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**The Hague Programme  
Strengthening Freedom, Security and Justice in the EU**

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MULTICULTURAL EUROPE



## **EPC WORKING PAPER**

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## Foreword

The creation of a European Area of Freedom, Security and Justice is one of the most challenging tasks facing the new Commission, with strong public demand for progress. This policy area is also among the most sensitive for Member States, and because of its high visibility, its success will be a key litmus test of public opinion in the evaluation of the Union's work. The EPC has committed itself to continuous work on the topic through a range of different activities and publications.

The adoption of the Hague Programme, entitled Strengthening Freedom, Security and Justice in the EU, marks a new milestone in the development of this policy area. The Programme, which builds on the previous Tampere agenda adopted in 1999, establishes the priorities and addresses the challenges which the Union and its Member States must face in the next five years.

In this context, the EPC, together with its strategic partner the King Baudouin Foundation (KBF), has devised a major initiative to address key developments in the field of migration and integration policies within its new work programme on Multicultural Europe. In this programme, the EPC/KBF explore the evolution of migration policies at EU level as well as the economic, social, cultural and political implications of improving the integration of migrants into European society. EPC/KBF are contributing to the debate through a range of activities, including expert meetings, public events and publications.

This EPC Working Paper includes a set of original contributions assessing the policy priorities outlined by the Hague Programme. In what is the first comprehensive attempt by experienced observers and practitioners to examine the Programme, encouraging developments are highlighted together with shortcomings and remaining concerns. All authors make concrete policy recommendations.

Contributions cover the entire range of policy issues addressed under the Hague Programme, namely asylum, migration, border control, police cooperation and the fight against terrorism and criminal justice cooperation. All the authors reflect the delicate balance achieved between continuity with the earlier Tampere agenda and policy innovation. At the same time, they agree that the new provisions envisaged in the Constitutional Treaty will pave the way for significant progress, once it enters into force.

In the opening contribution, **Steve Peers** gives a general assessment of the asylum section of the Hague Programme, including the development of the second phase of the Common European Asylum System (CEAS), and the external dimension of asylum policies. Professor Peers explores whether the measures envisaged in this section provide a strong enough basis for the Union to develop a real Common European Asylum System focussing on difficult issues such as the idea of processing asylum requests outside the Union. Although the ambitious target of 2010 has been established for the adoption of the second phase of legislation, Professor Peers expresses regret over the fact that there is no mention of the direction that the EU policy should take in this second phase.

Professor Peers also addresses the migration section of the Hague Programme in a separate chapter, which includes the pending issues of legal migration and the fight against illegal employment, irregular migration and the integration of third country nationals. He argues that it is difficult to envisage the impact that the Hague Programme will have on policies such as legal migration in the EU and concludes that EU policy on this subject can only move forward once the Constitutional Treaty enters into force. He stresses that the key issue will continue to be the introduction of qualified majority voting (QMV) in the Council, in order to convince those Member States that have traditionally been reluctant to adopt EU legislation in this area. He criticises the missed opportunity to rethink the external dimension of migration policies.

**Giuseppe Callovi** contributes an analysis of the Programme provisions regarding border controls, biometric identifiers in travel documents and visa policy. He explores whether the instruments and procedures included in this section of the Programme go far enough to enable the abolition of internal Union border controls. He specifically addresses critical questions such as the creation of the Agency on External Borders and a rapid reaction force of national experts to provide technical and operational assistance. The integration of biometric identifiers in different travel documents, visa permits and passports is also discussed in greater detail. Overall, Mr Callovi highlights that the Programme gives renewed impetus to adopt and implement measures already on the table, and fixes a new agenda that fills existing gaps and gives momentum to progress on unfinished points of the Tampere agenda.

