1. Gist of the Commission document

1.1 The objective of the proposal is to extend the mandate of the European Monitoring Centre on Racism and Xenophobia (EUMC) and to establish a European Union Agency for Fundamental Rights, as decided by the European Council on 13 December 2003.

1.2 The main difference between the existing legislation and the present proposals is that the latter extend the scope from racism and xenophobia, besides the regulatory systems recognised by the UN, ILO and the Council of Europe, to cover all areas of fundamental rights referred to in the Charter, without prejudice to those areas which are already covered by other Community agencies.

1.3 The Agency will deal with fundamental rights as regards implementation of Union law, both in the Member States and in those candidate countries and potential candidate countries which participate in the Agency. In addition, the Commission may ask the Agency to submit information and analysis on third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements.

1.4 The objective of the Agency is to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States with assistance and expertise relating to fundamental rights when implementing Community law in order to help them to fully respect these rights when they take measures or formulate a course of action within their respective spheres of competence.

1.5 Within thematic areas, the Agency will, in complete independence, collect and assess data on the practical impact of Union measures on fundamental rights and on good practices in respecting and promoting these rights; express opinions on fundamental rights policy developments; raise public awareness of all the texts and regulatory instruments to which EU refers and promote dialogue with civil society; and coordinate and network with various actors in the field of fundamental rights. The Agency will not have any complaint resolution mechanisms.

1.6 The proposal empowers the Agency to pursue its activities in areas referred to in Title VI of the Treaty on European Union.

2. General comments

2.1 The Committee welcomes the decision of the European Council to establish a European Union Agency for Fundamental Rights ('the Agency' thereafter) to enhance the Union principles and practices enshrined under Article 6 of TEU. It will create a mechanism for the monitoring of fundamental rights in the Union that could serve to improve the coordination of the fundamental rights policies pursued by the Member States. There is much in this Commission proposal that the Committee would welcome, in particular:

— the use of The Charter of Fundamental Rights as the point of reference for the Agency's mandate; making for the first time, social and cultural rights indissociable and of equal value. In this connection the Agency has a specific early warning capacity with regard to the implementation of social rights, including in EU relations with third countries;

— the extension of the scope of the Agency to include matters relating to police and judicial cooperation in criminal matters through Council Decision;

— the use of the Agency as the technical expert in the context of proceedings commenced under Article 7 of the Treaty on European Union;

— proposed measures to promote the independence and public interests within the Management Board, the Director and the Forum;
— participation of candidate or potential candidate countries.

2.2 The Committee welcomes paragraph 2 of the Preamble of the proposed Regulation, which recognises the scope of the existing rights to protect citizens and non-citizens within the Union. The Preamble states that The Charter of Fundamental Rights of the European Union reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedom, the social charts adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.'

The Committee recognises the need to strike the right balance between security, in particular anti-terrorist measures, and the protection and promotion of human rights and fundamental freedoms. In the aftermath of September 11 and the more recent Madrid and London bombings, human rights and fundamental freedoms may be compromised by some of the new anti-terrorist measures adopted by Member States. However one of the biggest weaknesses of the European cooperation in the field of security is the fact that these policies remain outside the Community framework and are drawn up mainly according to the intergovernmental method (the third pillar of EU). The role of the European Union is therefore very limited. This lacks transparency in the decision making process by the exclusion of the European Parliament and the European Court of Justice. Extending the remit of the new Agency to include the third pillar of the EU (Title VI of the TEU) would be a key element in maintaining a proper balance between freedom, security and justice in the policies developed by the Union (1).

2.3 The Committee recognises the expertise and the existing monitoring mechanism within the Council of Europe in the field of human rights and fundamental freedoms, including the enforceable social rights of the Revised European Social Charter. We also recognise the competence of the Council of Europe and its European Court of Human Rights to deal with human rights violation in accordance with various Conventions and international law in which the Agency does not have such competence. Therefore a more robust coordination and cooperation between the Agency and the Council of Europe is paramount.

The Agency must, like the Court of Justice of the European Communities in its opinions and judgements, refer to the international texts as to the interpretation and application of primary and secondary EU law.

