

Lord Grenfell  
Chairman, Select Committee on the European Union  
House of Lords  
London  
SW1A 0PW

8 November 2005

*Dear Mr Grenfell,*

#### European Fundamental Rights Agency

You wrote on 20<sup>th</sup> October asking me to clarify the Government's position on various aspects of the Commission's proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, and its proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the TEU. I would like to address each of your questions in turn:

- **The Government's position on the adequacy of the legal basis of the proposal and whether or not a Regulation creating an EU (as distinct from an EC) agency can be based on Article 308 of the EC Treaty.**

In the Government's Explanatory Memorandum of 20 July 2005, we set out our views on why we consider Article 308 of the TEC to be an appropriate legal base for the Regulation establishing the Agency. As Presidency we are working with other Member States to agree on the appropriate legal base for the Agency.

Article 308 TEC provides the Council with the means to attain the objectives of the Community if the Treaty has not provided the necessary powers. The importance of fundamental rights in Community law has been accepted for many years. While ensuring respect for fundamental rights is not specifically listed as a Community objective in Articles 2 and 3 TEC, the European Court of Justice has found that it is a condition for the lawfulness of Community acts, and respect for fundamental rights thus forms an underlying or implied objective of the Community. Member States are also required to respect fundamental rights when implementing such acts. We consider, therefore, that Article 308 is available as a legal base for the TEC proposal insofar as it aims to provide the Community Institutions with assistance to ensure that they respect fundamental rights (and so far as there is no specific legal base or bases for the proposal).



The legal base for the Regulation is in the TEC and this establishes the powers for the Agency with respect to Community law. As proposed, the Agency's remit on the third pillar derives from the Council Decision which has a TEU legal base. Given this dual legal basis which will ultimately result in a single Agency, we feel it is reasonable for the Agency to establish a European Union Fundamental Rights Agency, the name of which does not affect the scope of activity as set out in the substantive provisions of the Regulation.

**The Government's position on the extent to which the Agency may "refer" to international human rights instruments other than the EU Charter (Article 3(2))**

It is proposed that the Agency will refer to the Charter of Fundamental Rights, but this does not exclude it from referring to other human rights instruments. The Charter is not legally binding, but instead showcases the rights, freedoms and principles that already exist at the European level. Many of the rights in the Charter are reaffirmations of rights and freedoms contained in other international human rights instruments, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). By referring to the Charter, the Agency will implicitly and unavoidably be referring to the ECHR and to other international human rights instruments from which the Charter's provisions are drawn. As the Attorney General stated in his conference paper of 25<sup>th</sup> June 2004 "The Charter exercise is not minting new rights, but rather increasing the visibility of existing rights" (published in [2004] EHRLR (5), p473).

**The Government's position on whether the remit of the Agency should extend beyond Community law to encompass the Common Foreign and Security Policy and the Government's position on the geographical scope of the Agency, in particular the extent to which it should include participation by non Member States and therefore stretch beyond the Union.**

We do not support a second pillar remit for the Agency, and consider that the Agency's external role should be well defined and limited. Any substantial third country remit would overburden the Agency, and run the risk of duplication with other organisations and mechanisms and with the foreign and human rights policy of Member States.

- **The Government's position on the extent to which the Agency should be involved in pre-legislative scrutiny**

The Government believes that the Agency could provide independent guidance and advice on fundamental rights to Community Institutions upon request. This could be of assistance to them in policy formulation to ensure that fundamental rights considerations are adequately taken into account in proposals for Community legislation. Thus although the Institutions do their own impact assessments, the Agency could provide an informal means of pre-legislative scrutiny to the Community Institutions but not the Member States.

**The Government's position on the extent to which the Agency should be involved in monitoring Member States' compliance with fundamental rights under article 7 TEU.**

The proposal gives the Agency an advisory role under Article 7 TEU, in cases where a major breach of human rights is alleged to have taken place within a Member State on a matter falling within the Agency's competence. However, such a role would be only at the request of the Council. We are content with this from a policy perspective, provided that the Agency does not have the right of initiative in this regard.

- **The Government's position on the degree of any overlap between the Agency and the Council of Europe and other agencies (at national, Community and international level) in the field (including in particular the proposed EU Institute for Gender Equality) and how this can be minimised.**

It is clear in negotiations that all Member States are keen to ensure that the Agency should not duplicate the work done by other international organisations. The main focus of the Agency will be to provide assistance to Community Institutions when they are implementing Community law. This should avoid duplication of monitoring done by the Council of Europe as well as the more international, external monitoring work done by other organisations. The Commission has included a provision in the Regulation (Article 9 of Commission's proposal) for the Agency and the Council of Europe to enter into a co-operation agreement. This will require a member of the Council of Europe to sit on the Management Board of the Agency. We are keen to ensure that the Council of Europe is represented in the Agency's Executive Board with the same voting rights as it currently has at the European Monitoring Centre on Racism and Xenophobia (EUMC). Maximising co-operation with other relevant bodies such as the European Gender Institute, the OSCE and the UN is also important and is being considered.

**The Government's position on the structure of the Agency and its independence and accountability (particularly the role of the Commission in setting the Agency's Work Programme and whether or not its representatives on the Management Board ought to be subject to the requirement of independence which applies to the other board members).**

The independence of the Agency is crucial but the Agency should also be accountable to the Council for its operation. We are working with other Member States to ensure that the Agency's structure and working methods are designed to ensure its independence and accountability. With regard to the requirement of independence for the Commission's representatives at the Management Board, the Government deems it appropriate to consider other models of agencies established by the EU to provide a firm foundation for the Agency's management and for its accountability to the Council.

I am copying this letter to Jimmy Hood MP (Chairman of the Commons European Scrutiny Committee), Simon Patrick (Clerk to the Commons Committee), Michael Carpenter (Legal Adviser to the Commons Committee), Les Saunders (Cabinet Office), Stuart Young (Departmental Scrutiny Co-ordinator).

*Tommy, my,*



**CATHERINE ASHTON**