferred upon them both under Article 7 EU and under specific provisions of the EC Treaty and the EU Treaty in the field of fundamental rights, even when the link to fundamental rights is not explicit.

45. The independency and continuity of the tasks performed by the Network should be preserved by providing the Network with an adequate normative framework. The ***ad hoc*** creation of expert networks on a contractual basis, following a public call for tenders, is not in the long term a sustainable solution for the satisfactory fulfilment of the monitoring function currently entrusted to the Network. Valid reasons may be put forward for the integration of a group of independent experts in fundamental rights within the broad structure of the Agency, provided the functions of such a group and the mode of appointment of its members are explicitly defined in the Regulation revising, or substituting itself to, Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, and provided, therefore, the form of monitoring performed by the EU Network of independent experts on fundamental rights continues in this revised form.[39] No less valid reasons plead in favor of the maintenance of a separate group of independent experts, created under a decision of the European Commission, and entrusted with the preparation of regular reports on the situation of fundamental rights in the European Union and its Member States. Indeed, this latter solution - the establishment by a decision of the Commission of a group of independent experts in fundamental rights as a consultative body - may be required if, due either to the difficulty of identifying an adequate legal basis in the Treaties or due to considerations of opportunity, the remit of the Agency is confined to the legal order of the European Union, and does not extend to the Member States and to the monitoring of the situation of fundamental rights in situations presenting no relationship to Union law, as would contribute to the mechanism of Article 7 EU.

[2]* Doc. PE 339.635, at p. 6.

[39] This seems to be the position expressed in Amnesty International's contribution to the Commission Consultation on the establishment of an EU Fundamental Rights Agency, released in December 2004. Though proposing the incorporation of the role of the Network into the structure of the Agency, Amnesty International does emphasize the important role of that Network and of the monitoring function it performs (pp. 5-6).