The Committee reiterates its request for the EU to be a member of the European Convention on Human Rights and the Council of Europe's Revised European Social Charter when the necessary competence has been acquired by the EU.

2.4 The Committee has a major concern that the proposal does not promote or support wider representation from organised civil society in the Management Board and the Fundamental Rights Forum (thereafter 'the Forum') of the new Agency. This is contrary to the European Governance White Paper which states that Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs.....Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest (2).

2.5 The Management Board and the Forum should not just be comprised of lawyers and academics; it should have a wider diverse background of people, in particular NGOs, social partners, cultural, religious and humanist organisations that advocate and defend the fundamental rights of socially excluded and disadvantaged groups in our society.

3. Specific comments

3.1 Legal basis to establish the EU Fundamental Rights Agency

3.1.1 It can be argued that using Article 308 TEC together with a Council decision under Title VI, may not be sufficient to ensure that the Agency has competence in the areas covered by Union law. Article 308 TEC gives the Community (not the Union) the power to act unanimously to take appropriate measures to achieve an objective of the Community, in situations where that power has not been provided for by the TEC. It is a general objective of the Community to ensure that its own action fully respects and protects fundamental human rights but there are no specific powers provided for in the Treaty to that end.

3.1.2 The proposed Council decision is to then empower the Agency to pursue its activities in areas referred to in Title VI of the Treaty of the European Union.

3.1.3 The Committee emphasises that the protection and promotion of human rights are the common values and objectives of the Union as expressed in Article 6(4) of TEU, which states that The Union shall provide itself with the means necessary to attain its objectives and carry through its policies'. Therefore the Committee requests the Council to anchor the Agency in the strongest legal basis of competence in accordance with Article 6(4) in order to ensure that the Agency has the necessary powers to fulfil its functions.


3.2 Tasks of the Agency (Article 4)

3.2.1 The Committee recommends inserting a section in Article 2 of the object clause, that one of the objectives of the Agency is to formulate recommendations, which the institutions, bodies, offices and agencies of the Community and its Member States can use to take measures and formulate courses of action on fundamental rights and to provide information on the possibilities for legal action by the national human rights agencies to protect the rights of those individuals or groups discriminated against by legislation or by state practices which do not respect the principle of the rule of law.

The Agency should draw up an annual report on the implementation of fundamental rights in the EU and periodic reports regarding its relations with international institutions, particularly in the area of trade and development aid, and regarding the association agreements and the Cotonou Convention.

3.2.2 The Committee also recommends that the Agency may be requested by the European Parliament, the Council or the Commission to do assessments on the compatibility between the Charter of Fundamental Rights and any proposed new EU legislation and policy (including external policies such as trade with developing countries), notwithstanding the right to self initiate an assessment on any subject on European proposed legislation, in agreement or on proposal of its boards.

3.3 Areas of activity (Article 5)

3.3.1 Feedback from the consultation showed that 90 % of consultees wanted to ensure that the focus for the fight against racism and xenophobia would not get lost within the Agency. We therefore welcome the Commission’s proposal under Article 5(1)(b) that the Agency should always include racism and xenophobia in the thematic areas of its activities within the Multiannual Framework.

3.3.2 However, the Committee is of the view that in order to mainstream the fight against racism and xenophobia in the new Agency within the remit of Article 5(1)(b), a special Committee on Racism and Xenophobia should be set up within the Management Board to give direction, and to allocate the necessary resources.

3.4 Management Board (Article 11)

3.4.1 Composition

The Committee favours an inclusive Agency uniting all stakeholders and holds the view that this should be reflected in the composition of the Management Board (1). However, the Committee is concerned that the proposed Regulation does not promote or support wider representation from organised civil society on the Management Board.

The European Governance White Paper states that, ‘The Economic and Social Committee must play a role in developing a new relationship of mutual responsibility between the institutions and civil society, in line with the changes to Article 257 of the EC Treaty agreed at Nice’ (2). In accordance with this statement we recommend that a nominee appointed by the European Economic and Social Committee should serve as a member of the Management Board.

