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**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**

**BRIEFING PAPER**

**WHAT LESSONS CAN BE DRAWN, FOR THE FUTURE EU  
FUNDAMENTAL RIGHTS AGENCY, FROM THE  
EXPERIENCES AT MEMBER STATE LEVEL, BY THE  
BODIES OR INSTITUTIONS THAT HAVE A SIMILAR  
COMPETENCE IN THE FIELD OF HUMAN RIGHTS AT  
NATIONAL LEVEL.**

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## ***The national institutions for the promotion and the protection of human rights in the EU Member States***

This briefing note\* addresses the question of the role of the national institutions for the promotion and the protection of human rights in the EU Member States. Its purpose is to identify which lessons may be drawn by the EU institutions from the working of such institutions in the context of the debate on the establishment of the European Union Agency for Fundamental Rights.<sup>1</sup>

### ***1. National institutions for the promotion and protection of human rights: the general framework***

In the Vienna Declaration and Programme of Action of 25 June 1993, the World Conference on Human Rights reaffirmed 'the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights'. It also encouraged 'the establishment and strengthening of national institutions, having regard to the 'Principles relating to the status of national institutions' and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level'.<sup>2</sup>

A number of the EU Member States have established national institutions for the promotion and the protection of human rights (NHRIs), as encouraged by this passage of the Vienna Declaration and Programme of Action. These institutions have been established a set of guidelines based primarily on the 1993 Paris Principles on national institutions for the promotion and protection of human rights approved by the United Nations General Assembly.<sup>3</sup> Other texts however should be mentioned, in particular Recommendation No R(97)14 of the Committee of Ministers of the Council of Europe on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997; General Comment No. 10 of the Committee on Economic, Social and Cultural Rights of 14 December 1998: *The role of national human rights institutions in the protection of economic, social and cultural rights*<sup>4</sup>; and the Copenhagen Declaration, adopted on 13 April 2002 by the Sixth International Conference for National Institutions for the Promotion and Protection of Human Rights, held in Copenhagen and Lund.<sup>5</sup> These documents have been complemented by compendiums of best practices for the establishment of such institutions.<sup>6</sup>

The 1993 Paris Principles may be read as defining the following criteria for national institutions for the promotion and protection of human rights:

#### ***1. Mandate***

A mandate 'clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence' (competences and responsibilities, para. 2)

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<sup>1</sup> COM(2005)280, 30.6.2005.

<sup>2</sup> Vienna Declaration and Programme of Action of 25 June 1993, UN doc. A/CONF.157/23, at para. 36.

<sup>3</sup> UN doc. A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, 'National institutions for the promotion and protection of human rights'. These principles were initially approved by the Commission on Human Rights in resolution 1992/54 of 3 March 1992. They are further explained in National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights (New York/Geneva, 1995), see :

<http://www.ohchr.org/english/about/publications/training.htm>.

<sup>4</sup> UN Doc E/C.12/1998/25.

<sup>5</sup> available at: <http://www.nhri.net/SixthConference.htm>

<sup>6</sup> See, apart from the United Nations *Handbook* referred to above : Council of Europe, *Non-judicial means for the protection of human rights at the national level* (Strasbourg, 1998); Commonwealth Secretariat, *National Human Rights Institutions - Best Practice* (London, 2001).

A mandate including the submission to the Government, Parliament and any other competent body, ‘on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights’, including on legislative or administrative provisions in force or proposed, and any situation of violation of human rights which the institution decides to take up (competences and responsibilities, para. 3, a))<sup>7</sup>

The national institution should have the possibility to ‘freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner’, and to ‘hear any person and obtain any information and any documents necessary for assessing situations falling within its competence’ (methods of operation)

### *2. Composition and membership*

A composition of the national institution ‘in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights’, particularly by effective cooperation to be established with, or through the presence of, representatives of non-governmental organizations, trends in philosophical or religious thought, experts, parliament; if delegates from the Executive are included, they should participate in the deliberations only in an advisory capacity (competences and responsibilities, para. 4)

‘In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution’s membership is ensured’ (competences and responsibilities, para. 6).

### *3. Infrastructure*

‘The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence’ (competences and responsibilities, para. 5)

## ***2. Cooperation between the national institutions for the promotion and protection of human rights at European level***

### *a) The European Coordinating Group of NHRIs*

On the European continent, these NHRIs have been cooperating and exchanging experiences through different means. A European Coordinating Group was established, as a network of NHRIs holding biannual meetings in order to ‘offer a space for exchange and cooperation among its members [and to] promote respect for and protection of human rights across the continent and in international forums’.<sup>8</sup> It is currently chaired by the French National Consultative Commission for Human Rights. It held its Fifth Meeting in Berlin on 26 and 27 November 2004.