**Monica den Boer** focuses on the security dimension of the Hague Programme in her contribution, with a special focus on questions relating to

police cooperation, terrorism, the exchange of information and operational cooperation. She highlights the important steps towards good implementation that the Hague Programme brings, including the evaluation and implementation of EU instruments in the field of criminal justice and security. However, she concludes that the Hague Programme – far from being visionary – tends only to consolidate the instruments that are already underway and highlights the lack of a long term perspective as one of the main problems. The Hague Programme perpetuates ambiguity about whether the objective is to facilitate cooperation or to introduce a genuine European judicial space. Furthermore, differently from the other authors, she argues that the EU Constitution does not make decision-making on internal security much easier, as it leaves the power to the Council and allows extensive application of the unanimity principle.

Finally, **Susie Alegre** reflects on what a ‘European Area of Justice’ means in criminal law and whether or not the Hague Programme provides an adequate basis on which to build a genuine European judicial space. She examines the role of the European Court of Justice with respect to the area of EU criminal law, the development of the principle of mutual recognition and the role of Eurojust as one of the key instruments to improve effective cooperation in multilateral prosecutions. She tackles important issues such as the need to adopt legislation on procedural rights as a way to promote mutual trust between judicial authorities. She concludes that the Hague Programme contains key elements for the strengthening of justice in the EU but that it will not be capable of living up to its potential unless political will translates words into actions, which are backed by adequate financial resources and the ratification of the Constitutional Treaty.

**Cristina Pineda Polo**

# 1. The Hague Programme: An Introduction

*By Cristina Pineda Polo*

## Introduction

The Hague Programme on strengthening Freedom, Security and Justice in the EU was adopted by the EU Council in Brussels on 4 and 5 November 2004. The Programme, which builds on the previous five-year plan agreed in October 1999 in Tampere and takes up the new challenges to be faced in the next five years. It was drafted by the Dutch Presidency in close cooperation with the European Commission.

The multi-annual Programme for 2005-2010 establishes priorities in the former area of Justice and Home Affairs, includes an assessment of the policies established in Tampere in 1999 and outlines plans for their consolidation, while reflecting the spirit of the reforms envisaged by the new Constitution for Europe. The Programme proposes very ambitious objectives such as a common asylum system by 2010, abandoning unanimity in April 2005 in favour of qualified majority voting and co-decision for EU immigration and asylum law except for legal migration, and reviewing the Programme in the second half of 2006 to take into account the legal basis following adoption of the Constitution. The Commission is invited to present an Action Plan in 2005 with proposals and a timetable, similar to the existing Scoreboard.

The timing of this process has been criticized by several NGOs. Statewatch, for example, regrets that in practice there has not been time for civil society and national parliaments to react to the Hague Programme. Other organisations, such as Eurocop, have complained that they had merely been presented with the results and had not been consulted before. In an open letter, Amnesty International has expressed serious concern on the human rights content of the Hague Programme.

## Difficult issues on the table

Before the adoption of the Programme, a number of sensitive issues were addressed with a view to achieving unanimous agreement at the 4 and 5 November meeting of Heads of States and Government. These include:

1. The timing for a Common European Asylum System. Some Member States were inclined to take into account the evaluation of the first phase of the asylum policy before deciding on the time frame of the second stage. Others considered it important to keep the date of 2010 as the deadline for the second phase.
2. The joint processing of asylum applications. This was a highly controversial issue that the Presidency resolved by suggesting that a study be presented on the role of the EU in processing asylum applications outside the Union.
3. The transformation of the teams of national experts into a European corps of border guards.
4. The application of qualified majority voting in the Council and co-decision with the European Parliament to asylum and migration policies.
5. The conditions governing the application of the principle of availability for the exchange of information.
6. The mutual recognition in criminal matters in the area of ship-source pollution and the draft framework decision that would harmonise criminal sanctions for polluters. No agreement was achieved on this point.
7. The perspectives for a European Public Prosecutor office that would evolve out of Eurojust, the existing unit of national prosecutors. The reference to a European Public Prosecutor was eventually dropped from the Programme.
8. Progress in the area of judicial cooperation in civil law, with some Member States willing to go beyond what is reflected in the Hague Programme.

