



Recommendation 1744 (2006)¹

Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union

Parliamentary Assembly

1. The Parliamentary Assembly, recalling its [Resolution 1427 \(2005\)](#), reaffirms 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”.
2. To determine whether there is such a gap, it is necessary first to consider the existing human rights protection system which is built upon and around the Council of Europe. Over its fifty-six-year history, the Council of Europe – which now counts amongst its membership 46 countries of Europe – has developed a complete range of instruments and mechanisms for promoting and protecting human rights.
3. Since all European Union member states are also members of the Council of Europe, their actions in implementing European Union law are subject to the standards and supervisory mechanisms of the Council of Europe. In fact, by far the most serious lacuna surrounds the institutions of the European Union itself, the only public authorities operating in Council of Europe member states that are outside the jurisdiction of the European Court of Human Rights, although the European Court of Justice, in its decisions, does in fact follow the case law of the European Court of Human Rights.
4. The Assembly’s concern in this matter is motivated by a desire to ensure that the inhabitants of Europe as a whole benefit from the most effective and efficient overall human rights protection system. First and foremost, the agency should concentrate on filling the principal lacuna. Were it, in addition, to duplicate activities already undertaken by the Council of Europe (or by national human rights commissions), this could have serious adverse effects for the overall system. Duplication could lead to inconsistencies and create the possibility of “forum shopping,” with the countries that were subject to the different mechanisms giving preference to whichever took the more favourable position.
5. There could also be disadvantageous consequences from the perspective of European integration. The fact of having two parallel institutions engaged in similar activities within the same geographical region, one having a more limited membership than the other, would create new dividing lines in Europe by reference to states’ institutional situation in bodies devoted to human rights, one of the very principles intended to unite Europe. The apparent incoherence of creating a new European Union body to duplicate work already satisfactorily undertaken elsewhere would cause confusion amongst a European public already uncertain about the process of European integration. Duplication would also waste public money at a time of general budgetary stringency, thus further alienating citizens from European institutions, including the mechanisms of human rights protection.
6. At the Warsaw Summit in May 2005, the heads of state and government of the Council of Europe member states – including those of all European Union member states – reaffirmed the central role of the Council of Europe in protecting and promoting human rights and resolved to enhance its role as an effective mechanism of pan-European co-operation in this field, including by ensuring that the European Union and its member states make better use of available Council of Europe instruments and institutions. The Warsaw

1. Assembly debate on 13 April 2006 (14th Sitting) (see [Doc.10894](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Jurgens). Text adopted by the Assembly on 13 April 2006 (14th Sitting).



Summit also requested Mr Jean-Claude Juncker, Prime Minister of Luxembourg, to prepare a report on relations between the Council of Europe and the European Union. The Assembly considers that creation of a new, separate human rights body whose activities duplicate those of the Council of Europe would be entirely inconsistent with the decisions taken at the Warsaw Summit and contrary to the conclusions of the Juncker report.

7. At the beginning of the consultation procedure, the European Commission produced a consultation document containing, inter alia, the following points:

7.1. the agency will be required to monitor fundamental rights by area [thematically] and not prepare reports by country;

7.2. confining the agency's activities to the scope of EC/EU law would help avoid duplication of the activities of other bodies;

7.3. a mandate for the agency to act in relation to Article 7 of the Treaty on European Union (Maastricht 1992), to determine serious and persistent breaches by member states of the founding principles of the European Union, would be difficult to reconcile with an effective agency and could lead to overlap with the work of the Council of Europe, creating a very real risk of duplication and contradiction;

7.4. confining the agency's activities to European Union territory would clearly underline the political will to emphasise the importance of fundamental rights to and within the Union, effectively placing responsibility on the institutions; this message would be diluted if the agency's remit included third countries.

8. The Assembly deeply regrets the fact that subsequent developments appear to have lost sight of these points and firmly believes that they remain the most appropriate basis for an effective agency, analogous to a national human rights institution, with the potential to bring genuine added value to the overall European human rights protection system.

