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CCBE POSITION ON THE EUROPEAN COMMISSION PROPOSAL FOR A COUNCIL REGULATION ESTABLISHING AN EU AGENCY FOR FUNDAMENTAL RIGHTS

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Introduction

1. The Council of the Bars and Law Societies of Europe (CCBE), which through the national Bars and Law Societies of the Member States of the European Union and the European Economic Area represents more than 700,000 European lawyers, is responding in this paper to the Commission's proposal for a Council Regulation Establishing an EU Agency for Fundamental Rights¹.
2. In December 2003, the European Council agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia (EUMC) and to extend its mandate to become a Human Rights Agency. This idea was included in "the Hague Programme; strengthening freedom, security and justice in the European Union", adopted on 4-5 November 2004.
3. The European Commission responded to the Council proposal by issuing a Communication on the Fundamental Rights Agency in October 2004, thereby launching a public consultation on the remit, rights and thematic areas, tasks and structure of an agency.² During the public consultation procedure, the CCBE expressed its support for the creation of a Fundamental Rights Agency and issued a number of recommendations to the Commission.
4. In June 2005, the Commission presented its formal proposal for a Council Regulation Establishing an EU Agency for Fundamental Rights, to become operative in January 2007. This paper presents the CCBE's position on the proposed Regulation, together with an overview of the existing framework of human rights protection in Europe.

EU's existing approach to human rights

5. Beyond the EU level, the Council of Europe (COE) – which comprises 46 Member States, including the 25 EU Member States – is the main organisation promoting and protecting human rights and the rule of law in Europe through education, monitoring and direct enforcement of the obligations found in the European Convention on Human Rights (ECHR) and other COE treaties. Within the COE, the European Court

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

² All documents relating to the consultation, including the written replies, a report analysing them as well as a report on the hearing were posted on the European commission's Freedom, Security and Justice website and are accessible at:

http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm

of Human Rights is the judicial organ that decides on disputes concerning non-compliance with human rights obligations under COE treaties. The COE also includes a number of bodies that actively monitor respect for European human rights standards. The work of the European Commission against Racism and Intolerance (ECRI) covers all the necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Committee of Social Rights have specific mandates to monitor implementation of the COE treaties that address specific issues on torture and degrading treatment and economic and social rights. The Commissioner for Human Rights promotes education, awareness and respect for human rights in member states through visits, dialogue and the preparation of reports, opinions and recommendations. In addition, the Parliamentary Assembly, the Committee of Ministers and the Congress of Local and Regional Authorities of the COE carry out political monitoring, both thematic and country-specific, mainly on issues relating to human rights.

6. Within the EU legal system, the European Court of Justice recognised the existence of fundamental rights at Community level at an early stage, and has steadily extended them. Under the Court's continuing case-law, fundamental rights form part of the general principles of Community law and are equivalent to primary law in the Community legal hierarchy.
7. Over the past decades, the EU has gradually undertaken various efforts to create a framework of human rights protection within its institutional system. A noticeable milestone in this respect was the creation in 1992 of what is now Article 6(2) of the EU Treaty, which commits the EU to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The Treaty of Amsterdam introduced a provision in Article 7 of the EU Treaty giving the Council a discretionary power to determine the existence of a serious and persistent breach by a Member State of fundamental freedoms. In this case, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaty to the Member State in question. The Treaty of Nice supplemented this mechanism with a new procedure relating to a clear risk of a serious breach by a Member State of these principles (Article 7(1) TEU).
8. A significant step forward was made with the creation in 2000 of a European Charter of Fundamental Rights and the proposal to give it full legal effect by incorporating it into the EU Constitution. Although the Charter was solemnly proclaimed by the Commission, Parliament and Council and was politically approved by the Member States, it still lacks official legal status. More recently, a series of developments took place in the area of human rights, including the establishment of an EU Network of Independent Experts in Fundamental Rights in 2002, the Commission communication on the possible application of Article 7 of the EU treaty in 2003 regarding human rights compliance by EU Member States, and the establishment of a Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities, headed by Commission President Barroso, in 2004.