3.4.2 Governance arrangements

The Committee has concerns about the Agency’s independence, not only with respect to the EU institutions but also to the Member States. The previous experiences of EUMC show that, ‘Member States disturbed by the Centre’s work, sought to increase their influence over the Management of the Centre’ (3). Given that in many cases it is Member States acting individually or collectively in the Council, which are likely to infringe fundamental human rights when implementing EU law, the new Agency should be protected from political intervention by Member States. Safeguards should include the appointment of independent Management Board members.

The Commission is also required to approve the budget (Article 19(3)) and the work plan (Article 5(1)) of the new Agency. In order to ensure the independence of the Agency mechanisms need to be put in place to ensure as far as practicable that the UN Paris Principle on the national institution of Human Rights is complied with.

(1) EESC opinion on the ‘European Monitoring Centre on Racism and Xenophobia’ (rapporteur Mr. Sharma) CESE 1615/2003, para. 3.3.3 (OJ C80, 30.3.2004).
(2) EC Treaty of Nice, Art. 257, p. 15.
(3) EESC opinion on the ‘European Monitoring Centre on Racism and Xenophobia’ (rapporteur Mr. Sharma) CESE 1615/2003, para. 3.3.4 (OJ C80, 30.3.2004).
3.4.3 Number of meetings of the Management Board
The Committee recommends that the Management Board of the Agency should meet more than once per year to ensure greater accountability and participation of the Board members.

3.5 Executive Board (Article 12)
The proposed Executive Board will be comprised of a Chair, a Vice Chair and two representatives from the Commission. In our view this is a high proportion of members from the Commission and could be seen to compromise the independence of the Agency. We therefore recommend that the number of members of the Management Board is increased from two to five.

The Committee reiterates a more robust coordination and cooperation between the Agency and the Council of Europe is desirable as we highlighted in paragraph 2.3 and create a culture of human rights within the European Union as our prime objective. The Committee therefore recommends that one of the members of the Management Board in the Executive Board should come from the Council of Europe. This arrangement will ensure the synergy of the Agency and a complimentary role between the Agency and the Council of Europe.

3.6 Fundamental Rights Forum (Article 14)
3.6.1 The Committee is concerned that the proposal does not promote and support wider representation from organised civil society on the Forum. The Forum should have the widest representation from its stakeholders who are NGOs, social partners, cultural, religious and humanist organisations who have an interest in defending human rights. The Committee recommends that at least 1/3 of the members of the Forum should represent organised civil society.

3.6.2 The Regulation proposes that the forum should be chaired by the Director of the Agency. The Forum should be a sounding board for the Management Board as a whole and not just for the Director. Accordingly the Forum should be chaired by the Chairperson of the Management Board in order to ensure there is a close link between the two.

3.6.3 The expertise of the existing network of independent experts on Fundamental Human Rights should not be lost. The Committee recommends that the Network of Independent Experts should be represented on the Forum.

3.7 Independence and public interests (Article 15)
3.7.1 In order to ensure the independence of the Agency mechanisms need to be put in place to ensure as far as practicable that the UN Paris Principles on the National Institution of Human Rights is complied with. The Committee, therefore, recommends the following clause to replace Article 15 (1) which states that ‘The Agency shall fulfil its tasks in complete independence.’

‘The Agency shall fulfil its tasks in complete independence in keeping with the UN Paris Principles on the National Institution of Human Rights.’

3.8 Financial Provisions (Chapter 5), Article 19 (Drawing up of the budget)
The Committee reiterates the Paris Principles on adequate funding to resource the Agency to carry out its functions and activities. The purpose of this funding should be to enable it to have sufficient staff, premises and programme funding. Without adequate funding safeguards the Agency would be vulnerable to political influence by the EU institutions and Members States.

3.8.1 Therefore the Committee recommends the following clause be inserted before Article 19(1):

‘(1A) The Agency shall have adequate funding from the Union to carry out its functions through the annual budget cycle. The Agency may exceptionally apply for additional resources to carry out special or additional tasks not foreseen in the annual budget’.

Brussels, 14 February 2006.

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND