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The need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights

Report¹
Committee on Legal Affairs and Human Rights
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Summary

Since the creation of the European Union Agency for Fundamental Rights in 2007, there has been concern within the Council of Europe about unnecessary duplication by the Agency of the Council's work.

Since 2007, circumstances have changed and, following the entry into force of the European Union Lisbon Treaty, European Union competence in the field of human rights has further expanded. It is therefore now time to take stock of co-operation undertaken between the Agency and Council of Europe, according to the Committee of Legal Affairs and Human Rights. The Agency and the Council of Europe have established appropriate forms of co-operation and consult each other in their daily work. Although both institutions may sometimes work on the same or similar issues, they use different tools in carrying out their respective activities. The Agency's data collection and evidence-based analyses may complement the work undertaken by the Council of Europe's monitoring bodies.

The Committee welcomes this co-operation. It underlines the need for the European Union to accede to the European Convention on Human Rights without delay and for the Agency to retain – in its work – the Council of Europe's *acquis* in the human rights field as its main point of reference.

¹ Reference to committee: Doc. 11521, Reference 3430 of 14 April 2008.

A. Draft resolution²

1. The Parliamentary Assembly recalls that, in its Resolution 1427 (2005) and its Recommendation 1744 (2006), it expressed its concerns about the duplication of certain Council of Europe tasks by the European Union Agency for Fundamental Rights.
2. The Assembly notes that, even though the Agency's founding regulation and the 2008 Agreement on co-operation between the Agency and the Council of Europe, provide for some safeguards aimed at avoiding duplication of tasks, such a risk still exists in principle and concerns remain as to the risk of confusion in interpreting human rights standards in the 27 Council of Europe member states belonging also to the European Union. That is why the rapid accession of the European Union to the European Convention on Human Rights (ETS No. 5) is indispensable.
3. However, the Assembly notes that the current context is different from the one in which its previous texts were adopted: since 2007, the Agency and the Council Europe have established appropriate forms of co-operation. Both institutions use different tools in conducting their daily activities. The Agency's data collection and evidence-based analysis may complement the work undertaken by the Council of Europe, and in particular by the latter's monitoring bodies.
4. The Assembly stresses, however, that such fruitful co-operation in the future is dependent on the Council of Europe's *acquis* in the area of human rights protection at the European level being used as the main point of reference in the Agency's work.
5. The Assembly also notes that, following the entry into force of the European Union Lisbon Treaty on 1 December 2009 and the adoption by the European Union Council of the "Stockholm Programme" in December 2009, the Agency's substantive remit has been considerably expanded. The Assembly also notes with interest that the European Union has appointed a Commissioner for Justice, Fundamental Rights and Citizenship.
6. The Assembly calls upon European Union member states and institutions to take all necessary measures to avoid unnecessary duplication of tasks of the Council of Europe by the Agency, in particular by:
 - 6.1. ensuring that, in areas in which both the Council of Europe and the Agency conduct activities such as monitoring and/or data collection, the activities of both organisations complement each other and generate added value;
 - 6.2. applying the co-operation methods established in the relevant legal instruments concerning the functioning of the Agency and its relations with the Council of Europe, and in particular the 2008 Co-operation Agreement;
 - 6.3. ensuring that the Council of Europe's *acquis* in the area of human rights protection is always used as the main point of reference in the Agency's work;
 - 6.4. consulting the Council of Europe at an early stage when drafting its strategic documents such as the annual programmes and the multi-annual framework;
 - 6.5. reflecting once again on the allocation of financial and other resources to the different European human rights protection mechanisms in order to distribute them in a way which ensures their most effective use.

² Draft resolution adopted unanimously by the Committee on 27 April 2010.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution ... on the need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights, since the establishment of the latter in 2007.
2. The Assembly recommends that the Committee of Ministers:
 - 2.1. draws the attention of the European Union to the continuing need to avoid unnecessary duplication with the Council of Europe' mechanisms operating in the human rights field;
 - 2.2. in order to reach the above objective:
 - 2.2.1. holds regular exchanges of views with the Agency's senior representatives;
 - 2.2.2. ensures that the Council of Europe's *acquis* in the area of human rights protection is always used as the main point of reference in the Agency's work;
 - 2.2.3. ensures that there is a mutual exchange of relevant data between the Agency and the Council of Europe bodies, in particular the latter's monitoring bodies, in the areas in which both the Council of Europe and the Agency conduct activities, and that, to this end, staff members of both institutions work in close contact;
 - 2.2.4. ensures that the Agency's representatives are invited to meetings of the relevant Council of Europe intergovernmental committees and to the meetings of its other bodies which conduct activities on subjects of common interest;
 - 2.2.5. enhances co-operation between the Council of Europe and the Agency, inter alia through exchanges of staff, joint conferences, publications and statements on issues of common interest;
 - 2.2.6. continues to ensure that the independent person appointed on behalf of the Council of Europe on the Agency's Management and Executive Boards – as envisaged in the 2008 Agreement on Co-operation between the Agency and the Council of Europe – is of the highest calibre.

³ Draft recommendation adopted unanimously by the Committee on 27 April 2010.

C. Explanatory memorandum by Mr Boriss Cilevičs, rapporteur

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Appendix: See document AS/Jur/Inf (2010) 02 on the need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights

1. Introduction**1.1. My mandate**

1. The present report stems from a motion for a resolution on "The need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights" (Doc. 11521)⁴, tabled by Mrs Leutheusser-Schnarrenberger (Germany, ALDE) and other members of the Assembly on 31 January 2008. On 2 June 2008, the Committee on Legal Affairs and Human Rights appointed me as rapporteur.

2. The motion for a resolution reiterated a number of concerns regarding the dangers of the European Union Agency for Fundamental Rights ("the Agency") replicating tasks performed by the Council of Europe. Following my appointment as Rapporteur, I therefore decided to look more closely at the problems that this might create, as well as the specific areas in which the risk of duplication is most real.

3. On 11 September 2009, the Committee held an exchange of views with experts on these issues, in order to identify possible areas of duplication of the Council of Europe's and the Agency's tasks. The following experts took part in this hearing:

- Mr Morten Kjaerum, Director of the Fundamental Rights Agency of the European Union, Vienna
- Mrs Florence Benoît-Rohmer, Professor, Chairperson of the Scientific Committee of the Fundamental Rights Agency
- Mr Krassimir Kanev, Director of the Bulgarian Helsinki Committee, Sofia
- Mr Rick Lawson, Professor, Faculty of Law, University of Leiden

4. At the invitation of Mr Morten Kjaerum, the Director of the Agency, I carried out a visit to the Agency's headquarters in Vienna on 30 October 2009. During this visit, I met with Mr Kjaerum, Mr Guy de Vel, the independent person appointed by the Council of Europe sitting on the Agency's Management Board and its Executive Board, and its staff members, Mrs Eva Sobotko and Mrs Maria Amor Martin Estebanez. We discussed the different forms and possible areas of co-operation between the Council of Europe and the Agency, as well as the latter's remit, also in the perspective of the entry into force of the Lisbon Treaty.

⁴ Available at <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11521.pdf>.

5. In November 2009, I also met with the Chairperson of the Management Board of the Agency at that time, Mrs Anastasia Crickley, and Mrs Ilse Brands Kehris, a member of the Agency's Executive Board,⁵ with whom I discussed the current forms of co-operation between the Council of Europe and the Agency and whether there was a real risk of unnecessary duplication of tasks of the two institutions.