9. However, despite these efforts, the European Union human rights system continues to be too heavily dependent on judicial remedies, and fundamental rights are still being granted somewhat indirectly to citizens without being immediately visible. While effective judicial protection is one of the fundamental requirements in a democratic society, it does not guarantee that rights will not be violated. Therefore, more proactive and preventive mechanisms are necessary in the EU legal space to ensure more legal certainty and coherence in fundamental rights protection. The CCBE believes that the Agency, if equipped with a sufficiently substantive mandate, could play a role in this regard.

About the Commission's proposal

The remit of the Agency

10. The Agency's main activities will be the EU-wide collection and analysis of information, opinions and the dissemination of information, helping the EU itself to fully respect fundamental rights in its action. The terms of reference for the Agency are the Charter of Fundamental Rights and the fundamental rights defined in Article 6(2) of the EU Treaty. The inclusion in the terms of reference of the rights guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, seems sensible since it allows the Agency to give its opinion on the basis of human rights standards which go beyond the rights of the Charter. Moreover, it still remains to be seen if and when the Charter becomes legally binding, and, in relation to third countries, it would also be necessary to apply the more universal human rights regime of the Council of Europe.
11. The Agency's substantive mandate is in principle limited to the Community and to the Member States when applying Community law, thus excluding Member States' human rights observance generally. Besides concerning itself with the situation of fundamental rights at the EU level and in those candidate countries and potential candidate countries which participate in the Agency, the Commission may ask the Agency to submit information and analysis on third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements. Through the parallel Council Decision, the Agency will also be allowed to pursue its activities in areas referred to in Title VI of the EU Treaty; that is, police and judicial cooperation in criminal matters.
12. While on the one hand the Agency's mandate should be sufficiently broad to carry out its tasks effectively, its mandate should also be adequately focussed and coherent in order to allow the Agency to develop realistic and achievable goals. Collection and analysis of human rights data at Member State level is already ensured by existing instruments such as the Network of Independent Experts, national ombudsmen and human rights institutes, the OSCE and various Council of Europe human rights bodies which monitor the situation in EU Member States irrespective of whether a specific matter can be regarded as implementation of EU law or as an autonomous, domestic issue. The CCBE agrees, therefore, with the Commission's proposal to limit

the remit of the Agency's mission to fundamental rights protection within the scope of EU competences and not to include human rights observance in general.

13. The CCBE also welcomes the Commission's proposal in Article 4(e) that the Council may exploit the expertise of the Agency if it finds it useful when acting on a proposal by one third of the Member States, by the European Parliament or by the Commission during the procedure under Article 7 TEU. A systematic and permanent monitoring of the Member States for the purposes of Article 7 would not be practical as it could overload the Agency with work. A special competence in this respect would also be unnecessary since extremely serious human rights violations would also be observed when the Agency monitors how Member States apply EU law.
14. As to the partial extension of the Agency's remit to third countries, it would be useful – as the Commission proposes in Article 3 (3) – to task the Agency with providing, upon request, information and analysis on fundamental rights issues in third countries that have or are about to have an association agreement with the EU. Since the early 1990s the EU has more or less systematically included a human rights clause in its association agreements with third countries and it would be appropriate to allow a body to verify objectively whether these clauses are being executed. It would, however, also be useful if the agency could be invoked to supply information and recommendations on major human rights concerns which may arise outside Europe, in countries not covered by such an agreement. The CCBE, therefore, proposes an extension of the remit of the Agency to the effect that it may also be called upon to supply information and recommendations on fundamental rights issues in third countries where major human rights concerns arise.