## The Preamble

The preamble recognises that the Hague Programme builds on Tampere and takes into account the evaluation of the Commission in June 2004. It requires the application of Art 67.2 of the Treaty Establishing the European Community no later than April 2005 in order to apply co-decision to Title IV measures including asylum, migration and visa policies, to which this procedure will apply under the Constitutional Treaty. This is an important



step in this area which is also strongly supported by the European Parliament which wants to have a stronger voice on Justice and Home Affairs matters.

The Programme covers fundamental rights and citizenship; asylum and immigration; the management of borders; integration of migrants; fight against terrorism and organised crime; police cooperation and judicial cooperation in criminal and civil law. Finally a European Strategy on Drugs will be added to the Programme at a later stage, following its adoption by the European Council in December 2004.

Among the objectives that already appeared in Tampere, the Programme stresses that prevention and repression of terrorism are key elements. It also devotes a full new chapter to integration replacing the old "*fair treatment of third country nationals*," and it is given high priority in the Programme.

## General orientations of the Hague Programme

- The Constitutional Treaty has become the benchmark to define key objectives and determine the level of ambition for the future. In this perspective, a review of the Programme is envisaged to be completed by November 2006 with a view to taking into account the change of the legal basis that the Constitution entails.
- There is also a strong commitment to fundamental rights. The EU Charter of Fundamental Rights, the European Convention of Human Rights and Fundamental Freedoms and the Geneva Convention should be "*fully respected*." In this context, the European Council also welcomes the transformation of the European Monitoring Centre on Racism and Xenophobia into a Human Rights Agency. It also stresses its possible role in the fight against racism, anti-semitism and xenophobia.
- A lot of emphasis is put on the timely implementation of the Programme. To this end the Commission is asked to present a yearly evaluation report. This reflects previous criticism of the lack of a proper evaluation of the measures adopted or of the practical benefits of these measures.

What follows is an introduction to the Hague Programme with particular attention given to the main innovations envisaged in the domains of asylum, migration and integration.

## I. Strengthening Freedom

This section highlights the importance of enhancing EU citizens' rights; in particular by maintaining a regular dialogue with civil society according special attention to the fight against anti-semitism, racism and xenophobia. The wording on anti-semitism is new.

The document refers to the importance of taking a "*comprehensive approach*" to the area of migration and asylum policies, which entails strong coordination between migration and asylum policies and other policy fields. This reflects the idea that asylum and migration should be mainstreamed into other policy domains, such as employment and social affairs, external relations, development and aid policies.

The importance of the collection, provision and exchange of data on migration is highlighted in the Programme, as it constitutes the basis for a common analysis of the migratory phenomena.

### 1.1 A common asylum system

The Programme outlines ambitious objectives such as the creation of a common European System by 2010 and the creation of a new Asylum Unit, set to become the European Asylum Office in 2010. In the negotiations a number of countries such as Germany, UK, Ireland, Sweden and Portugal expressed concern that the deadline of 2010 was too ambitious. The Commission and France, however, strongly supported the EU Presidency.

With a view to the second stage of implementation of the asylum programme, additional objectives are:

- A common asylum procedure and a uniform status for those granted asylum or subsidiary protection.
- A Commission study on the legal and practical implications of joint processing of asylum applications within the Union and also a feasibility study on processing asylum applications outside the Union in close cooperation with the UNHCR. This is something that will certainly require further discussion since the idea of joint processing outside the EU is not new and has already raised controversy.
- A new European Refugee Fund.

## 1.2 Legal migration, free movement and integration of third country nationals

This chapter entails a great deal of innovation. While the past five years have been strongly focused on the fight against illegal migration, the Hague Programme addresses legal migration and in particular economic migration. The Dutch Presidency has also stressed the importance of coordinating policies on the integration of migrants. Germany has been the main opponent of addressing legal migration at the EU level believing it to be a national competence. It firmly opposed moving away from unanimity and, therefore, severely narrowed the perspectives for progress in this domain.