1.2. Aim of this report

6. During the negotiations leading to the creation of the Agency in 2007, considerable trepidation was expressed, inter alia, by the Parliamentary Assembly⁶ and the Secretary General of the Council of Europe regarding the role of the Agency. The primary concern was that the newly founded Agency would undermine the Council of Europe's sphere of authority in the field of human rights protection in Europe by duplicating parts of the work of Council of Europe bodies. Such duplication, it was argued, could result in dividing lines within Europe, cause confusion and waste valuable resources. It was argued – and rightly so – that a *modus vivendi* would need to be found to permit the newly created Agency to take into account and not undermine, in its work, the highly developed and effective human rights instruments and mechanisms developed by the Council of Europe consisting of 47 member states, including all 27 European Union (“European Union”) member states.⁷

7. That said, one can say now that such a *modus vivendi* has been found in the regulation founding the Agency⁸, the Memorandum of Understanding between the Council of Europe and the European Union of 2007⁹ and the 2008 agreement on the co-operation between the latter and the Council of Europe.¹⁰ Furthermore, in its work, the Agency often refers to the European Convention on Human Rights (“ECHR”) and other Council of Europe instruments. However, concerns still appear to exist regarding the potential for the work of the Council of Europe to be unnecessarily duplicated by the Agency, as well as the possibility of the Agency's mandate being extended.

8. The Assembly's main concern relating to the existence and the functioning of the Agency is a potential duplication of activities in some areas, in which both the Council of Europe and the Agency work (such as the protection of children's rights, access to justice and “human rights issues related to the information society”), which may cause differing and even conflicting interpretations of European human rights standards and even the emergence of double standards. The need to prevent these negative trends becomes all the more urgent in view of the growing budget of the Agency and the potential participation of certain non-European Union member states in its work.

9. One must, however, bear in mind the context in which this subject is being broached, namely the progressive transfer to the European Union of certain state competences which reinforces the need for the Union to be bound by international human rights law and, in particular, the urgency for it to accede to the ECHR,¹¹ following the entry into force of the Lisbon Treaty.¹² If the Union is to be truly founded on common European human rights norms then these must be the same as those to which member states have committed themselves internationally. Otherwise, the European Union will expose its citizens “to the

⁵ Since December 2009, Mrs Ilse Brands Kehris is the Chairperson of the Agency's Management Board.

⁶ Parliamentary Assembly Resolution 1427 (2005) and Recommendation 1744 (2006).

⁷ See Jörg Polakiewicz, “The European Union and the Council of Europe – Competition or Coherence in Fundamental Rights Protection in Europe?” in Paulo Canelas de Castro (ed.), *The European Union at 50: Assessing the Past, Looking Ahead* (Proceedings of the Jean Monnet Conference held in the University of Macau, China, 27-28 May 2008), to be published by the Centre for Legal Studies, University of Macau. An overview of the core Council of Europe mechanisms and institutions can be found in the Appendix to a Parliamentary Assembly report of 28 March 2007, “The state of human rights and democracy in Europe”, Doc. 11202:

http://assembly.coe.int/Sessions/2007/Debate/ENmecanismesdemocratie_annexe1.pdf.

⁸ Council Regulation (EC) No. 168/2007.

⁹ Memorandum of Understanding between the Council of Europe and the European Union of 10 May 2007, available at: www.coe.int/t/der/docs/MoU_EN.pdf.

¹⁰ Agreement between the European Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe of 15 July 2008: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:186:0007:0011:EN:PDF>.

¹¹ See Parliamentary Assembly Doc. 11533, report of the Committee on Legal Affairs and Human Rights, “The accession of the European Union/European Community to the European Convention on Human Rights”, Rapporteur: Mrs Marie-Louise Bemelmans-Vidéc, Netherlands, EPP/CD. See also Parliamentary Assembly Recommendation 1834 (2008) on “The accession of the European Union/European Community to the European Convention on Human Rights” at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/EREC1834.htm>.

¹² Article 6, paragraph 2, of the Treaty on the European Union: “... The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties ...”

inadequacies of the lesser protection available in its internal regime ... [and the possible] propagation of separate human rights regimes for the Union and Member States [which would] create confusion among the latter as to the scope of their obligations and may provide them with a pretext for ignoring their international undertakings in the areas in which they have transferred powers to the Union".¹³ It is therefore in this context that one should assess the work of the Agency.¹⁴ The Agency has the potential to make an important contribution to the protection of human rights within the European Union within the specific scope of its mandate. Indeed, there is no reason why, when referring to the work of Council of Europe monitoring bodies and/or other international standards, it should not strive to provide a higher level of protection of human (fundamental) rights within the Union. This type of work could also – potentially – positively influence human rights standards within our own Organisation. But it is also legitimate to explain why duplication by the Agency of the work of the Council of Europe is undesirable, and that this is not merely a theoretical problem. There is a risk of divergent interpretations, which could lead to a weakening of human rights protection within Europe, the possibility of forum shopping and an unnecessary waste of resources.

10. Here, several questions spring to mind: What mechanisms are, or should be, put into place to ensure that the Agency is able to make good on its obligation to alleviate the danger of inefficiency and duplication of the Council's work? Also, is it not likely that, due to the transversal character of human rights (see below), the Agency will in the course of its day-to-day work overstep the limits of its areas of competence and, in the longer term, progressively extend the ambit of its action? In the light of these different dimensions of human rights monitoring, what are the real dangers involved in parallel monitoring systems of the Council of Europe bodies and the Agency? How best to avoid double monitoring, leading to diverging or conflicting assessments, which risks introducing double-standards in human rights protection in Europe? Should not additional avenues of co-operation be sought with the Agency and its staff to see how best such potential difficulties can be circumvented?

11. A further ground for concern is that the European Commission has already accepted some of the Agency's priority themes identified by reference not to the Agency's mandate or the Union's legal competences but to the expectations of stakeholders.¹⁵ Such an approach is likely to further expand the scope of the Agency's activities in an uncontrollable and unforeseeable manner. This may not necessarily entail negative consequences for the Council of Europe, given that the implementation of its own standards could, in effect, be enhanced by certain activities of the Agency.

12. In my report, I will strive to show that both the Council of Europe and the Agency have the potential to develop synergies in several domains and their work may be mutually complementary, since both institutions have different tasks and use different instruments in carrying them out. However, one should also bear in mind the overall context following the entry into force of the Lisbon Treaty: the tendency to reinforce the European Union's competences in the field of the protection of human rights may also entail the risk of unnecessary duplication of the work of the Council of Europe and the risk of diverging interpretations of human rights protection standards.

2. The Agency's field of action

2.1. The establishment of the Agency and its tasks

13. The European Union Agency for Fundamental Rights (FRA)¹⁶ was established on 15 February 2007 by Council Regulation (EC) No 168/2007,¹⁷ following the decision of the European Council in December 2003 that the European Monitoring Agency for Racism and Xenophobia (EUMC)¹⁸ should become a 'human rights agency'.

14. The prescribed objective of the Agency is to provide advice and expertise relating to fundamental (human) rights to the institutions, bodies, offices and agencies of the European Union and its member states

¹³ Israel de Jesus Butler and Olivier de Schutter "Binding the European Union to International Human Rights Law" in vol 24, Yearbook of European Law 2008 (Oxford University Press) pp. 277-320, at p. 279.

¹⁴ For a recent in-depth study on this subject, see Olivier de Schutter "The European Union Fundamental Rights Agency: Genesis and Potential" in "New Institutions for Human Rights Protection" (Oxford University Press, editor K. Boyle, 2009), pp. 93-135.

¹⁵ See the Agency's Annual Work Programme 2009 at http://fra.europa.eu/fraWebsite/attachments/wp09_en.pdf.

¹⁶ See also http://fra.europa.eu/fraWebsite/home/home_en.htm.

¹⁷ See Council Regulation (EC) No. 168/2007 of 15 February 2007. Hereinafter also referred to as the "founding regulation." Available at: http://fra.europa.eu/fraWebsite/attachments/reg_168-2007_en.pdf.

¹⁸ Established by Regulation (EC) No. 1035/97.

when implementing Community law.¹⁹ To meet this objective, the Agency collects, records, analyses and disseminates relevant, objective, reliable and comparable information and data and develops methods and standards to improve their comparability, objectivity and reliability. It also carries out, co-operates with or encourages scientific research and surveys, preparatory studies and feasibility studies, either on its own initiative or at the request of the European Parliament, the Council of the European Union or the European Commission. In addition, the European Parliament,²⁰ the Council of the European Union²¹ or the European Commission,²² when implementing European Union law, can request (legally non-binding²³) opinions, conclusions and reports on specific thematic topics from the Agency.²⁴ They may also concern the compatibility of their legislative proposals with fundamental rights. Furthermore, the Agency may produce thematic reports on topics of particular importance to the Union's policies and publishes an annual report on fundamental rights issues covered by the Agency's activities. Other functions include raising awareness of the general public about fundamental rights and promoting dialogue with civil society.²⁵ For this purpose, the Agency establishes a co-operation network through a Fundamental Rights Platform,²⁶ composed of non-governmental organisations and other stakeholders.²⁷

15. The Agency has no legislative scrutiny and no regulatory decision-making powers. According to Article 4(2) of the founding regulation, the Agency's opinions cannot deal with the legality of Community acts within the meaning of Article 230 of the EC Treaty²⁸ (currently Article 263 of the Treaty on the Functioning of the European Union²⁹). Nor can it deal with the question of whether a member state has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the EC Treaty (Article 258 of the Treaty on the Functioning of the European Union).

16. Furthermore, the Agency is not permitted to undertake its own investigations and cannot carry out any kind of enforcement role. The Agency cannot examine individual complaints or monitor whether European Union member states adhere to the Union's values and principles, nor does the European Council have an obligation to consult the Agency before it decides that there has been a severe and sustained violation of human rights by a member state (Article 7 of the Treaty).

2.2. The geographical scope of the Agency's activities

17. One of the Assembly's concerns has been the geographical scope of the Agency's activities. As stipulated in the founding regulation, the Agency's remit is limited to the European Union and its 27 member states and should not extend to third countries. However, Article 28 of the founding regulation declares that the Agency will also be open to the participation of candidate countries as *observers* (Croatia, "the former Yugoslav Republic of Macedonia" and Turkey), after a decision of the relevant Association Council, which will indicate the nature, extent and manner of these countries' participation in the Agency's work, taking into account the specific status of each country. In addition, the Association Council may also invite the Western

¹⁹ Article 2 of Regulation No. 168/2007, *supra* note 18.

²⁰ See two FRA reports on homophobia: "Homophobia and Discrimination on Grounds of Sexual Orientation in the European Union Member States Part I – Legal Analysis", 30 June 2008 and "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 31 March 2009, which were prepared at the request of the European Parliament.

²¹ See FRA opinion on the proposal for a Council Framework decision on the use of Passenger Name Record (PNR) (28 October 2008), at http://fra.europa.eu/fraWebsite/attachments/FRA_opinion_PNR_en.pdf, which was prepared at the request of the Presidency of the Council.

²² See the Agency's report "Developing indicators for the protection, respect and promotion of the rights of the child in the European Union (Summary report)", 25 March 2009, prepared at the request of the Commission.

²³ The non-normative character of such opinions is not, however, so obvious. European Union legislative institutions rarely derogate from opinions of European Union agencies. If they do so, reasons must be provided. See D. Chalmers, "The Politics of European Reason and New Reasons for European Politics: the European Union Fundamental Rights Agency", in: "Fifty Years of European Integration. Foundations and Perspectives", ed. A. Ott and E. Vos, T.M.C. Asser Press, The Hague, 2009, pp. 86-87 and 95-96.

²⁴ The Agency may also produce such documents on its own initiative. Recently, it commented on the "Stockholm programme": see its comments of 3 November 2009 on the Presidency Draft, at: www.fra.europa.eu/fraWebsite/attachments/OP-Stockholm-Prog-Presidency-Draft_en.pdf and its opinion of 29 July 2009, at: www.fra.europa.eu/fraWebsite/attachments/FRA-comments-on-Stockholm-Programme.pdf.

²⁵ See Article 4 of the founding regulation.

²⁶ See Article 10 of the founding regulation.

²⁷ These are trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts from European and international bodies and organisations.

²⁸ Treaty Establishing the European Community.

²⁹ <http://register.consilium.europa.eu/pdf/en/08/st06/st06655.en08.pdf>.

Balkans countries, which have concluded a Stabilisation and Association Agreement³⁰ with the EC, to participate in the Agency as observers. To date, no third country takes part in the Agency's work as an observer.³¹

18. However, it should be noted that in the first year of existence the Agency's Work Programme (for 2007) already explicitly included capacity building and awareness-raising in Croatia and Turkey as one of its operational priorities,³² even though neither country's status within the Agency had been defined by the relevant Association Council, as stipulated in Article 28(2) of the founding regulation. This has been part of the process of preparing these countries for participation in the work of EC agencies (in particular, the FRA (formerly the EUMC)) since 2003. These activities were aimed at supporting and building up the capacity of civil society actors³³ by integrating them into the data collection work of the EUMC/FRA through its RAXEN network methodology.³⁴

2.3. Substantive remit of the Agency

19. Recital 8 of the founding regulation states that "[t]he Agency should act only within the scope of application of Community law",³⁵ and this is confirmed by Article 3(3) of the regulation. In line with its geographical limits, the latter provision reaffirms that the Agency's mandate is limited to scrutinising the European Union institutions and the member states' implementation of EC law. The Agency does not have a mandate to monitor the respect of human rights by European Union member states acting within their own national legal orders and outside EC competence. Submitting the European Union institutions not only to the long-existing judicial review by the Court of Justice of the European Union but also to an independent mechanism 'monitoring' their compliance with the standards of human rights protection in Europe constitutes a step in the right direction. And, as already indicated above, until such a time as the European Union accedes to the European Convention on Human Rights, international organisations – of which the European Union institutions are the most visible examples – are the only public authorities operating in Council of Europe member states that are still outside the jurisdiction of the European Court of Human Rights.

20. Within the area of European Union law, the Agency's mandate was initially limited to issues falling under the "first pillar" of the European Union.³⁶ Recital 32 of the founding regulation expressly excluded any competence of the Agency in third pillar matters dealing with police co-operation and judicial co-operation in criminal matters. The Agency's remit has nonetheless changed following the entry into force of the Lisbon Treaty, which eliminated the structure of "pillars" within the European Union architecture. Consequently, police and judicial co-operation fall under the scope of European Union law³⁷ and therefore fall also under the scope of the Agency's activities. On the one hand, from the Council of Europe's perspective, this broadened remit of the Agency might not be welcomed, since an extension of the Agency's mandate to cover former third pillar issues would have rendered the risk of duplication with the Council of Europe's activities much greater. However, on the other hand, including former third pillar issues in the Agency's remit of control may be considered as an improvement, since these policy areas have the greatest potential impact

³⁰ A Stabilisation and Association Agreement (SAA) represents for the Western Balkan countries a key step on the path to negotiations for European Union membership. Currently the European Union has signed SAAs with certain official candidate countries (Croatia and "the former Yugoslav Republic of Macedonia") and certain potential candidates for European Union accession (Albania, Bosnia and Herzegovina, Montenegro and Serbia).

³¹ Guy de Vel, *L'actualité de l'Agence des Droits Fondamentaux de l'Union européenne et son interface avec le Conseil de l'Europe*, to be published soon by Université Pierre-Mendès-France Grenoble II.

³² The Agency's Annual Work Programme for the year 2007 can be accessed at: http://fra.europa.eu/fraWebsite/attachments/wp07_en.pdf. The last Annual Work Programme, for 2010, can be accessed at: www.fra.europa.eu/fraWebsite/attachments/wp10_en.pdf.

³³ The targeted organisations were NGOs, research organisations and specialised bodies active in the field of combating racism, xenophobia and anti-Semitism.

³⁴ To this effect three projects were carried out and assisted by Commission programmes: PHARE RAXEN_CC (2003-2004), PHARE RAXEN_BR (started in 2005) and RAXEN_CT (2006-2008). RAXEN is a European information network which collects background data and information that will facilitate its analysis of phenomena of racism, xenophobia and anti-Semitism, and also identifies positive initiatives and "good practices". Its network is composed of National Focal Points (NFPs) in each member state.

³⁵ Recital 8 of Council Regulation (EC) No. 168/2007.

