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The EU Fundamental Rights Agency: Satellite or Guiding Star?

Raison d'être, tasks and challenges of the EU's new agency

Gabriel Nikolaij Toggenburg

At the beginning of March, a new agency of the European Union (EU) began its work in Vienna. The European Fundamental Rights Agency (EFRA) will replace the European Monitoring Centre on Racism and Xenophobia (EUMC), which was created in 1998. In contrast to the EUMC, the new agency will be responsible for the entire area of fundamental rights. As the EU and the Council of Europe already have a considerable amount of instruments in the field of human rights protection, the necessity of an additional one in Europe is not entirely uncontroversial. The new agency does, however, have considerable potential for improving the EU's human rights policy, for creating more synergies in an "integrated European area of human rights" and for a focused debate on issues related to "diversity management".

According to a recent Eurobarometer survey (EB 66), human rights are among the three values which are of the most personal importance to Europeans in all of the EU member states. Historically, it is thanks to the Council of Europe that Europe has gained a human *rights* profile, which goes beyond the purely *political* identity rhetoric.

This profile has however not only been shaped by the European Convention on Human Rights (ECHR), the hobby horse of the Council of Europe. Rather, Europe's "human rights culture", now also propagated by the EU, is comprised of a complicated patchwork of legal texts, court rulings, opinions and reports.

Within the EU's territory alone, this network of norms and instances includes 27 national legal cultures, at least two dozen human rights treaties based on international law and numerous national and international institutions which are active in the field of human rights. Even within the framework of UN instruments, there were over 1000 written recommendations on the human rights situation in the countries of Western and Eastern Europe from treaty implementation monitoring bodies, independent experts and other commissions in 2006. In light of this large amount of instruments, institutions and information, the "human rights conduct" of states would appear to be sufficiently

documented and evaluated. Since the Council of Europe created the office of a European Commissioner for Human Rights in 1999, whose mandate is to promote awareness and disseminate information on European human rights, these tasks can also be considered to be covered. Within this context, the Secretary General of the Council of Europe's remarks on the idea of an EU human rights agency—"With all the best will of the world I can't understand what it's going to do"—are fairly understandable.

The two points at issue: bureaucratisation and duplication

The reasons to approach the new agency with scepticism were extremely diverse. For instance, Germany, Slovakia and Great Britain succeeded in uniting about a quarter of the member states to join them in preventing from the outset the agency's remit covering the areas of police and judicial cooperation. The main reason for this was classic sovereignty concerns, which had nothing to do with the idea of the fundamental rights agency itself. On the other hand, there were also critical voices, particularly from the European Parliament and certain NGOs. They saw this kind of mandate limitation as an argument against the agency itself, the general idea being better to have no agency at all than a weak one. There was also a small minority who were against the creation of the agency in principal. In Germany, for example, there was resistance to the project up until the very end.

The tug-of-war between the member states began with the appropriate proposal in the European Council of 13 December 2003 and did not end until the middle of February 2007, when the regulation founding the agency was formally adopted in the Council. The 48 month marathon debate was characterised by rational arguments as well as populism, national sovereignty interests and silent disinterest on the part of some states.

The criticism levelled at the agency can be summarised in two words: bureaucratisation and duplication. As far as the risk of bureaucratisation is concerned, it should be emphasised that the decision to build a fundamental rights agency does not imply the creation of a further EU body, but replaces an existing one, namely the EUMC.

However, the EUMC's funding will, over the next few years, gradually be trebled to reach an annual budget of 24 million euros by 2013. Similarly, the number of staff is due to be increased to a maximum of 100 members. While the EUMC was the smallest agency up until now, with 37 staff members and a budget of 8 million euros, the fundamental rights agency when fully developed will be one of the middle ranking agencies.

The wider context: the risk of agency inflation

Even adapting the Vienna agency's funding and personnel to its new mandate was enough to cause considerable resistance. However, this can only be understood when looked at within the context of the complete lack of a coordinated "agency policy". The fundamental rights agency is a good example of how EU agencies develop in the grey area of intergovernmental horse-trading. In this spirit, representatives from the member states pressed ahead in the European Council with their decision of 13 December 2003, without consulting the other EU institutions or the Council of Europe and without incorporating the agency into a well-thought out, comprehensive EU human rights strategy.