The tasks of the Agency

15. In order for the Agency to bring added value and fill in existing gaps in the EU's human rights system and avoid duplicating the work of other organisations, the Agency's main task should be promoting human rights in EU decision and policy making and providing advice at pre-legislative stage. As such, the Agency could usefully contribute in highlighting and mainstreaming human rights issues when EU legislation and policies are being developed and prevent the adoption of measures that might run counter to fundamental rights.
16. In the Commission's proposal, one of the tasks of the agency mentioned in Article 4 (d) is to "formulate conclusions and opinions *on general subjects* for the Union institutions and the Member States when implementing Community law". The second paragraph of the same Article further states that these conclusions and opinions "shall not concern questions of the legality of proposals from the Commission under Article 250 of the Treaty, positions taken by the institutions in the course of legislative procedures or the legality of acts within the meaning of Article 230 [on judicial proceedings] of the Treaty". The words "on general subjects" together with the second paragraph of Article 4 might give rise to doubts as to whether the Agency could express its views on the compatibility of certain provisions within legislative and policy proposals with human rights standards. Although the Agency should not have the legal competence to hinder or interfere with the legislative and judicial procedures

established in the EU, it should be able, in an advisory capacity, to assess the human rights implications of policy and legislative initiatives, and give its opinion on their compliance with human rights norms. This would also be necessary to achieve the objective set out in Article 2, which provides that the aim of the agency is to support the EU when it takes measures or formulates courses of action to fully respect fundamental rights. The CCBE proposes, therefore, a stipulation in the Regulation making more explicit the Agency's advisory capacity at the early stages of policy and decision making that impact human rights.

17. An important task of the Agency will be to gather objective, reliable and comparable information on the development of the situation of fundamental rights. Crucial to this task is the capacity and right to access information and hear relevant persons. In order to gain an objective and unbiased understanding of the human rights situation, the Agency should be allowed to collect information in an active fashion through its own data collection mechanisms. If the agency were to rely solely on passive data collection, it could be prevented from discovering human rights infringements and its independent character could be put into question. Article 4 (a) of the Regulation provides that the Agency is to collect information "communicated to it" by Member States, EU institutions and other relevant (inter)national bodies and organisations. Article 6 complements this by providing that the Agency "shall set up and coordinate the necessary information networks" for data collection. Thus, the Regulation seems to endow the Agency with a combination of active and passive data collection methods. However, the Regulation itself fails explicitly to ensure the Agency's right to access information and to hear relevant persons. Moreover, there is no provision requiring Member States to send regular reports to the agency. The CCBE proposes, therefore, to include a provision obliging Member States to send relevant human rights data to the Agency in the form of regular reports and to ensure explicitly the Agency's right to hear persons and obtain information necessary to consider the human rights situation in a particular Member State or Member States.

Conclusion

18. The EU has gradually but steadily committed itself to human rights in both its internal and external affairs. The creation of a human rights Agency would constitute another step forward that could significantly contribute to the development of a more integrated and preventive approach to human rights protection. However, in the Commission's proposal the Agency still lacks a number of attributes in order for it to play such a role and to usefully complement the existing mechanisms of fundamental rights observation at European and national level.
19. The CCBE considers that the main added value of the Agency would be its advisory capacity at the early stages of decision and policy making in order to assist the EU fully to comply with fundamental rights standards when it develops policies and legislation. The current text of the Commission's proposal is not sufficiently clear about this. Moreover the proposal fails to allow the Agency to be called upon for advice on major human rights concerns which may arise in third countries, and it omits a provision requiring Member States to regularly report to the agency and giving the Agency active research powers.

20. The CCBE accordingly proposes the following:

- *to stipulate in the Regulation more explicitly the Agency's advisory capacity at the early stages of policy and decision making that impact human rights;*
- *to extend the remit of the Agency to the effect that it may also be called upon to supply information and recommendations on fundamental rights issues in third countries – which are not covered by an association agreement – where major human rights concerns arise; and*
- *to include a provision obliging Member States to send relevant human rights data to the Agency in the form of regular reports and to ensure explicitly the Agency's right to hear persons and obtain information necessary to consider the human rights situation.*

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