³⁶ The three pillars formed the basic structure of the European Union. The first pillar was also referred to as "the Community pillar", corresponding to the three Communities: the European Community, the European Atomic Energy Community (Euratom) and the former European Coal and Steel Community (ECSC). Contrary to the second and third pillars, which functioned on the basis of intergovernmental procedures, the Community procedure applied to the first pillar. While the second pillar was devoted to 'common foreign and security policy', the third pillar embraced matters related to 'police and judicial co-operation'.

³⁷ See Articles 82–89 of the Treaty on the Functioning of the European Union.

on human rights in the European Union. As a result of this change, the Agency will be able to deal with and provide advice on issues such as counter-terrorism; the European Arrest Warrant; police co-operation, including the exchange of personal data in the context of criminal investigations; and the exchange of evidence in criminal proceedings under the European Evidence Warrant. This is significant since, at the same time, these also constitute the areas where existing control mechanisms in the European Union are weakest. For example, police co-operation is the area of European Union law where the judicial oversight of the Court of Justice of the European Union is most limited.³⁸

21. A possible point of contention in relation to the Agency's substantive remit is the fact that there is a fine line between what is within the scope of Community law and what is within that of the domestic law of European Union member states. This also touches upon the manner in which the Agency (the European Union?) may/should differentiate between what are perceived as "fundamental rights" (within the European Union context applicable to all citizens and persons lawfully within a member state; an expression developed by the European Court of Justice in the 1970s when applicants were legal persons) and "human rights" (which, for instance, by virtue of Article I of the ECHR, are secured for "everyone" within the jurisdiction of states parties). Also, human rights are transversal: they do not respect the artificial lines which separate domestic issues from matters of European Union law. In the context of a report on such issues as racism and xenophobia, for instance, it will be difficult at times to separate those aspects which fall within the scope of Community law from those which fall within the scope of domestic law. For this reason, it would be desirable that the Agency deal with thematic human rights aspects without touching unnecessarily upon issues falling under the scope of domestic law.

22. Another issue springs to mind in this context: European Union external co-operation. Generally speaking, human rights concerns are or ought to be a vital part of every internal and external European Union policy, including external assistance, development co-operation, and trade. Most European Union agreements include a human rights clause, requiring partners to respect human rights and democratic principles, and providing for targeted restrictive measures if such principles are breached. As mentioned before, the founding regulation broadly declares that "[t]he Agency should act only within the scope of application of Community law",³⁹ restricting its sphere of influence to the European Union institutions and the member states' implementation of EC law. Is it therefore right to assume that the implementation of Community law is merely restricted to matters in the European Union's 'internal' legal system? This matter is not so simple, as it relates to the geographical remit of the Agency.⁴⁰ The European Union's obligations under Community law also include the duty not to violate human rights in third countries. Thus one may also argue that the Agency could have a role in ensuring that the European Union correctly applies its numerous conditionality clauses.⁴¹

23. The thematic areas of activity of the Agency are laid down in a Multi-annual Framework adopted by the Council of the European Union, upon a proposal of the European Commission and after consulting the European Parliament. They must include the fight against racism, xenophobia and related intolerance. Article 2 of the Multi-annual Framework of 28 February 2008⁴² identifies the following nine thematic areas to be covered by the Agency's work within the next five years (2007-2012):

- (1) racism, xenophobia and related intolerance;
- (2) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination);
- (3) compensation of victims;
- (4) the rights of the child, including the protection of children;
- (5) asylum, immigration and integration of migrants;
- (6) visa and border control;
- (7) participation of the citizens of the Union in the Union's democratic functioning;
- (8) information society and, in particular, respect for private life and protection of personal data;
- (9) access to efficient and independent justice.

³⁸ See Article 276 of the Treaty on the Functioning of the European Union.

³⁹ Recital 8 of Council Regulation (EC) No. 168/2007.

⁴⁰ See, on this subject, Olivier de Schutter, "The European Union Fundamental Rights Agency: Genesis and Potential", *supra* note 15, at pp. 120-123.

⁴¹ The European Union frequently includes human rights conditionality clauses in its trade and co-operation agreements with third countries. The purpose of these clauses is to entitle either party to take appropriate measures in the event that the other party fails to comply with human rights or democratic principles.

⁴² Full text available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:063:0014:0015:EN:PDF>.

24. All of these themes are transversal and fall within both the European Union's area of competence and the member states' exclusive field of action. Therefore, the Agency may not be able to address these issues comprehensively without overstepping its substantive remit.

25. Another possible point of contention is the definition of 'fundamental rights' in Article 6(2) of the Treaty on the European Union (in its version before the changes introduced by the Lisbon Treaty⁴³), to which the Agency shall refer in carrying out its tasks.⁴⁴ This implies that the Agency shall refer, on the one hand, to the European Convention on Human Rights, and, on the other hand, to the European Union Charter of Fundamental Rights, which is now legally binding on European Union institutions and member states, when applying European Union law. As some authors note, there is a dual standard of protection, since the two instruments have, to some extent, different underlying philosophies, even though many provisions overlap.⁴⁵ While the ECHR is rather based on securing individual autonomy and respecting individual will, the European Union Charter of Fundamental Rights is aimed also at providing an integrated account of civil, political and social rights.⁴⁶ This dualism of approach may create tensions in the work of the Agency. As pointed out by D. Chalmers:

"If it adopts the ethos of ECHR, it will be criticised for not developing rights other than civil liberties and having a very thin vision of fundamental rights – all the defects meant to be remedied by the Charter. If it adopts the ethos behind the Charter, it will be accused of a high degree of intrusion and policy-making as well as not paying sufficient attention to individual autonomy – something that is supposed to underpin national constitutional traditions and the ECHR".⁴⁷

2.4. The Agency's tools and actions

2.4.1. Data collection and analysis

26. In order to ensure complementarity with (and added value to) the work of the Council of Europe, it is necessary to examine the Agency's specific tasks and working methods. A comparison of those tasks with those already performed by the Council of Europe may serve to demonstrate and assess the risks of duplication in the Agency's activities with those already performed by the Council of Europe. To start with, the founding regulation sets out a rather narrowly defined and restrictive framework for the Agency's tasks, limiting them, *inter alia*, to providing information on applicable human rights standards, passive data gathering, the development of methods to improve the comparability and objectivity of such data at the European level, as well as analysis and reporting.⁴⁸

27. It should be noted that, in carrying out its daily activities, the Agency uses various instruments aimed at collecting data, which differ from those used by the Council of Europe. To conduct its surveys, it often needs the help of contractors specialised in this area, for instance GALLUP while carrying out the EU-MIDIS survey on minorities and discrimination.⁴⁹

2.4.2. Opinions

28. At first sight, the Agency seems to have been restricted so severely in its functions as to resemble a mere 'network of networks' set up with the simple purpose of collecting, organising and analysing data from different existing networks, namely national human rights bodies and other actors in the human rights field. However, as clearly spelled out in Article 4 of the founding regulation, the Agency also has the right to

⁴³ "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

⁴⁴ See Article 3, paragraph 2, of the founding regulation: "The Agency should refer in its work to fundamental rights within the meaning of Article 6(2) of the Treaty on the European Union, including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations."

⁴⁵ D. Chalmers, *op. cit.*, p. 91.

⁴⁶ *Ibid.*

⁴⁷ D. Chalmers, *op. cit.*, p. 93.

⁴⁸ Articles 4(1)(a) and 4(1)(b) of the founding regulation.

⁴⁹ FRA conducted a major representative survey (executed by GALLUP), interviewing selected ethnic minority and immigrant groups in all of the 27 member states of the European Union. See at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/2009_en.htm.

provide technical expertise to Union institutions and the member states when implementing Community law.⁵⁰

29. In so far as requests for opinions and/or technical expertises are concerned, alignment with minimum Council of Europe human rights standards ought to be ensured. Here I have in mind, for example, the need to question the fairness of blacklisting for alleged terrorist activity in the light of the recent case-law of the European Court of Justice and the findings of the Parliamentary Assembly,⁵¹ and the so-called Dublin II system with its evident shortcomings *vis-à-vis* the ECHR as concerns asylum decisions.⁵² Indeed, the French Presidency of the European Union Council already requested an opinion from FRA on the Passenger Name Record (PNR) agreement that was being negotiated with the United States.⁵³

30. That said, the Agency is merely allowed to formulate legally non-binding opinions and conclusions for European Union institutions and member states “when implementing Community law”. The latter certainly does not include the introduction of human rights standards in any form or way.