The current 22 Community and 6 EU agencies derive their *raison d'être* from assisting the Commission or the Council General Secretariat by providing expertise independent of politicisation for the European decision-making process. In addition, the agencies enable an intense, institutionalized dialogue with the relevant spheres of interest. All this aims to increase the Union's transparency and improve

relations with the general public. The cost of the EU agencies, which currently employ over 2600 staff and permanent officials, runs to around one billion euros annually. With the exception perhaps of EUROPOL, the level of public familiarity with these bodies is extremely low. The agencies' recent PR initiative—"Whatever we do, we work for you" is not going to change this. Of course, this in itself does not say anything about the necessity and the quality of the EU agencies. The image evoked by Commission President Barroso, who compared the agencies to satellites, certainly appears to be unfortunately chosen: Barroso should not be surprised if, from the citizens' perspective, what agencies mainly have in common with satellites is that they are neither visible nor well-grounded.

There are no legal criteria and procedures whatsoever for determining the seat of agencies. In light of the fact that ten, or to be more precise, ten new member states do not host a single agency (while Greece for example has four agencies), there is a risk that the EU shall in the coming years attempt to achieve a more just geographical distribution through "agency inflation". Nevertheless, the proliferation of bureaucracy *alone* is not a sufficient argument against the fundamental rights agency. For where bureaucracies cooperate and work efficiently to fulfil necessary tasks, they should be welcomed rather than be seen as an evil.

The crux: is there a risk of duplication?

The important issue is therefore the second argument put forward by critics, namely duplication of tasks and procedures. Within this context, opponents of the project have referred back to the Council of Europe's existing instruments and structures. What needs to be examined therefore is to what extent the fundamental rights agency adheres to the two principles suggested by the Council of Europe: the principle of non-

duplication and the obligation to cooperation and coordination. If the "agency constitution" (in other words the regulation establishing the fundamental rights agency) takes these demands into account, then even the self-appointed lawyers of the Council of Europe can be satisfied with the new agency.

If there are structural duplications, these can be addressed by minimising areas in which both organisations are responsible. In the case of unavoidable parallel competences, duplication can be countered through stronger cooperation mechanisms. Both ways of reducing duplication are mentioned in the agency constitution.

Generally speaking, the agency is not—in contrast to the Council of Europe—responsible for the human rights conduct of the member states insofar as this is limited to the national level. And even within the EU context, in other words, when member states are implementing EU law, the agency's main focus will not include submitting regular country reports. Instead, the agency will submit thematic opinions on matters of particular importance to EU law. Against this background, it makes sense that the role originally discussed for the agency—within the framework of the procedure set out in Article 7 of the EU Treaty (the procedure for political sanctions, introduced in 1997 by the Amsterdam Treaty)—was not included in its remit: the agency will neither regularly examine whether or not member states adhere to the Union's values and principles, nor must the Council consult the agency before it decides that there has been a severe and sustained violation of human rights by a member state.

Another important point is the fact that the agency (except in relation to candidate states) is not responsible for third states, thus considerably limiting the potential for overlap with the work of the Council of Europe.

Similarly, the agency must, as a general rule, take the work and results of the Council of Europe's specialised bodies into con-

sideration when collecting information. The agency constitution specifically mentions the Council of Europe's monitoring instruments and the Commissioner for Human Rights. As far as the development of its multi-annual programme and the individual yearly programmes, as well as relations with civil society are concerned, the agency is explicitly obliged to ensure synergies with the Council of Europe. These internal obligations are underpinned by the fact that an independent person, appointed by the Council of Europe, is among the 30 members of the agency's Management Board. In addition, it was agreed during negotiations in the Ministerial Council that the Council of Europe's representative may also participate in the Executive Board. Towards the end of negotiations a new provision was introduced: a Scientific Committee, consisting of eleven independent experts and responsible for ensuring the scientific quality of the agency's work. Also this scientific control might contribute to avoid overboarding institutional egocentrism. All in all, it can be said that the agency constitution certainly contains very useful specifications for cooperation and coordination between the Council of Europe and the EU. This does not mean that the work of the Council of Europe takes precedence over that of the EU. What can be said is that the agreement to be reached between the two organisations (see below) indicates that cooperation and coordination will not be one-way traffic.