### *b) The role of the Council of Europe and its Commissioner for Human Rights*

This cooperation between European NHRIs has been encouraged by the Council of Europe. Recommendation No R(97)14 adopted by the Committee of Ministers of the Council of Europe, cited above, which encourages the Council of Europe Member States to ‘consider, taking account of the specific requirements of each member State, the possibility of establishing effective national human

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<sup>7</sup> The Paris Principles specify that a national institution ‘may be authorized to hear and consider complaints and petitions concerning individual situations’; additional principles relate to that function. However, this is not necessarily to be part of the mandate of a national institution.

<sup>8</sup> For a description of the activities of the European Coordinating Group of national institutions for the promotion and protection of human rights, see the communication submitted to the United Nations Commission on Human Rights, UN doc. E/CN.4/2005/NI/2 (30 March 2005).

rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions’, also invites the governments to ‘promote co-operation, in particular through exchange of information and experience, between national human rights institutions and between them and the Council of Europe’. By Resolution 97(11) which it adopted at the same meeting,<sup>9</sup> the Committee of Ministers of the Council of Europe decided ‘to institute, in the framework of the Council of Europe, regular meetings with national human rights institutions of member states to exchange views and experience on the promotion and protection of human rights in their areas of competence’. The Resolution also invites the Secretary General of the Council of Europe to ‘ensure that national human rights institutions are informed of relevant activities concerning the promotion and protection of human rights in the framework of the Council of Europe’. Indeed, one of the main functions of national institutions for the promotion and protection of human rights – as it also appears clearly from the Paris Principles adopted in 1993 by the United Nations General Assembly<sup>10</sup> – is to contribute to the implementation by the State concerned of international human rights law : thus, the Council of Europe naturally has considered that the NHRIs of its Member States should constitute the channel not only of international human rights law, but also of the standards of the Council of Europe.

After the Commissioner for Human Rights of the Council of Europe was established in 1999 – one of the missions of whom it is to ‘facilitate the activities of national ombudsmen or similar institutions in the field of human rights’<sup>11</sup> –, an agreement between the Commissioner’s Office and the Presidency of the European Co-ordinating Committee of NHRIs led to the establishment of a Liaison Office ensuring that the co-operation between the Office of the Commissioner for Human Rights and the European NHRIs continue on a regular basis. Biannual meetings have been held between the Office of the Commissioner for Human Rights and European NHRIs. The third of such biannual events, called European Roundtables of National Human Rights Institutions, was held in Berlin on 25-26 November 2004. The participants there ‘called on the Council of Europe Commissioner for Human Rights to pursue his efforts to assist member States in setting up truly independent NHRIs pursuant to the Paris Principles and to intensify his good co-operation with them, especially by convening round table meetings at yearly (and not bi-annual) intervals and by facilitating engagement among NHRIs and Council of Europe fora in their field of competence, as is foreseen in the agreement on the establishment of the Liaison Office between the Commissioner’s Office and the Presidency of the European Co-ordinating Committee’.<sup>12</sup>

### ***3. The national institutions for the promotion and protection of human rights in the EU Member States***

The EU Network of Independent Experts on Fundamental Rights prepared a comparative table of NHRIs within the EU Member States in March 2004.<sup>13</sup> The International Coordination Committee of national institutions for the promotion and protection of human rights, which was established in 1993 and consists of representatives of national institutions, also constitutes a useful source of information on NHRIs. The main observations which this calls for are the following.

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<sup>9</sup> Resolution 97(11) on co-operation between national human rights institutions of the Member States and between them and the Council of Europe, adopted by the Committee of Ministers on 30 September 1997, at the 602nd meeting of the Ministers’ Deputies.

<sup>10</sup> Under the Paris Principles, NHRIs should in particular ‘promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation’; and ‘encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation’.

<sup>11</sup> Article 3, d), of the terms of reference of the mandate of the Council of Europe Commissioner for Human Rights, as adopted by Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999,

at its 104th Session, Budapest. The Commissioner for Human Rights also is to ‘provide advice and information on the protection of human rights and prevention of human rights violations. When dealing with the public, the Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment’.

<sup>12</sup> See Council of Europe doc. CommDH/NHRI(2004)2.

<sup>13</sup> Opinion n° 1-2004. The documents of the Network may be consulted on : [http://www.europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm)

The situation in the Member States with regards to the establishment of NHRIs remains varied. The Vienna World Conference on Human Rights recognized that 'it is the right of each State to choose the framework which is best suited to its particular needs at the national level'. However, the variations between the Member States of the EU concern not only the precise modalities of implementing the Paris Principles according to different national contexts; they concern the establishment of NHRIs itself.