2.4.3. Monitoring?

31. Does the Agency have a mandate in the field of monitoring? If so, does the Agency’s human rights monitoring have any added value or would it merely duplicate the work of the Council of Europe’s existing monitoring mechanisms? What would be the Agency’s ‘monitoring role’ following the “*Stockholm Programme – Developing a Europe that Protects*”, adopted by the European Council in December 2009?⁵⁴

32. But it appears that the term of “monitoring” is employed in the Council of Europe and the Agency to describe different activities. Monitoring as understood by the Council of Europe includes verifying member states’ compliance with human rights standards and addressing policy recommendations to individual countries.⁵⁵ “Monitoring” within the meaning of the Agency’s competences comprises merely information gathering and the preparation of comparative reports; hence the term “monitoring” is – rightly – not even mentioned in the Agency’s founding regulation.⁵⁶ But this subject merits further reflection. Olivier de Schutter ably points out :

“[T]he Fundamental Rights Agency’s mission is not supposed to involve ‘normative monitoring’ – evaluation of compliance on the basis of a pre-existing normative grid; it is, rather, to provide technical advice on the basis of its collection and analysis of information pertaining to the situation of fundamental rights in the Member States. However, it is uncertain whether it will be possible, in practice, to maintain a watertight division between monitoring consisting only in collecting and analyzing information in order to offer technical assistance, on the one hand (“advisory monitoring”), and monitoring implying an evaluation of the degree of compliance with fundamental rights, on the other hand (“normative monitoring”): even mere fact-finding, after all, necessarily consists in highlighting certain situations, and thus putting pressure on the actors concerned to remedy any deficiencies found to exist. In addition, even though points of emphasis of formulation may differ – with expert bodies of the Council of Europe explicitly evaluating certain situations for their compliance with the relevant standards, and the Fundamental Rights Agency more cautiously reporting about what it has found to occur and making certain recommendations of a general nature about trends – it remains the case that the same situations may be considered under both mechanisms”.⁵⁷

⁵⁰ See Article 4 of the founding regulation.

⁵¹ See Assembly report (Doc. 11454) and Addendum, and Assembly Resolution 1597 (2008) and Recommendation 1824 (2008).

⁵² Courts in several member states, as well as a number of governments, have deemed Greece to be ‘unsafe’ for return of asylum seekers; return can put asylum seekers at risk of *refoulement* by the Greek authorities, in breach of ECHR requirements. See also EC Council Regulation No. 343/2003 and Doc 11990, “Improving the quality and consistency of asylum decisions in the Council of Europe member states”, paragraph 50.

⁵³ FRA opinion on the proposal for a Council Framework decision on the use of Passenger Name Record (PNR) (28 October 2008), *supra* note 22.

⁵⁴ www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf.

⁵⁵ For a convenient overview, see Appendix in Parliamentary Assembly report of 28 March 2007, “The state of human rights and democracy in Europe”, Doc. 11202, at: http://assembly.coe.int/Sessions/2007/Debate/ENmecanismesdemocratie_annexe1.pdf.

⁵⁶ See Council Regulation (EC) No. 168/2007 of 15 February 2007 (see document AS/Jur/Inf (2010) 02).

⁵⁷ Olivier de Schutter “The two Europe’s of human rights: the emerging division of tasks between the Council of Europe and the European Union in promoting human rights in Europe”, in “The Columbia Journal of European Law (2008)”, vol. 14, No. 3, pp. 509-661, at p. 253.

33. According to this author, the tasks of the Agency remain distinct from those of a monitoring body in the classic meaning of the expression, such as those established under the Council of Europe instruments.⁵⁸ The Agency's 'monitoring' is performed for reasons specific to the Union, and in particular to assist European Union member states in their implementation of European Union law, which should better take into account fundamental rights, and in order to facilitate the progress of candidate countries⁵⁹ to the European Union towards meeting the accession criteria.⁶⁰

34. However, even if there is an overlap in the tasks of the Council of Europe bodies and the Agency providing the European Union member states with the 'assistance and expertise relating to fundamental rights', whether this overlap is problematic depends on the nature of the relationship between both institutions and, even more decisively, on the status which the findings made by the Council of Europe monitoring bodies will have in the Agency's opinions, conclusions and reports.⁶¹ If the Agency refers explicitly and systematically to the findings of the Council of Europe bodies, this might strengthen the authority given to the interpretation by those bodies and contribute to an improved follow-up of the recommendations they address to the states concerned. Moreover, divergences in the conclusions made by both bodies could thus be avoided.⁶²

35. That said, one should always bear in mind that the instruments of the Council of Europe impose *minimum* standards on the states parties, and that they contain provisions which allow these states to go beyond those minimal requirements, for instance by the conclusion of international agreements affording more favourable protection to the individual.⁶³ Nothing in the Council of Europe instruments prohibits the European Union member states or the European Union itself from further improving the protection of human rights.⁶⁴

36. Existing or future European Union or Agency 'monitoring' mechanisms could also offer an added value in relation to the existing Council of Europe mechanisms, by producing more up-to-date data, having a more flexible thematic scope and giving a more complete picture of the human rights situation in respective member states. Thus, with the aid of the European Union, the Council of Europe could further improve the quality of its own monitoring activities.⁶⁵

2.5. The Agency's budget

37. The Agency is funded by the taxpayers of the same states that fund 80% of the budget of the Council of Europe. The Council of Europe, including the European Court of Human Rights and the Parliamentary Assembly, has a budget of about € 200 million annually to implement its strong legal mandate to ensure the respect for human rights, democracy and the rule of law throughout Europe. It has had to accommodate a policy of zero real budgetary growth over many years, endangering core activities. By contrast, the budget of the Agency is growing and will soon reach 10% of that of the whole of the Council of Europe, including the European Court of Human Rights.⁶⁶

38. The budget of the Fundamental Rights Agency for the next few years will be as follows:

	2007	2008	2009	2010	2011	2012
Budget, in € million	14	15	17	20	20	22

⁵⁸ Olivier de Schutter "The European Union Fundamental Rights Agency: Genesis and Potential" in "New Institutions for Human Rights Protection" (Oxford University Press, editor K. Boyle, 2009), p. 118.

⁵⁹ Which is not possible for the time being; see "The geographical scope of the Agency's activities" above.

⁶⁰ *Supra* note 59, p. 125. This author also notes that, indeed, it would be unthinkable to entrust the Council of Europe bodies with the task of evaluating whether a country complies with the criteria laid down for accession to the European Union.

⁶¹ *Supra* note 59, pp. 119-120.

⁶² *Supra* note 59, pp. 128.

⁶³ *Supra* note 59, p. 124.

⁶⁴ *Ibid.*

⁶⁵ Speech by Professor Rick Lawson at the Committee's meeting in Paris on 11 September 2009.

⁶⁶ For parliamentarians and their tax-paying constituents, the contrast between the extreme budgetary rigour in Strasbourg and the substantial resources made available to the Agency are difficult to comprehend and to justify. But this criticism is obviously directed at Council of Europe member states and not at the Agency: see Andrew Drzemczewski "The prevention of human rights violations: monitoring mechanisms of the Council of Europe" in "The Prevention of Human Rights Violations" (2001, Martinus Nijhoff, ed. A. Sicilianos), pp.139-177, at pp.140-141. (French version in *Revue Trimestrielle des Droits de l'Homme*, 2000, pp. 385-428.)

39. Its initial staff of 50 is still growing. It now consists of 66 members (54 temporary staff members and 12 contract staff members). According to the last FRA Staff Policy Plan, by the end of 2010 the Agency will employ 72 temporary staff members and 25 contract staff members, hence in total 97 staff members.