9. The Treaty establishing a Constitution for Europe is often mentioned in justification for establishing the agency, even by reference to the fact that its ratification process has been blocked. The Assembly notes that this treaty, agreed upon as a package of measures, would also have given far greater powers to national parliaments with respect to the European Union legislative process, in particular in relation to the application of the principle of subsidiarity. Unfortunately, however, the role of national parliaments in the discussions surrounding the agency has not been properly acknowledged, despite several – including in the Czech Republic, France, Germany, the Netherlands, the United Kingdom and, jointly, in Estonia, Latvia, Lithuania and Poland – having expressed serious reservations.

10. The Assembly recommends that all European Union member states' national parliaments that have not already done so give serious and detailed consideration to the proposed agency, with a view to adopting a position based on the present recommendation. Assembly delegations from the relevant parliaments should take the lead in initiating the necessary procedures.

11. Given the double mandate of its members as democratic representatives at both national and European levels, the Assembly draws on its own existing positions and on the objections raised thus far within national parliaments to make the following recommendations to the institutions and member states of the European Union:

11.1. the agency should be explicitly limited, in its mandate, to human rights issues that arise within the European Union's internal legal order;

11.2. the agency should be explicitly required, in its mandate, to refer in its work to the principal human rights instruments of the Council of Europe, namely the European Convention on Human Rights (ETS No. 5), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126), the European Social Charter (ETS No. 35), and the Framework Convention for the Protection of National Minorities (ETS No. 157);

11.3. the agency should have no mandate to undertake activities concerning non-European Union member states. Should such a mandate nevertheless be considered absolutely necessary, it should be strictly confined to candidate countries and limited to issues arising from the accession process;

11.4. the agency should be explicitly excluded, in its mandate, from engaging in activities that involve assessing the general human rights situation in specific countries, in particular those that are members of the Council of Europe;

11.5. establishment of the agency should not be accompanied by creation of a new forum for human rights;

11.6. the agency should be explicitly required, in its mandate, to ensure that it avoids duplication of the activities of the Council of Europe;

11.7. the Council of Europe should be represented on the management structures of the agency at a level and with voting rights at least equal to those that it currently enjoys on the management structures of the European Monitoring Centre on Racism and Xenophobia;

11.8. the legal basis of the agency must be beyond reproach. In the interests of transparency, the critical opinion of the legal services of the Council of the European Union, as referred to by the French National Assembly and the Czech Senate, should be published;

11.9. further serious and detailed consideration should be given to the application of the principle of subsidiarity. This should involve detailed comparison of the various activities proposed for the agency with the relevant acts of member states at both national level and in other international fora, including in particular the Council of Europe;

11.10. further serious and detailed consideration should also be given to application of the principle of proportionality, taking into account the exact extent to which the relevant treaty contains objectives of relevance to the activities proposed for the agency;

11.11. given the importance to the legal environment in which the agency would operate of the European Union Charter for Fundamental Rights having binding effect and the European Union acceding to the European Convention on Human Rights – both foreseen in the Treaty establishing a Constitution for Europe – consideration should be given to postponing creation of the agency until the fate of these provisions has been resolved;

11.12. the political will impelling the proposals for the agency should be employed to give new impetus towards European Union accession to the European Convention on Human Rights, which would be the most important step in ensuring that the European Union acts with full respect for human rights;

11.13. final decisions relating to the agency should be deferred until national parliaments in all European Union member states have had the opportunity of adopting final positions on matters relating to it. The present report and recommendation complement but cannot completely substitute for the full range and detail of positions that might be taken in national parliaments.

12. Bearing in mind the more general work currently being undertaken concerning relations between the Council of Europe and the European Union, the Assembly strongly believes that the issue of the agency should not be addressed outside this context. The Assembly therefore makes the following recommendations to the Committee of Ministers and to the institutions and member states of the European Union:

12.1. work on a co-operation agreement between the agency and the Council of Europe should be deferred until the precise mandate of the agency has been determined;

12.2. final decisions on the creation and mandate of the agency should be deferred until the overarching new framework for enhanced co-operation between the Council of Europe and the European Union (at present being discussed as a “memorandum of understanding”) has been defined and agreed upon.

13. Finally, the Assembly recommends to the Committee of Ministers that, since this issue is of profound significance to the overall European human rights protection system and thus to the Council of Europe in particular, it gives further serious and detailed consideration to the issue, with a view to reaching a common position based on the present recommendation.