13 of the 25 Member States have established a NHRI. These States are Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Latvia, Luxembourg, Poland, Portugal, Sweden and Spain. All of these institutions with the exceptions of three (Cyprus, the Czech Republic and Latvia) have been granted 'A' status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which implies that they are considered to conform fully with the Paris Principles.<sup>14</sup> These institutions are : for Cyprus, the National Organisation for the Protection of Human Rights (1998); for the Czech Republic, the Ombudsman Office (1999); for Denmark, the Danish Institute for the Protection of Human Rights (2002) ; for France, the Commission nationale consultative des droits de l'homme (1984); for Germany, the German Institute for Human Rights (2001) ; for Greece, the Greek National Commission for Human Rights (1998) ; for Ireland, the Irish Human Rights Commission (2001); for Latvia, the National Human Rights Office (1995) ; for Luxembourg, the Consultative Commission on Human Rights (2000); for Poland, the Commissioner for Civil Rights Protection (1999); for Portugal, the Provedar de Justiça (1999); for Spain, the Ombudsman (*Defensor del Pueblo*) (2000); for Sweden, the Ombudsman against Ethnic Discrimination (1999).

However, it is sometimes difficult to assess precisely whether the institution which is set up fully complies with the Paris Principles. For instance, although it has been granted 'A' status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), the Swedish Ombudsman against Ethnic Discrimination has a mandate limited to combating ethnic discrimination,<sup>15</sup> which constitutes a more limited mandate than that recommended under the Paris Principles. As to the National Organisation for the Protection of Human Rights established in Cyprus, although it complies essentially with the Paris Principles, its funding remains problematic.<sup>16</sup> Certain institutions fulfil in the Member States functions which resemble those of a NHRI, although they may not present all the characteristics of such institutions. The most significant examples are:

In **Austria**, the Austrian Human Rights Advisory Board (*Menschenrechtsbeirat*) was established in 1999 in reaction to a recommendation of the European Committee for the Prevention of Torture (CPT). It consists of an equal number of governmental and non-governmental members and has the function of monitoring the federal law enforcement agencies and advising the Minister of Interior in all human rights aspects. The Advisory Board established six regional Human Rights Commissions with the task of regularly visiting all places of detention under the authority of the Ministry of the Interior and of monitoring the use of force by law enforcement authorities. Although the independence has been guaranteed by a special constitutional provision, the members of both the Advisory Board and its Commissions can be released by the Minister of the Interior and are not fully independent.

In **Estonia**, the Legal Chancellor of the Republic of Estonia is an independent official who is appointed to office by the Parlement (Riigikogu) on the proposal of the President of the Republic for a term of seven years; the Office of the Legal Chancellor currently consists of approximately 40 qualified lawyers and other staff. The Legal Chancellor not only acts as an ombudsman on the

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<sup>14</sup> <http://www.nhri.net/ICCMembers.htm>

<sup>15</sup> There are other Ombudspersons in Sweden, which in total has six official such institutions : the Office of the Parliamentary Ombudsman (JO), Consumer Ombudsman (KO), Office of the Equal Opportunities Ombudsman (JämO), Ombudsman against Ethnic Discrimination (DO), Children's Ombudsman (BO), Office of the disability Ombudsman and Ombudsman against Sexual Orientation Discrimination (HomO). These ombudsmen however deal with the complaints they receive; their functions may not be assimilated to those normally performed by NHRIs.

<sup>16</sup> The conditions under which this institution currently is working does not adequately ensure that it can remain independent. The organisation employs only one person, whose salary is arranged directly from the Government through the amount provided for the Law Commissioner Office.

basis of individual complaints; he also controls the conformity with the constitution of all new laws, foreign treaties, regulations and other legal acts of state and municipal organs, and may recommend that these acts be modified in order to ensure compliance, and if the competent authority does not follow upon this recommendation, he may bring the issue to the Supreme Court.

In **Finland**, there exists an Advisory Board on International Human Rights matters, nominated by the cabinet and linked to the Ministry of Foreign Affairs. There also exists a Parliamentary Ombudsman, elected by Parliament and independent from Government, which receives complaints under a broad mandate, including constitutional rights, international human rights and good administration. She can order prosecution in most serious cases, although she usually only issues reprimands. A study prepared in 2002 within the Abo Akademi University Institute for Human Rights proposed a network model for the setting up of a national institution where the office of the Parliamentary Ombudsman, the existing Advisory Board on International Human Rights and academic human rights institutes would work closely together in order to cover the functions required by the Paris Principles.<sup>17</sup> The government however, has not acted upon this recommendation yet.

In **Slovakia**, the Slovak Centre for Human Rights was established in 1993.<sup>18</sup> Under an agreement concluded on 15 March 1994 between the United Nations and the Government of the Slovak Republic regarding the establishment of the Slovak Centre for Human Rights, the government is bound to provide adequate premises for the Human Rights Centre, to provide adequate funds, and to ensure the legal and operational independence of the Human Rights Centre. The Human Rights Centre has an administrative board composed of nine members, appointed by the President of the Slovak Republic (1), the President of the National Council of the Slovak Republic (1), the Public Defender of Rights (Ombudsman)(1), the Prime Minister on the motion of NGOs (1), the Minister of Labour, Social Affairs and Family (1), and the Deans of the Law Faculties of the four universities of the country (4). The Human Rights Centre monitors the situation of fundamental rights in the country. It publishes reports and accomplishes research and educational activities.

Finally, a number of Member States have ombudspersons, created following Recommendation No. R(85)13 on the Institution of the Ombudsman, adopted on 23 September 1985 at the 388th meeting of the Ministers' Deputies. Indeed, this Recommendation encourages the Member States of the Council of Europe to 'consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved'; this to a certain extent aligns the mandate of the ombudsman with those normally entrusted to NHRIs. In **Slovenia** for instance, the Ombudsman is entrusted by the Constitution (Art. 159.1)<sup>19</sup> with the protection of human rights and basic freedoms in matters involving state bodies, local government bodies and statutory authorities. The Ombudsman may, in particular, submit initiatives for amendments of statutes and other legal acts to the National Assembly and the Government (Art. 45.1 of the Constitutional Court Act<sup>20</sup>); he may discuss broader questions important for the protection of human rights and basic freedoms as well as for the legal protection of citizens in the Republic of Slovenia (Art. 9.2 of the Ombudsman Act<sup>21</sup>). On the other hand, in a number of Member States, the Ombudsman does not have powers related to human rights matters, and his or her mandate is limited to the more classical function of controlling compliance with the principles of good administration. This is the case, for instance, of the Seimas (Parliamentary) Ombudsmen's Office established in 1994 in **Lithuania**.<sup>22</sup>

<sup>17</sup> See <http://www.abo.fi/instut/imr/norfa/miko-pohjolainen-martin.pdf> (Finnish)

<sup>18</sup> Act of the National Council of the Slovak Republic No. 308/1993 Coll. of 15 December 1993, as amended by the Act No. 136/2003 Coll.

<sup>19</sup> Official Gazette RS, Nos. 33/91, 42/97, 66/00 and 24/03.

<sup>20</sup> Official Gazette RS, No. 15/94.

<sup>21</sup> Official Gazette RS, Nos. 71/93, 15/94 and 56/02.

<sup>22</sup> There are five Seimas (Parliamentary) Ombudsmen : two are entrusted with the investigation of the activities of State institutions; three investigate the activities of local government officers. They receive complaints relating to abuse of office by state and local authorities.

A number of EU Member States have no NHRI, nor any equivalent institution such as an Ombudsperson whose mandate extends to human rights matters and to proactive action, through the issuance of opinions or recommendations. These States are **Belgium** – despite a statement in favor of the establishment of a NHRI in the governmental declaration of July 2003 –, **Finland**,<sup>23</sup> **Hungary**,<sup>24</sup> **Italy**, **Lithuania**, **Malta**, and the **Netherlands**.

The situation of the **United Kingdom** is somewhat specific insofar as there exists hitherto a NHRI for one part of the country (Northern Ireland Human Rights Commission) while there are three other national institutions which focus only on discrimination (Commission for Racial Equality, Disability Rights Commission, and Equal Opportunities Commission). However, the situation in the United Kingdom is evolving, as the government has agreed to the proposal of the Parliament's Joint Committee on Human Rights that a Commission for Equalities and Human Rights should be established, to take over the work of the three equality bodies, while also focusing on the three other equality strands (age, religion and belief and sexual orientation) and taking responsibility for the promotional agenda which underpins the Human Rights Act. The Government published a White Paper concerning the proposed Commission for Equality and Human Rights (CEHR) on 12 May 2004, describing the role, functions and powers of the new proposed new Commission.<sup>25</sup> Following a consultation period, the Government published a response on 18 November 2004, including certain changes to its initial proposal. The Government intends to appoint the Chair and Commissioners by 2006 so that the body will be up and running in 2007. A process of phased entry is anticipated for the existing Commissions, with all of them being incorporated by 2008/09.