40. It is obviously too early to assess how the overlap of similar types of work should best be handled. Take, for example, the Agency's project on "protection of children's rights"⁶⁷ and compare it with that of the work in the Council of Europe on a closely related topic.

41. Before the Agency's initiative, the Council of Europe had launched its programme "Building a Europe for and with children", which seeks to promote children's rights and protect them from all forms of violence. Through this programme, we are streamlining child-related issues within the Council of Europe, ensuring better visibility for Council of Europe standards and the case law of the European Court of Human Rights. A High Level Conference took place to launch the 2009-2011 Stockholm strategy which refocuses the programme after its first three years of operation (2006-2009). The ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse was promoted through a series of seminars and conferences (regional, national and continent-wide), the last of which took place in Toledo, Spain, in March 2009. Campaigns and initiatives were conducted in member states, most notably the campaign "Raise your hand against smacking!", with the Council of Europe confirming its position as a leading organisation in the field of children's rights and as a key United Nations partner, notably by providing the European forum for the follow-up to the Global Study on Violence against children initiated by the Secretary General of the United Nations.⁶⁸

3. Co-operation between the Council of Europe and the Agency

3.1. General co-operation framework and consultations

42. In terms of avoiding duplication of work, Article 9 of the founding regulation commits the Agency to coordinating its tasks with the Council of Europe's work, and the Council of Europe has signed both a Memorandum of Understanding⁶⁹ with the European Union and a Co-operation Agreement with the EC which, to a certain extent, clarify the situation.⁷⁰ According to point 10 of the Memorandum of Understanding, the Council of Europe "will remain the benchmark for human rights, the rule of law and democracy in Europe". The Co-operation Agreement underlines the principle of non-duplication and the obligation to co-operate and coordinate their work.⁷¹ Co-operation between the two institutions covers the whole range of the Agency's activities.⁷²

43. An independent person appointed by the Council of Europe also sits on the Agency's Management Board and on its Executive Board.⁷³ He or she participates in the meetings of the Agency's Executive Board and his/her views shall be duly taken into account, especially to ensure complementarity and added value as regards the activities of the Agency and of the Council of Europe. He or she also has the right to vote in the Executive Board as regards the preparation of certain decisions of the Management Board.⁷⁴

44. Furthermore, in accordance with the Co-operation Agreement,⁷⁵ regular contacts have been established at the appropriate level between the Agency and the Council of Europe. The Director of the Agency and the Council of Europe Secretariat have each appointed a contact person to deal specifically with

⁶⁷ Overall, for the year 2009 the Agency has allocated € 70 000 in operational expenditure (as opposed to "overheads") and 1.5 staff positions to the thematic area of "the rights of the child, including the protection of children". The individual project components covered by the operational expenditure in 2009 are 'communication and awareness-raising' (€ 50 000) and 'networking and education' (€ 20 000).

⁶⁸ With respect to the financial resources for the Council of Europe's three-year programme (2009-2011), a total budget of € 1 058 600 was allocated to the initiative for the year 2009. This overall budget is composed of operational expenditure amounting to € 328 800, expenses for staff (€ 629 600) and € 100 200 for various other expenses and recharged services. The two initiatives financed by the overall operational expenditure are 'Protection, provision and participation for children in Europe' (€ 252 100) and 'Supporting families in the best interests of the child' (€ 76 700).

⁶⁹ *Supra* note 10.

⁷⁰ *Supra* note 11.

⁷¹ Point 2 of the Co-operation Agreement.

⁷² Point 6 of the Co-operation Agreement.

⁷³ Mr Guy de Vel, former Director General of Legal Affairs of the Council of Europe as titular member, and Mr Rudolf Bindig, former member of the Parliamentary Assembly, as alternate: see Article 9, last line, of Regulation (EC) No. 168/2007, and Section V of the Agreement of 18 June 2008 between the EC and the Council of Europe.

⁷⁴ Point 19 of the Co-operation Agreement.

⁷⁵ Point 3 of this agreement.

matters relating to their co-operation. The person appointed by the Secretary General regularly takes part in the Management Board's meetings.⁷⁶

45. As a general rule established by the Co-operation Agreement,⁷⁷ representatives of the Council of Europe Secretariat are invited by the Agency's Executive Board to attend meetings of the Agency's Management Board as observers (with the exception of agenda items of an internal nature). On the other hand, on the basis of the Co-operation Agreement,⁷⁸ the Council of Europe invites representatives of the Agency to attend – as observers – the meetings of the Council of Europe intergovernmental committees in which the Agency has expressed an interest (for instance, in work relating to the Roma and the rights of LGBT persons⁷⁹). The Agency's representatives may also be invited as observers to the meetings or exchanges of views organised by the Council of Europe human rights monitoring committees or committees set up under partial agreements and to exchanges of views organised by the Committee of Ministers of the Council of Europe (most recently in November 2009 with the participation of the Agency's Chairperson of the Agency's Management Board and the Director of the Agency).

46. In order to coordinate its activities, the Agency regularly consults the Council of Europe Secretariat when preparing its annual work programme⁸⁰ and annual report⁸¹ and regarding its co-operation with civil society (in particular within the Fundamental Rights Platform).⁸² On such a basis, both institutions may agree on conducting joint and/or complementary activities on subjects of common interest.⁸³

47. Thus, the Agency's representatives regularly take part in the proceedings of certain intergovernmental committees, conferences and other activities of the Council of Europe.

48. It is also noteworthy that the Co-operation Agreement⁸⁴ provides for the possibility for the Agency to award grants to the Council of Europe in order to promote co-operation between both institutions as well as temporary exchanges of staff between them.⁸⁵ So far, these possibilities have not been used.

49. According to the FRA document "FRA Mission and Strategic Objectives 2007-2012", referring to the Multi-annual Framework for the Agency for the period 2007-2012, in achieving its long-term objectives, the Agency will be "... ensuring complementarity and maximizing synergies with the Council of Europe ...".⁸⁶

3.2. Exchange of information

50. According to the Co-operation Agreement, the Agency and the Council of Europe shall provide each other with information and data collected in the course of their activities. Such information and data may be then used by both institutions in the course of their activities.⁸⁷ Moreover, the Co-operation Agreement obliges the Agency to take due account of the judgments and decisions of the European Court of Human Rights concerning the areas of activity of the Agency and, where relevant, of findings, reports and activities of the Council of Europe's human rights monitoring and intergovernmental committees in the human rights field, as well as those of the Council of Europe's Commissioner for Human Rights.⁸⁸ Either institution, when using information from the other's sources, shall indicate the origin and reference thereof.⁸⁹ Both institutions shall also ensure, by means of their networks, the widest possible dissemination of the results of their respective activities on a reciprocal basis.⁹⁰ It would be interesting to examine more closely to what extent these commitments stemming from the Co-operation Agreement are observed in practice.

⁷⁶ Information taken from the statement made by Mr Morten Kjaerum, the Agency's Director, at the Committee meeting in Paris on 11 September 2009.

⁷⁷ Point 4 of the Co-operation Agreement.

⁷⁸ Point 4 of the Co-operation Agreement.

⁷⁹ FRA representatives took part in the meetings of the Council of Europe Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity of the Steering Committee on Human Rights (CDDH), preceding the adoption by the Committee of Ministers on 31 March 2010 of the Recommendation CM/Rec(2010)5 to member states to combat discrimination based on sexual orientation or gender identity.

⁸⁰ See Article 9 of the founding regulation and Point 13 (a) of the Co-operation Agreement.

⁸¹ Point 13 (b) of the Co-operation Agreement.

⁸² Point 13 (c) of the Co-operation Agreement.

⁸³ Point 14 of the Co-operation Agreement.

⁸⁴ See Point 15 of the Co-operation Agreement.

⁸⁵ See Point 16 of the Co-operation Agreement.

⁸⁶ See at www.fra.europa.eu/fraWebsite/attachments/FRA-mission-strategic-objectives_en.pdf.

⁸⁷ See Point 7 of the Co-operation Agreement.

⁸⁸ See Point 8 of the Co-operation Agreement.

⁸⁹ See Point 9 of the Co-operation Agreement.

⁹⁰ See Point 10 of the Co-operation Agreement.

51. In its work, the Agency refers to the European Convention on Human Rights and other Council of Europe instruments. For example, in the Annual Report for 2009,⁹¹ European Union member states are urged to take account of the case law of the European Court of Human Rights when implementing the Council of Europe Convention on Action against Trafficking in Human Beings,⁹² and references to recent judgments of the European Court are made in relation to many of the thematic areas discussed. Reference is also made to European Commission against Racism and Intolerance (ECRI) and the European Social Charter. A recent report on child trafficking referred extensively to the above-mentioned Convention on Action against Trafficking in Human Beings and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) and called for their ratification by those European Union member States that had so far failed to do so.⁹³ Another example in this context may be the Agency's 2009 report on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States.⁹⁴ Part I of this report (*Legal Analysis*) contains several references to the work of the Council of Europe in this area, including Parliamentary Assembly's recommendations, recommendations of the Congress of Local and Regional Authorities, statements by the Secretary General of the Council of Europe and the Commissioner for Human Rights,⁹⁵ the ECHR and the case-law of the European Court of Human Rights⁹⁶. Part II (The Social Situation)⁹⁷ states that the Council of Europe was "... another important source of relevant data ..." and for the purpose of the preparation of the report, the Commissioner for Human Rights, Thomas Hammarberg, was also interviewed.⁹⁸

52. Co-operation between the Agency and the Council of Europe's Office of the Commissioner for Human Rights is well under way. In 2009, it focused on a wide range of issues. The Commissioner participated in an International Conference on Roma Migration and Freedom of Movement, jointly organised in Vienna by the FRA, the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the OSCE High Commissioner on National Minorities and the Commissioner's Office.⁹⁹ Information and data on a broad range of human rights subjects were regularly exchanged between the FRA and the Commissioner's Office also in the context of expert meetings, workshops and round tables organised by both FRA and the Council of Europe. The human rights situation of Roma, persons with mental health problems, discrimination on the grounds of sexual orientation and gender identity, the rights of the child and multi-level human rights implementation were shared priority concerns in 2009. In December 2009, the Commissioner participated in the high-level panel of the European Union Fundamental Rights Conference in Stockholm, organised by the FRA and the Swedish European Union Presidency.¹⁰⁰ Moreover, the Commissioner's Office is presently preparing a comparative study on the situation concerning homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the Council of Europe member states. This study will result in a policy-oriented, comparative report covering all 47 Council of Europe member states, building on and using the information already collected by the Agency for the 27 European Union member States. Moreover, in his paper on Human Rights and Gender Identity,¹⁰¹ the Commissioner for Human Rights refers several times to the data collected by the Agency on this issue.

53. The Agency also co-operates with the Council of Europe's monitoring bodies in the field of combating discrimination and protection of national minorities. Like its predecessor, the EUMC, it works in close co-operation with the European Commission against Racism and Intolerance. For instance, on 19 March 2010, both bodies, along with the OSCE's ODIHR, issued a common statement on the occasion of the International Day for the Elimination of Racial Discrimination.¹⁰² Moreover, the Agency also often refers to the work of the

⁹¹ Available at www.fra.europa.eu/fraWebsite/attachments/FRA-AnnualReport09_en.pdf.

⁹² At p. 75; this convention was signed on 16 May 2005; CETS No. 197.

⁹³ Child Trafficking in the European Union Challenges, perspectives and good practices (July 2009), available at http://fra.europa.eu/fraWebsite/attachments/Pub_Child_Trafficking_09_en.pdf.

⁹⁴ Available at http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2008/pub_cr_homophobia_0608_en.htm.

⁹⁵ Ibid., pp. 10-11.

⁹⁶ For instance, pp. 20, 22-23, 36 and 58-60.

⁹⁷ Available at

http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub_cr_homophobia_p2_0309_en.htm.

⁹⁸ Ibid., p. 27.

⁹⁹ www.coe.int/t/commissioner/Newsletter/latest.asp.

¹⁰⁰ <http://fra.europa.eu/fundamentalrightsconference/index.html>.

¹⁰¹ <http://wcd.coe.int/ViewDoc.jsp?id=1476365>.

¹⁰² The statement focused particularly on manifestations of racism and xenophobia on the Internet. The organisations pointed to the danger of the Internet as a platform for the spreading of racist and xenophobic views, as well as highlighting the potential for the Internet to be used as a tool to challenge such attitudes. It is available at: http://fra.europa.eu/fraWebsite/attachments/FRA_ECRI_ODIHR_Statement_EN.pdf.

Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, and in particular its country-specific opinions.

54. Currently, both institutions also co-operate on the issues of Roma discrimination and the “Rights of the Child project”.¹⁰³ The Agency ensures the engagement of the Council of Europe in the main projects on child trafficking and separated asylum-seeking children and “Rights of the Child Indicators”. On the occasion of the 20th anniversary of the Convention of the Rights of the Child on 20 November 2009, the Agency and the Deputy Secretary General of the Council of Europe issued a joint statement. As regards Roma discrimination, the Agency and the Council of Europe work together on joint action on freedom of movement and migration (conferences, reports, joint statements). In May 2009, at the meeting of the Committee on Legal Affairs and Human Rights in Târgu Mureş, a staff member of the Agency presented the results of the European Union survey on discrimination of minorities. Further co-operation between both institutions is also foreseen or already under way on subjects such as the situation of irregular migrants, combating violence against women and human rights education. Within the Council of Europe itself, it is also more and more frequent for several departments, not only those dealing specifically with human rights but also with health issues (for instance, on the issue of disabled persons), to consult the Agency and/or refer to its reports and other documents.

55. It should also be noted that the Council of Europe and the Agency are developing new forms of co-operation. New projects are elaborated jointly by both institutions from the very beginning. For example, in January 2010, the European Court of Human Rights and the Agency embarked on a year-long joint project aimed at increasing the knowledge and domestic implementation of European Union law and other legal instruments in the field of non-discrimination. The project will result in the publication of a handbook of the case law of the European Court of Human Rights and the Court of Justice of the European Union in several European languages¹⁰⁴. A joint project on human rights education will also start in the coming months.

56. The above-mentioned examples demonstrate that there are good practices of co-operation between the Council of Europe’s bodies, including its monitoring bodies, and the Agency; both institutions’ activities may indeed be mutually complementary. Such a tendency seems to be observed also by the Independent Person appointed by the Council of Europe, who has indicated that co-operation is “well under way”.¹⁰⁵

4. Perspectives following the entry into force of the Lisbon Treaty

57. Following the entry into force of the Lisbon Treaty on 1 December 2009, there might be new developments in the European Union policies on the protection of human rights and also in the scope of the remit of the Agency, which is now competent to deal with issues falling within the scope of justice and police co-operation.

58. The European Union Charter of Fundamental Rights has become legally binding. The European Union and its bodies, as well as the member states, when implementing European Union law, are bound by this Charter.¹⁰⁶

59. Moreover, new Article 2 of the Treaty on the European Union¹⁰⁷ refers to the notion of “the rights of persons belonging to minorities”. The introduction of this notion to the treaty also gives new possibilities for the Agency to widen and enhance its activities in the field of the protection of such rights. It should be also noted that the European Union Charter of Fundamental Rights underlines that discrimination on the basis of “membership of a national minority” is forbidden and that the “Union shall respect cultural, religious and linguistic diversity”.¹⁰⁸ Moreover, the Treaty of Lisbon contains a new general obligation for the European Union to combat exclusion and discrimination,¹⁰⁹ which reinforces the Agency’s tasks in these fields.

¹⁰³ Information from the speech made by Mr Morten Kjaerum, the Agency’s Director, at the Committee meeting in Paris on 11 September 2009.

¹⁰⁴ http://fra.europa.eu/fraWebsite/media/mr-150110_en.htm.

¹⁰⁵ Text presented by Mr Guy de Vel, Council of Europe representative on the Fundamental Rights Agency, at the meeting of the Committee on Legal Affairs and Human Rights on 29 April 2009.

