



**Amnesty International response to the Commission's
Proposal for a Council Regulation establishing an
EU Agency for Fundamental Rights**

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Amnesty International response to the Commission's Proposal for a Council Regulation establishing an EU Agency for Fundamental Rights

Amnesty International attaches great importance to the Commission proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights (the Agency), as well as the Commission proposal for a Council Decision empowering the Agency to pursue its activities in areas referred to in Title VI of the Treaty on the European Union¹.

The establishment of the Agency will mark a highly significant step in the process whereby the EU is shaping its policy with regard to observance and fulfilment of human rights within its own borders. However, it is precisely for that reason that Amnesty International is at the same time very critical of the proposals – not for what the Agency will be able to do, but for what it will be precluded from dealing with. Thus, while welcoming the proposals as a step in an incremental process, Amnesty International takes issue, as it has done consistently in the consultations², with the fact that this process reflects a too limited and *ad hoc* approach to fundamental rights policy in the EU.

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

I. The Fundamental Rights Agency in the context of the EU's internal human rights policy

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

- The adoption of the EU Charter of Fundamental Rights in 2000³;
- The establishment of an EU Network of Independent Experts in Fundamental Rights in 2002;
- The Commission Communication on the application of Article 7 TEU⁴ in 2003;
- The creation of a Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in 2004;
- The Commission proposal for a Regulation to set up a European Institute for Gender Equality in 2005⁵; and more generally
- The stated commitment to ensuring a proper balance between security and human rights; and
- The overarching goal of strengthening the EU as an 'Area of Freedom, Security and Justice'.

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

Human rights in practice

Over the past year Amnesty International has appealed in vain to the Commission to fulfil its role as 'guardian of the treaties' over the expulsions of 'illegal immigrants' back to North Africa, without due process and in breach of international human rights obligations. A recent report demonstrated a significant human rights deficit in the EU's counter-terrorist effort⁶ and called for an examination of the threats to the "balance" between security and human rights. Furthermore, the UK Government's recent statements about changing "the rules of the game" in the fight against terrorism, and exempting itself from certain human rights obligations related to the absolute prohibition of

¹ COM(2005) 280 final, Brussels, 30.06.2005.

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

³ Proclaimed in Nice on 7 December 2000, OJ C364, 18.12.2000, p.1.

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

⁵ COM(2005) 81 final, 8.3.2005.

⁶ *Human rights dissolving at borders? Counter-terrorism and EU criminal law*, Amnesty International EU Office, May 2005, available at www.amnesty-eu.org

torture and of *refoulement* to countries where serious human rights abuses occur, raise serious human rights concerns – but ones which the EU will not address itself.

Building mutual trust

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

Double standards

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

The EU's internal human rights policy – a need for careful reflection

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

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

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

The Fundamental Rights Agency – a positive step?

In view of the concerns highlighted above, Amnesty International welcomes the Commission proposals as a step towards remedying the deficiencies of the EU's domestic human rights policy, and agrees that the geographical remit for the Agency is focused on the EU itself and on candidate countries. At the same time, the proposals as they stand do not go far enough as its substantive mandate is limited to the Community and Member States applying Community law – i.e. excluding Member States' human rights observance generally. There is only a small window left open in that the Agency will be allowed to pursue its activities in areas referred to in Title VI TEU; that is police and judicial cooperation in criminal matters. An even smaller window is offered by the possibility that the Council may make a request of the Agency's technical expertise in connection with Article 7 TEU.

⁷ Text accompanying the proposal on the Commission's website:
http://www.europa.eu.int/comm/justice_home/fsj/rights/fsj_rights_agency_en.htm

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

II. The Commission Proposal for a Council Regulation

Objective and Scope

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

'When implementing Community law'

Amnesty International regrets that the scope of the Agency's activities is restricted to the situation of fundamental rights in the EU and its Member States when implementing Community law⁸, and based on the EU Charter, for a number of reasons.

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

By way of example, according to the case law of the European Court of Justice, while it will consider the fundamental rights arguments in the situations below⁹:

- The right of an EU citizen to have recourse to judicial process before s/he is deported from a Member State¹⁰;
- Relying on freedom of expression and assembly to demonstrate and block a motorway, thereby restricting the free movement of goods¹¹,

it will not review the following situations:

- Detention of an EU citizen under national law in the own Member State¹²;
- Deportation of a non-EU citizen relying on the right to family life to remain with her family in a Member State¹³; or
- Arguing that freedom of expression prohibits a Member State from blocking the sale of videos, thereby restricting the free movement of goods¹⁴.

As the breadth of Community law expands, in particular in fields such as asylum, immigration and criminal matters, so does the possibility of bringing new situations within the remit of the Agency. Indeed, it seems impossible to assess the impact of EU immigration policies without due regard to existing national immigration policies. The current discrepancy between the EU creating a 'Fundamental Rights' Agency, and the reality of excluding much of

⁸ Draft Regulation, Article 2 and 3(3).

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

¹⁰ Case 48/75 *Royer* [1976] ECR 497.

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

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

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

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

what is generally understood as fundamental rights from its remit, will do little for the credibility and legitimacy of the Agency or the EU.

Title VI (police and judicial cooperation in criminal matters)

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

Article 7 TEU

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

Third countries

Amnesty International welcomes and supports the possibility that the Agency may provide information and analysis on fundamental rights issues regarding third countries with which the Community has concluded or will conclude association agreements, or agreements containing a human rights clause¹⁵. It questions why only the Commission may request such information and analysis, and recommends that the European Parliament be empowered to request the Agency's assistance as well.

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

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

Tasks

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

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

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

Cooperation with other bodies

The Council of Europe

Amnesty International welcomes the proposal in Article 9 of the draft Regulation for the Community to enter into a cooperation agreement with the Council of Europe for the purpose of establishing close cooperation between the

¹⁵ Draft Regulation, Article 3(4).

latter and the Agency. The importance of such an agreement is evident and it should be concluded immediately upon the creation of the Agency.

The European Institute for Gender Equality

Amnesty International welcomes the suggestion that the Director of this new body may attend meetings of the Management Board of the Agency¹⁶, but regrets the lack of clear delineation between the work of the two entities.

The Network of Independent Experts in Fundamental Rights

There is no reference to the Network in the Commission's proposals. In the Impact Assessment Report¹⁷, the Commission suggests that the expertise of the Network would not be lost if it were incorporated into the structure of the Agency by becoming one of its "networks". Amnesty International is concerned that this would result in the Network losing its broad mandate to review and comment upon human rights generally in the Member States, in favour of a narrower remit. It is crucial that the Network, as one of the few bodies with a broad human rights mandate, retain its current remit.

National human rights institutes

Amnesty International considers the establishment of the Agency should give an impetus to the establishment of a national human rights institute or commission, in accordance with the UN Paris Principles¹⁸, in each Member State and candidate country where such an entity does not yet exist. Such institutes would serve as members of the Agency "network".

Independence, Accountability and the Paris Principles

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

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

Management Board

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

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

Executive Board

Some serious questions arise with regard to the Executive Board of the Agency¹⁹. As currently proposed, it will be composed of two representatives from the Management Board (the Chairperson and Vice-Chairperson) and two Commission representatives. As there are also two Commission representatives on the Management Board, there is a possibility that the Executive Board will be composed entirely or in majority by Commission representatives. This is unacceptable for an independent institution. An express provision prohibiting either of the Commission representatives from being elected Chairperson and Vice-Chairperson of the Management Board, and therefore sitting on the Executive Board must be included. Alternatively, if the intention is that the same two Commission representatives sit on the Management and the Executive Boards, this should be clarified in the wording of Article 12(1) of the draft Regulation.

¹⁶ Draft Regulation, Article 11(8).

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

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

¹⁹ Draft Regulation, Article 12.

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

Director

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

Amnesty International welcomes Article 15 of the draft Regulation which recognises the need for the Management Board, the Director and members of the Forum to act independently. Nonetheless, Amnesty International is concerned that other provisions in the draft Regulation do not reflect this crucial need for independence.

Firstly, the Director will be appointed by the Management Board on the basis of a list of candidates proposed by the Commission²⁰. Amnesty International strongly suggests that the list of candidates include possible recommendations by national human rights commissions and prominent NGOs throughout the EU. Furthermore, Amnesty International supports the involvement of the European Parliament in the vetting of the Director, on a compulsory and not on a (as currently drafted) discretionary basis.

Secondly, it is again the Commission that will recommend the Director's continued employment, and institute possible dismissal. These clear and direct links between the appointment, terms of employment and dismissal of the Director of an independent Agency and the Commission are inappropriate.

Amnesty International makes the following recommendations with regard to the establishment of the Agency:

7. The scope of activities by Member States that are to be considered as falling within the sphere of "implementing Community law" should be clarified.
8. The Council should set out the criteria it will use when deciding whether to consult the Agency in its role under Article 7 TEU.
9. The European Parliament should be granted the right to request the assistance of the Agency regarding third countries.
10. The Agency should be open for interaction with individuals, at least to the extent that they should have a right to submit information.
11. The Agency should be mandated to conduct a human rights assessment where concerns arise in relation to Council redrafting of proposed legislation, or where a Member State puts forward a legislative proposal.
12. The Commission should clarify the interconnections between the Agency and the European Institute for Gender Equality.
13. The Network of Independent Experts in Fundamental Rights should be enabled to continue as an autonomous entity, retaining its current remit, and as such also to serve as a "network" member for the Agency.
14. The Agency should recognise as one of its aims the establishment in each Member State and candidate country of a national human rights institute or commission, in accordance with the UN Paris Principles, which would also serve as a "network" member for the Agency. The Preamble to the Regulation could also refer to the Paris Principles as a guide for the Agency itself.
15. The independence and pluralism of the Agency must be guaranteed through the appointment, terms of employment and dismissal of the Director, the Management Board and the Executive Board.

²⁰ Draft Regulation, Article 13.