Variations exist, too, within the 13 Member States in which a national institution essentially compliant with the Paris Principles exists.<sup>26</sup> Of particular interest are the composition of these institutions, their independence, and the powers which they are recognized. Appendix I to this note summarizes these different dimensions in the form of a table.

#### 4. Final remarks

There are two ways to conceive the future EU Fundamental Rights Agency in relationship to the NHRIs of the EU Member States. First, the Agency could be seen as an institution for the promotion and protection of human rights in the legal order of the Union. It could seek inspiration, for the identification of the guarantees of its independence, for the composition of its organs, and for the definition of its powers as well as of its working methods, from the practice of the existing NHRIs in the Member States, remaining of course within the general framework set by the 1993 Paris Principles. Second, the Agency could be seen as based on the existing network of European NHRIs, and as a forum in which the existing NHRIs (or the equivalent institutions in the Member States which have no NHRI in the sense of the Paris Principles) could exchange their experiences and work together in order to contribute, through reports, recommendations and opinions, to improving the protection of fundamental rights in the Union.

A position such as that recently adopted by the European Group of national institutions for the promotion and protection of human rights (Common position regarding the European Commission's proposals for a Council regulation establishing a European Union Agency for Fundamental Rights, 17 January 2006) combines both ideas : the European Group of national institutions for the promotion and protection of human rights takes the view that 'the Agency must comply with the principles of independence, pluralism and transparency contained in the UN Paris Principles on National Human Rights Institutions'; but it also advocates that the Agency should work in 'close cooperation with the already existing institutions, particularly NHRIs and other national independent bodies' and that the structure should

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<sup>23</sup> See however the description above.

<sup>24</sup> However, as a result of the amendment of the Constitution in 1989 and the 1993 Act on the Parliamentary Commissioners, four commissioners exist : the Parliamentary Commissioner for Human Rights, the Deputy Ombudsman, the Parliamentary Commissioner for Data Protection and Freedom of Information, the Parliamentary Commissioner for Ethnic Minorities. These Parliamentary Commissioners were elected by the required two-thirds majority of the Hungarian Parliament on 30 June 1995.

<sup>25</sup> *Fairness for All: A New Commission for Equality and Human Rights* (Cm 6185).

<sup>26</sup> This comprises the 13 NHRIs having been accredited with 'A' status by the ICC, despite the reservations made above.



comprise ‘representatives of national human rights institutions (NHRIs) and (...) representatives of European institutions’.

Similarly, certain elements in the proposal of the Commission appear to be influenced by the first model : for instance, the fundamental rights forum (Art. 14 of the proposal) which is to be composed in a way roughly similar to a NHRI constituted at the level of the Union; the very idea of the Agency being ‘independent’ (Art. 15(1): ‘The Agency shall fulfil its tasks in complete independence’); the fact that, apart from the two representatives of the Commission, the other members of the management board are ‘independent persons’ appointed by each Member State (25-27, or more if third countries participate), by the European Parliament (1), by the Council of Europe (1); or the cooperation with civil society, non-governmental organisations, social partners, which the Agency is encouraged to undertake (Art. 4(1), i)). Other elements however clearly bring us closer to the second model : in particular, the ‘independent persons’ the Member States should appoint to the management board of the Agency should be persons ‘with high level responsibilities in the management of an independent national human rights institution; or, with thorough expertise in the field of fundamental rights gathered in the context of other independent institutions or bodies’ (Art. 11(1), al. 2), which suggests a vision of the management board as a network of NHRIs and equivalent institutions which may exist in the Member States ; the two representatives of the Commission on the management board have a right to vote on the decisions adopted by the board, which is not in conformity with the requirement under the Paris Principles that if the government is represented, its representatives should have only a consultative voice ; furthermore, the executive board comprises, not only the chairperson and the vice-chairperson of the management board, but also the two representatives of the Commission, which again would not be compatible with an understanding of the EU Fundamental Rights Agency conceived as a national institution for the promotion and protection of human rights for the legal order of the Union.

While it may be tempting to combine the two ideas (that of the EU Agency as a NHRI for the Union, on the one hand; that of the EU Agency as a network of NHRIs or equivalent institutions existing at the national level, on the other hand), these ideas can be dissociated from one another. We could conceive the EU Fundamental Rights Agency as an independent institution for the promotion and the protection of human rights within the EU legal order, ensuring the ‘pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights’ as recommended by the Paris Principles, for instance with a management board composed of persons presented by European-level human rights non-governmental organisations, academic experts, or the social partners represented at European level. We could also imagine the EU Agency as a network of national institutions for the promotion and protection of human rights which exist at national level. The two visions are clearly distinguishable in theory.