¹⁰⁶ Article 6, paragraph 1, of the Treaty on the European Union.

¹⁰⁷ “Article 2. The Union is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. ...”.

¹⁰⁸ Articles 21 and 22 of the Charter of Fundamental Rights.

¹⁰⁹ According to Article 3, paragraph 3, of the Treaty on the European Union, the Union “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of child” and, according to Article 10 of the Treaty on the Functioning of the

However, the Agency's new tasks in this area have yet to be introduced in the second "Multi-annual framework" (2012-2017) that the Commission is going to prepare soon.¹¹⁰

60. Changes in the scope of the Agency's tasks, as defined in the "Multi-annual framework", might also follow after the appointment of Ms Viviane Reding as the newly established Commissioner for Justice, Fundamental Rights and Citizenship.¹¹¹ In accomplishing her tasks, the Commissioner might refer more often to the data collected and analysed by the Agency. Since the Commission will soon be preparing a new multi-annual framework for the Agency, the Commissioner will certainly contribute to its elaboration as from 2012.¹¹² It is also likely that she will request more opinions on the implications of the Commission's legislative proposals for human rights.

61. Finally, it is important to mention the "Stockholm Programme", defining the framework for European Union police and customs co-operation, rescue services, criminal and civil law co-operation, asylum, migration and visa policy for the period 2010–2014, as adopted by the European Union summit in December 2009.¹¹³ This document puts more emphasis on fundamental rights.¹¹⁴ More specifically, it invites the European Union institutions to use the Agency's expertise and to cooperate more closely with the latter at the stage of elaborating legislative proposals touching upon fundamental rights¹¹⁵. In this document, the European Council also noted that the Fundamental Rights Agency "has reached operational maturity" in its field of activity.¹¹⁶ The European Commission is now to prepare an action plan to put in place the priorities established in this document.¹¹⁷

62. Eventually, the role of the Agency may evolve following the accession of the European Union to the European Convention on Human Rights. It is likely that, in the years to come, the Agency will be consulted more often by European Union institutions, and in particular by the European Commission.

5. Concluding remarks

63. It is too early to evaluate the work of the Fundamental Rights Agency and it is not my mandate to do so. What is, however, useful, is for us to see how best – together with the Agency – we can obtain a clearer picture of the Agency's role in promoting and implementing human rights standards within the European Union without the risk of undermining the position of the Council of Europe as the leading human rights organisation in Europe. Permit me to recall, in this connection, the Assembly's position on this subject. In its Resolution 1427 (2005) the Assembly was of the opinion that "the creation of a fundamental rights Agency within the European Union could make a helpful contribution, provided that a useful role and field of action is defined for it and that the Agency therefore genuinely "fills a gap" and presents irrefutable added value and complementarity in terms of promoting respect for human rights".¹¹⁸ And in this Resolution,¹¹⁹ the Assembly also took 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 European Union, along the lines of similar national institutions that exist in several member states".

European Union, "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

¹¹⁰ Guy de Vel, *supra* note 32.

¹¹¹ As the first commissioner for this portfolio, Mrs Reding has set herself the following objectives: "Be the Guardian of the European Union Charter of Fundamental Rights, which is now legally binding on the Union. I will make sure that the Charter becomes the compass for all European Union policies and that European Union Member States respect it whenever European Union law is implemented. I will work to create a strong and coherent European area of fundamental rights and will apply a 'zero tolerance policy' when it comes to violations of the European Union Charter."

See http://ec.europa.eu/commission_2010-2014/reding/about/mandate/index_en.htm.

¹¹² Guy de Vel, *supra* note 32.

¹¹³ *Supra* note 55.

¹¹⁴ On 3 November 2009, the Fundamental Rights Agency reacted positively to the draft of this programme, with an opinion paper "The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda", based on the current thematic priorities of the Agency and inspired by the factual evidence the Agency's own research had so far produced; available at: <http://fra.europa.eu/fraWebsite/attachments/FRA-comments-on-Stockholm-Programme.pdf>

¹¹⁵ *Supra* note 115, p. 12.

¹¹⁶ *Supra* note 115, p. 2.

¹¹⁷ Within six months following its adoption.

¹¹⁸ Parliamentary Assembly Resolution 1427 (2005), paragraph 10, available at:

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta05/ERES1427.htm>.

¹¹⁹ Paragraph 13.

64. Since the creation of the Agency in 2007, certain synergies have been forged and developed between the latter and the Council of Europe. Although several doubts remain as to the risk of unnecessary duplication of tasks, there are several safeguards aimed at ensuring the Council of Europe's primary role in the area of human rights protection in Europe, such as the appointment of the independent person in respect of the Council of Europe in the Agency's managing bodies and the contact persons within both institutions, as well as provisions on the co-operation framework and methods in the Co-operation Agreement. Both institutions are currently elaborating various methods of fruitful co-operation in the areas which fall within the scope of both through mutual consultations and exchange of data. The Agency often refers to the Council of Europe's pertinent conventions, the *acquis* of its monitoring bodies and the case law of the European Court of Human Rights. Simultaneously, the Council of Europe bodies, including its Commissioner for Human Rights, also quote the Agency's reports and the data it has collected through surveys and other methods of gathering information. Hence both institutions may well become complementary and their co-operation of benefit to all concerned.

65. However, one should also bear in mind that human rights protection mechanisms within the European Union will also change following the entry into force of the Lisbon Treaty, which grants a legally binding character to the European Union Charter of Fundamental Right and provides for a legal basis for the accession of the European Union to the ECHR. On the one hand, these developments may increase the role of the Agency, which is likely to be more often consulted by European Union institutions. On the other hand, there may also be an increased risk of duplication of tasks (notably within the remit of the newly established European Union Commissioner for Justice, Fundamental Rights and Citizenship). As to the provisions of the European Union Charter of Fundamental Rights that are based on the ECHR, there is also an increased risk of diverging interpretations from those of the European Court of Human Rights by the Court of Justice of the European Union and other European Union institutions and member states when implementing European Union law. That is why rapid accession of the European Union to the ECHR would enable this risk to be avoided.

66. Some degree of duplication of the Council of Europe's tasks by European Union institutions, including the Agency, seems to be unavoidable,¹²⁰ even though certain safeguards have been put in place to minimise it.¹²¹ This risk of overlapping may increase in future, in particular in the area of the former "third pillar" and in respect of European Union candidate countries. The existing procedures for analysing the Agency's work and its compliance with the Council of Europe standards should therefore be applied vigilantly. Among different European Union bodies and especially within the Agency, the spirit of co-operation with the Council of Europe should be continuously promoted and existing Council of Europe standards should always be referred to as minimum standards for human rights protection throughout Europe. Before developing new activities and projects, the Agency should consider what it would add to the Council of Europe's work on the same topic.

67. Stronger human rights standards among European Union member states may stimulate other states to improve their own systems, too, but care must be taken not to create new dividing lines in Europe. That was always the Assembly's position and there is no reason to depart from it now.

68. Care must also be taken that new European Union standards do not occasionally fall behind those of the ECHR upheld by the Council of Europe. Different political and economic interests pursued by the European Union may at times create a situation in which existing human rights standards are diluted in order to achieve other objectives. This could also be an important common task of the Agency and its partners in the Council of Europe.

69. To conclude, one thing is certain: the Council of Europe must remain the primary forum for human rights protection in Europe. This role, and human rights protection in Europe, can best be strengthened by strong and useful links with the Agency, if synergies between both institutions continue to be developed with full respect for Council of Europe standards, and even more so if the European Union accedes to the ECHR.

¹²⁰ Speech by Mr Krassimir Kanev, Director of the Bulgarian Helsinki Committee, made during our Committee meeting in Paris on 11 September 2009. He also pointed out that the duplication of tasks in the area of non-discrimination already exists.

¹²¹ Speech by Professor Florence Benoit-Rohmer, Chairperson of the Scientific Committee of the Fundamental Rights Agency, made at the Committee meeting in Paris on 11 September 2009.