The agency as a centre of mediation in a new integrated human rights area in Europe

The agency constitution provides for the EC signing an agreement with the Council of Europe. It is to be hoped that its content will go beyond that of the one reached between the Community and the Council of Europe on what was up until now the EUMC. It would make sense to establish in the agreement an institutionalised, far

reaching network of European monitoring organisations which specialise in human rights. For after 50 years of international cooperation, it is high time to institutionalise *interorganisational* cooperation in Europe. In view of the agency's broad mandate, many other monitoring bodies such as the Court of Human Rights, the Commissioner for Human Rights or the Advisory Committee of the Framework Convention for the Protection of National Minorities, need to be included in a non-binding yet formalised information network. Here, the agency can build on initial experience of the EUMC and its inter-agency meetings with the Office for Democratic Institutions and Human Rights (ODIHR, OSCE), the European Commission against Racism and Intolerance (ECRI) and the Office of the High Commissioner for Human Rights (OHCHR, United Nations). The hope was also expressed that the EU fundamental rights agency could promote the setting up of a network between the various national human rights institutes. If the Vienna agency succeeds in institutionally linking its "National Focal Points" (the NFP of the EUMC in Germany has up until now been the European Forum on Migration Studies of the University of Bamberg), the national human rights institutions, the non-governmental organisations active in the field of human rights, the Council of Europe and the various monitoring bodies for international human rights treaties as well as facilitating a constant exchange between them through a new electronic database, then the fundamental rights agency could become a network of networks. By establishing new axes of communication, it would be able to get the wheels of human rights protection in Europe rolling without having to reinvent them.

Even during the discussion on the human rights agency, networking and cooperation between the EU and the Council of Europe was driven forward. The critical debate on the agency made the need for closer synergetic relations between the

Council of Europe and the EU all the more clear. This new awareness is expressed, for example, in the Warsaw Action Plan of May 2005. In this document, the Heads of State and Government of the Council of Europe agreed to give inter-organizational cooperation renewed impetus. The ten “guidelines for relations between the Council of Europe and the European Union” do not just call for the EU’s accession to the ECHR; after examining the situation regarding respective competences (parts of the conventions are beyond the EU’s remit), the EU is also to accede to other conventions.

In particular the guidelines call for ensuring greater compatibility between the legal texts of both organisations. The European Union is even called upon to transpose into European Community law those parts of the Council of Europe Conventions which are within its remit and to refer back to the Council of Europe’s competence in all matters concerning human rights. Within this context, it does not seem too much to expect that rather than leading to a duplication of responsibilities, the agency shall act as a positive catalyst in closer co-operation between the EU and the Council of Europe.

The Mandate: Data collection, completing expert reports and communication

In contrast to some national human rights institutes such as those in Poland, Portugal, Spain or Sweden, the EU fundamental rights agency is not responsible for individual rights protection. An EU citizen who feels that his rights have been violated cannot approach the agency, but continues to be dependent on the European Court of Human Rights in Strasbourg (Council of Europe). The agency has a purely supportive role, does not reach any legally binding decisions and acts in a purely advisory capacity. The agency’s central goal is to support the EU bodies, as well as the member states in matters of human rights policy.

The agency is to achieve this goal through four tasks:

- ▶ collecting, evaluating and disseminating information on matters related to human rights protection;
- ▶ reporting, which not only includes submitting an annual report on the fundamental rights situation in the EU, but also and in particular, providing specific, thematic opinions;
- ▶ developing a communication strategy within the field of human rights as a corner stone for dialogue with civil society (which will also be flanked by a fundamental rights platform for non-governmental organisations);
- ▶ conducting academic research, which includes establishing academic networks.

In all of these areas, the agency can act on own initiative.

The issue of whether the agency was to be permitted to react to relevant Commission drafts and the opinions on these of other EU bodies within the framework of the European legislative process, remained controversial up until the very end. The original Commission proposal specifically ruled this out and thus denied the agency a central instrument in following EU policy from a human rights perspective. Fortunately, the final regulation allows the agency to submit reports and opinions on such documents from the EU institutions—however, only when the institution involved specifically requests this. This limitation is somewhat unfortunate since such a competence to submit reports would not have represented the competence to establish non-compliance within the framework of infringement proceedings, but merely the possibility of examining relevant proposals and opinions at all stages of the legislative process from the perspective of a human rights expert. In May 2005, the EU Commission once again underlined that all legislative proposals were to be examined to assess their compatibility with fundamental rights. Fundamental rights thereby have particular

importance as a transversal value within the context of an anticipatory impact assessment for European legislation. The Commission does not, however, appear to have wanted to give the agency too prominent a role, perhaps because it feared the latter could be politically instrumentalised during the legislative process. It will therefore depend on the European Parliament whether the agency will be involved in the legislative process on a regular basis. The agency for its part will have to ensure that it retains strict political neutrality and the highest possible level of competence in its capacity as an expert. This would foster inter-institutional trust and lay the cornerstone to the agency one day being entrusted with a significantly more influential role in following the legislative process.

The limitations to the mandate: third states and the third pillar

The above described tasks of the agency are limited both in terms of their subject area and in their geographic scope. As far as the territorial limitation is concerned, the agency's tasks are restricted to the EU. In the case of the official candidate states for Union membership, Croatia, Macedonia and Turkey, the relevant association council can unanimously decide that the agency is to deal with fundamental rights issues in these states, in so far as this is necessary to facilitate legal implementation of the EU acquis. This specific restriction to the EU's body of law could imply that those areas of human rights which do not fall within the scope of Community law (but which did play a role in candidate monitoring of former candidate states), such as prison conditions, children's rights and the rights of ethnic groups fall outside of the agency's remit.

As far as the restriction in terms of subject area is concerned, the Vienna agency must stay within the scope of Community competence when carrying out its work. According to the agency constitution this means that any actions on the part of states

which are not related to implementing EC law are outside the agency's remit. This restriction is however—in accordance with the case law of the European Court of Justice— to be interpreted in a very restrictive sense: even those measures taken by member states which fall within the field of application of Community law without involving any direct implementation of a particular EC directive, are part of the agency's remit.

The area outside of Community law—that of the so-called second and third pillars—lies beyond the agency's remit. It is difficult to understand the exclusion of the whole complex of police and judicial co-operation in criminal matters. This does, after all, concern a group of policy fields which frequently contain implications for fundamental rights (for example, criminal justice measures taken to combat the risk posed by terrorism). As discussed above (see p. 2) the question of expanding the agency's mandate to include the third pillar was a particularly contentious issue during Council negotiations. The appropriate *political* resistance on the part of some (according to reports - seven) member states was legally reinforced by the Council's Legal Service. Of course, the issue of extending the mandate is in the end a political one, as it is decided upon unanimously in the Council.

According to the agreement to disagree reached at the end of the Finnish Presidency in December 2006, extending the mandate will be discussed once again before the end of 2009. In the meantime, what is important is that the Ministerial Council was able to agree on a declaration which allows EU institutions to decide whether to involve the agency in third pillar matters within the framework of the legislative process. Within this context, the Council has declared that the agency's expertise could also be helpful for member states implementing EU law. In the coming years, the agency will therefore be on "stand by" as far as third pillar issues are concerned. The more often it is involved on a voluntary basis and the more it can prove its worth

through its supportive role, the more likely it is that by the end of 2009, it will no longer be regarded as “the ogre of the third pillar”.

Ethnic Minorities and Diversity Management

The agency mandate is, however, not only restricted in terms of subject matter and geographic scope. As discussed, the extent of its intervention is also fairly narrow due to its purely consultative role. This reduced level of impact in vertical terms is countered by an extremely wide remit in horizontal terms: the agency is in fact responsible for the entire spectrum of human rights. The issues the Vienna agency can deal with range from protection of personal data, freedom to choose an occupation, freedom of movement, to the presumption of innocence. In order not to lose itself within this wide spectrum, the agency will soon need to set convincing points of orientation. The agency constitution provides clear specifications for this. According to the constitution, the agency is obliged to have one fixed focus in each multi-annual programme: the fight against racism, xenophobia and related intolerance. The regulation clearly states that the agency “should continue to cover the phenomena of racism, xenophobia and anti-Semitism, the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights”. This means that the agency’s main task shall involve comprehensively dealing with the legal and de facto situation of a group of people, who find themselves—particularly on the grounds of ethnicity—in a minority position. In other words, the core competence of the agency shall involve those human rights issues which arise in relation to asylum, integration, anti-discrimination, affirmative action, social inclusion, ethnic and linguistic discrimination, political participation, identity protection, immigration and intercultural dialogue; in short,

so-called “diversity management”. Particularly in light of the fact that firstly the whole of Europe is facing the twin challenge of immigration and integration; secondly, that the models of assimilation (for example in France), as well as that of multiculturalism (for example in Great Britain) have clearly and drastically failed and that thirdly, neither the Council of Europe nor the OSCE have concentrated expertise in the field of diversity management, it seems entirely appropriate to regard the EU agency as a future think tank and consultative service provider on these issues.

The network of independent fundamental rights experts: maintaining a proven practice

In particular areas, especially those outside of the agency’s core competence, there will always be a need for external expertise. In these cases, the EU network of independent fundamental rights experts should be approached. The mandate of the network, created in September 2002 by the Commission upon the EP’s recommendation, ended without extension in September 2006, despite the fact that its work was widely praised and its value undisputed. It is questionable if and to what extent the network could continue to exist alongside or within the agency. An argument for continuing this practice and ensuring a certain independence for the agency is the fact that in the network a highly skilled legal expert was responsible for each member state and these 25 legal experts provided a *normative* evaluation of the human rights situation in all of the member states and the EU. On the other hand, synergies are also important for an expert network: the network should be able to fall back on the agency’s academic assistants and administrative staff. All in all, this points to a compromise solution, namely a long term revitalisation of the association of experts as an information network in accordance with the agency constitution.

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A “to do” list for the first year

- ▶ The director and the Management Board must be appointed quickly and the positions given to highly qualified personnel. These people will need to have specialised knowledge, as well as managerial skills in order to set the agency on the right track and establish its initial credentials in a dialogue with states and institutions.
- ▶ The far-reaching goals and tasks in the agency constitution must be swiftly translated into practical core areas upon which basis a specific (and also international) division of tasks can be established. The experience of the EUMC has shown how important it is to first agree internally on an appropriate and clear mission in order to be able to present this externally with confidence. The director could convince the member states personally of the agency and its mission through a large scale “tour des capitales”.
- ▶ In formulating a mission, the agency should not be guided by external feasibility studies, but rather by the “fundamental rights platform” foreseen in the agency constitution. This NGO cooperation network must become operational as soon as possible. As regards its future work, the agency should always regard the fundamental rights platform as its source of legitimisation and partner.
- ▶ The agreement with the Council of Europe should be negotiated in such a way that creates the opportunity for an Europe-wide “integrated area of human rights” as described above. Other actors in this human rights area must be approached without delay—particularly at the level of mere “technical” permanent officials. An additional possibility within this context would be a Europe-wide conference at which the relevant networks and institutions could together develop new coordination channels. For their part, it is down to the EU member states to take the agency seriously and

appoint appropriately qualified personnel as so-called National Liaison Officers.

If the agency follows this to-do list, then it will not end up as a pale administration satellite but will rise as a widely recognised guiding star in matters of human rights. This would be a welcome step towards the European Union finding its place, which is perceived by Europeans—according to the Eurobarometer survey mentioned at the beginning of this article—as having the protection of human rights as its strongest characteristic.