What are the merits of each of these respective models? The first option is however sometimes considered to be difficult to reconcile with the specificities of EU law and the role of agencies in the EU institutional construction. It is said, in particular, that the fact that the EU has limited competences (it may only exercise the competences which it has been attributed by the Member States) would not be reconcilable with the tasks normally entrusted to a NHRI. Second, it is added, the institutions of the Union should preserve their entire freedom of appreciation about what initiatives to take in the exercise of their competences to develop fundamental rights, and such appreciation – especially where it might involve the very delicate appreciation of the situation of fundamental rights in the Member States – could not be left to an Agency. Third, the agencies as they exist under the framework of European Community law (see, in particular, European Commission, Meta-Evaluation on the Community Agency System, Final Report of the Budget DG – Evaluation Unit, 15 September 2003) would not be reconcilable with the kind of organisation required from an independent institution for the promotion and protection of human rights. The author of this note is not convinced that these arguments are totally conclusive. While of course the structure and the working methods of the EU Fundamental Rights Agency should take into account the framework under which it will be placed – in particular as regards the relationship of the Agency to the EU institutions –, there is no insuperable obstacle in considering it in the form of a NHRI for the legal order of the Union. In particular, it is clear that the conclusions and opinions which the Agency should deliver either on its own initiative or upon request of the institutions (Art. 4(1), d)) shall

have to take into account the principle of conferral, and could not lead the Agency to recommend the Union institutions to exercise powers they have not been attributed under the treaties. It is also clear that any conclusions or opinions adopted by the Agency will not be binding upon the institutions, who shall be entirely free either to take them into account or to disregard them, in the exercise of their powers : indeed, NHRIs are normally conceived as acting on an advisory basis, i.e., as consultative bodies. Finally there are many similarities between a Fundamental Rights Agency and other agencies set up in order to provide the necessary expertise collected through independent means to the institutions in order to facilitate their work, so that the classical model of Community agencies is in fact transposable to the setting up of an EU Fundamental Rights Agency conceived along the lines of a NHRI for the Union.

The second model would be that of the EU Fundamental Rights Agency conceived as a network of NHRIs or equivalent institutions existing in the EU Member States. This is intellectually seducing. However, there are two main difficulties with this approach. First, there is no uniformity among the Member States : as described in detail above and in the attached table, only 13 out of 25 have NHRIs considered to comply with the Paris Principles, and even among those States, strikingly different types of institutions may be identified; while in a few of the other Member States institutions performing relatively similar functions to NHRIs do exist, seven Member States still have no institution even vaguely similar to a NHRI, and in certain cases – for example in the Netherlands – the government has explicitly rejected the idea of creating such an institution. Second, under this model, each NHRI (or equivalent institution) would be represented within the structure of the Agency, but whereas each NHRI deals with national questions (i.e., with the promotion and protection of human rights at national level), the Agency would require an expertise about specifically European questions (i.e., which concern the development of Union legislation and policies), which are potentially very different and have their own specificities. This second model risks entertaining a confusion as to the actual role of the EU Fundamental Rights Agency : while it would in principle be entrusted with contributing to the promotion and protection of human rights within the legal order of the EU, it might be perceived as a forum where the Member States' performances in the field of human rights are compared with one another, and where national institutions meet in order to share concerns they have about human rights developments at then national level and which answers these concerns call for.

On both these issues, the differences should not be underestimated with the Working Party created under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.<sup>27</sup> This Working Party, which has an advisory status and is to act independently, is composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission. However, under this Directive, each Member State has to set up an independent supervisory authority responsible for monitoring the application within its territory of the provisions adopted pursuant to the Directive (see chapter VI) ; in proposing the EU Fundamental Rights Agency, by contrast, the Commission does not propose to impose on all the Member States to create an independent institution for the promotion and protection of human rights, which would ensure an equivalent uniformity. Secondly, while the rules on which both the national supervisory authorities and the Working Party created under Article 29 of Directive 95/46/EC have been harmonized throughout the Member States – so that the Working Party may ensure that the interpretations converge and that problems of interpretation are clarified in its opinions –, certainly no such harmonization can be said to have taken place in the vast fields which present a relationship to the protection of fundamental rights. Indeed, fundamental rights are not as such a 'field': they are a set of requirements which have to be complied with in all the fields in which the public authorities act, and they cannot be circumscribed to any particular domain of activity.

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<sup>27</sup> OJ L 281 , 23.11.1995, p. 31.

## APPENDIX I: The existing national institutions for the promotion and protection of human rights in the EU Member States

	<b>Composition</b>	<b>Independence</b>	<b>Powers</b>
Cyprus: National Organisation for the Protection of Human Rights (1998)	President: independent government officer appointed by the Council of Ministers for a renewable period of five years. Two committees: committee on the implementation of conventions composed of representatives of ministerial departments; committee on guidance, composed of distinguished persons in the field of human rights proposed by diverse actors, including civil society.	Independence formally guaranteed under Sect. 1 of its Memorandum (representatives of the government in the committee on the implementation of conventions only have consultative voice); however the level and method of funding does not ensure independence	<ul style="list-style-type: none"> <li>• Issues recommendations and reports to the authorities</li> <li>• Prepares the State reports to human rights treaties bodies</li> <li>• May examine human rights violations on its own initiative or on the basis of complaints</li> <li>• Recommendations concerning compliance with international instruments in the field of human rights</li> </ul>
Czech Republic: Ombudsman Office (1999)	Ombudsman office comprises the Ombudsman, one Deputy Ombudsman, and the staff.	Independence is guaranteed and effective, as the Ombudsman is placed under the responsibility of the Parliament	<ul style="list-style-type: none"> <li>• Receives and examines complaints about cases of maladministration</li> <li>• May investigate on his own initiative and address recommendations</li> </ul>
Denmark: Danish Institute for the Protection of Human Rights (2002)	Director of the Institute, and four departments (research department; international department; information and education department; national department); a Council for Human Rights ensures that the work of the Institute conforms to its mandate	High degree of independence guaranteed under the Act on Establishment of a Danish Centre for International Studies and Human Rights of 6 June 2002	<ul style="list-style-type: none"> <li>• Offers advice to the Parliament and Government on human rights matters</li> <li>• Human rights training and awareness raising</li> <li>• (Since May 2003) may hear complaints relating to alleged instances of discrimination</li> </ul>
France: Commission nationale consultative des droits de l'homme (1984)	Composed of representatives of the government (which however have advisory powers only), as well as of two members of the Parliament (one from the National Assembly and one from the Senate), the members of the Council of State, magistrates, and the Mediateur de la République (ombudsman); as well as a large number of representatives of civil	Although its members are appointed by the Prime Ministers, the CNCDH is truly independent because of its pluralist composition and because the representatives of the executive have no voting powers	<ul style="list-style-type: none"> <li>• Adopts opinions on parliamentary or governmental bills or proposals, as well as on compliance with human rights in the practice of the authorities</li> <li>• Contributes to the reports presented by France to human rights treaties bodies</li> </ul>

	society organisations (NGOs and unions, experts, academics, e.g.)		
Germany: German Institute for Human Rights (2001)	Composed of one executive board; one advisory board composed of representatives of civil society and academia; and an assembly of members. Staff currently of 9 employees.	Independence is guaranteed under the responsibility of the <i>Bundestag</i> , although the funding is received from ministerial departments; the representatives of ministries and of the <i>Bundesrat</i> which are members of the Institute do not have voting rights	<ul style="list-style-type: none"> <li>• Information and documentation on human rights matters</li> <li>• Advises the public authorities on human rights issues</li> <li>• Does not exercise forms of monitoring</li> </ul>
Greece: Greek National Commission for Human Rights (1998)	Under Article 2 of Law 2667/1998, the GNCHR is composed of a large number of personalities from civil society organisations (including unions), from the media, from universities, from the Bar; two of the members are eminent personalities appointed by the Prime Minister	The independence of the GNCHR is ensured by the fact that the representatives of the participating institutions elect the president and vice-president of the Commission, and by the fact that the representatives of ministerial departments participate without a right to vote.	<ul style="list-style-type: none"> <li>• Submits recommendations, reports and opinions on the legislative, administrative or other measures which could improve the situation of human rights in Greece</li> <li>• Awareness-raising in the field of human rights</li> <li>• Consultative opinions on the reports Greece is to submit to human rights treaties bodies</li> <li>• Annual report on the situation of human rights in Greece</li> <li>• Contribute by opinions to the implementation of international human rights law in Greece</li> </ul>
Ireland: Irish Human Rights Commission (2001)	15 members, including the President	The Irish Human Rights Commission had demonstrated its independence despite initial fears after the government refused to appoint the members recommended by an independent selection committee	<ul style="list-style-type: none"> <li>• May examine legislative proposals for their compliance with human rights, if requested to do so by Government</li> <li>• May make recommendations either upon request or on its own motion on how to improve the situation of human rights in Ireland</li> <li>• May conduct enquiries (sect. 9 of the Human Rights Commission Act 2000)</li> <li>• Awareness raising in the field of</li> </ul>

			<p>human rights</p> <ul style="list-style-type: none"> <li>• May assist individual victims of human rights violations or offer legal representation</li> <li>• May institute legal proceedings in its own name based on the Irish Constitution or an international treaty in force in Ireland</li> </ul>
Latvia: National Human Rights Office (1995)	The Director is appointed by the Saeima (Parliament) upon the proposal of the Cabinet of Ministers, and has a status equivalent to that of a Minister, which ensures his or her independence. The deputy director and staff are appointed by the Director.	Independence is effective, although not protected in the <i>Satversme</i> (Constitution) (the Office is a public institution whose independence is functional rather than institutionally guaranteed)	<ul style="list-style-type: none"> <li>• May inquire about complaints for human rights abuses</li> <li>• May react to allegations of human rights abuses</li> <li>• Monitors the situation of human rights in the country</li> <li>• Information and dissemination activities</li> <li>• May examine the compliance of legal acts with human rights and where a conflict is suspected submit an application to the Constitutional Court</li> </ul>
Luxembourg: Consultative Commission on Human Rights (2000)	The Commission is composed of 22 members with diverse backgrounds, appointed for terms of three years for their expertise in human rights or issues of general interest	Full independence	<ul style="list-style-type: none"> <li>• Provides opinions and recommendations of an advisory nature to the government, either upon request of the government or on its own initiative</li> </ul>
Poland: Commissioner (Ombudsman) for Civil Rights Protection (1999)	Ombudsman is appointed by the Sejm (lower house of Parliament) for a five-year term of office		<ul style="list-style-type: none"> <li>• May carry out investigations on complaints and deliver opinions on the appropriate solution; may also request that disciplinary proceedings be commenced, or judicial proceedings initiated, with a right to take part in those proceedings and file cassation appeals against any final judgment reached</li> </ul>

			<ul style="list-style-type: none"> <li>• May propose legislative initiatives</li> <li>• May seek from the Constitutional Tribunal a decision on the compatibility of statutory laws, international treaties and other regulations with the Constitution</li> </ul>
Portugal: Provedar de Justiça (1999)	Ombudsman elected by the Parliament for a four year period renewable once, and is supported by a staff (25 Assessors and 5 co-ordinators), including a technical and administrative staff	Independence is guaranteed under the Statute establishing the institution of the Ombudsman ; enjoys an immunity both civil and criminal for the recommendations or opinions adopted in the exercise of his functions. Budget of the office is adopted by Parliament, and the Ombudsman is recognized ministerial powers with regard to the authorisation of expenses	<ul style="list-style-type: none"> <li>• May receive complaints relating to actions or omissions of the public authorities, and delivers recommendations to the competent bodies</li> <li>• May make recommendations relating to legislative initiatives which might be adopted in order to improve the protection of human rights</li> <li>• May deliver opinions upon the request of the Parliament</li> <li>• May request from the Constitutional Court a ruling on the constitutionality or legality of any act adopted by the public authorities (Art. 281, para. 1 and 2(d) of the Constitution)</li> <li>• Is recognized certain investigative powers in order to fulfil his function effectively</li> </ul>
Spain: Ombudsman ( <i>Defensor del Pueblo</i> ) (2000)	Under the Organic Law 3/1981 of 6 April 1981 (BOE du 7 mai 1981), the Defensor del Pueblo is elected by the Cortes Generales (Senate and Congress) for 5 years, with a 3/5 majority	Independence guaranteed through the modalities of his/her election, requiring the support of a large group of political forces; is also independent in the exercise of the mandate and is recognized a certain immunity	<ul style="list-style-type: none"> <li>• May supervise the administration for cases of maladministration (also with respect to the Autonomous Communities, since cooperation agreements have been passed with the Ombudspersons in the Communities)</li> <li>• May file complaints on behalf of aggrieved citizens or on his/her own motion, including amparo before the Constitutional Tribunal ; and may</li> </ul>

			<p>challenge the constitutionality of a legislation adopted by the Cortes</p> <ul style="list-style-type: none"> <li>• May adopt opinions on his/her own motion</li> <li>• May request information from the Executive; any refusal to provide the information requested may be arbitrated by the Cortes</li> <li>• Where he/she identifies indicia of criminal offences, may submit the information to the prosecutor or to the general council of the judiciary</li> </ul>
Sweden: Ombudsman against Ethnic Discrimination (1999).	Appointed by the Parliament for a term of four years	Independence is ensured through the process of appointment (election by Parliament)	Offers advice in individual cases and may seek to reach a friendly settlement with the alleged wrongdoer