### Legal Migration and the fight against illegal employment

There is a recognition that legal migration is an important element that should be considered when negotiating partnerships with third countries. The fact that legal migration plays a role in advancing economic development and contributes to the implementation of the Lisbon Strategy is also acknowledged in the text. In order to achieve this, the Commission is requested to present an Action Plan on Legal Migration before the end of 2005, including admission procedures capable of responding to demands for migrant labour in the European market, taking into account the debate on the Green Paper on labour migration and the Commission Communication on the links between legal and illegal migration from June 2004. Member States will continue to determine the individual, national admission volume. At the same time, Member States are called upon to reduce the informal economy that is a pull factor for illegal migration.

### Integration of third country nationals

The integration of third country nationals is a key point of the Hague Programme's objective of ensuring the stability and cohesion of our societies and preventing the isolation of certain groups. In order to achieve this, the Hague Programme calls for a comprehensive approach that involves all stakeholders and pledges greater co-ordination of national and EU initiatives.

The Programme also references a European Council opinion for the creation of equal opportunities, leading to "*civic citizenship*" and to the elimination of obstacles to integration.

In this context, the Programme proposes the establishment of Common Basic Principles, underpinning a coherent European Framework on integration.

To this end, the Programme calls for the creation of a website for the exchange of experiences and information.

### **1.3 The External Dimension of Asylum and Migration**

The external dimension of asylum and migration is one of the main innovations introduced by the Dutch Presidency, with the purpose of developing asylum and migration policies outside the Union. The external dimension is divided into three sections:

#### I. Partnership with third countries

The EU should assist third countries in building their capacities for migration management; protecting refugees; preventing and combating illegal immigration; promoting legal channels for migration; improving the refugee situation and providing better access to durable solutions.

The Programme calls for the integration of migration into the Country and Regional Strategy Papers by spring 2005.

#### II. Partnership with countries and regions of origin

The Commission is asked to develop EU Regional Protection Programmes that will build on the experience gained in pilot protection programmes. These programmes will focus on capacity building and joint resettlement programmes. UNCHR has already shown its support for this idea.

The Programme also calls for policy coherence between migration, development cooperation and humanitarian assistance and asks the Commission to present the according proposals by the spring of 2005.

#### III. Partnerships with countries and regions of transit

Strengthening the co-operation and capacity building with countries along the Southern and Eastern borders of the EU are a further key point in the Programme. In particular, it requires intensified cooperation through the Country and Regional Strategy Papers and, again, asks the Commission to report on progress by the end of 2005.

### Return and re-admission policy

The development of a strong common policy on return features prominently in the Programme. In particular, the idea of creating the position of a special representative for a common readmission policy is new.

The establishment of minimum standards for return procedures in early 2005 and the establishment of a European Fund for return by 2007 are also envisaged.

## **1.4 Management of Migration Flows**

### Border Checks and the fight against illegal immigration

The Programme underlines that measures to enable the abolition of controls at internal borders are adopted as soon as possible after the Schengen Information System (SIS II) has become operational. In this context solidarity and responsibility sharing, including financial implications, are key.

In particular, the Programme calls for:

- The establishment of the European Agency for the Management of Operational Cooperation at the External Borders on 1 May 2005.
- Support for Member States in the control and surveillance of long or difficult external borders, including facing up to unforeseen circumstances due to exceptional migratory pressures.
- A full review of the tasks of the Agency and an evaluation of the national expert teams including a feasibility study on the creation of a European system of border guards.
- The development of a plan on trafficking in human beings in 2005.

### Biometrics and information systems

The Programme calls for harmonised solutions at the EU level on biometric identifiers.

- The Commission is asked to explore the interoperability between the Schengen Information System (SIS II) the Visa Information System (VIS) and Eurodac.<sup>1</sup> The balance between law enforcement and fundamental rights must be taken into account, the Programme underlines. On the other hand, a number of NGOs have voiced their concerns about the potential misuse of data collected by Eurodac.

- The Programme requires that further steps be taken in order to integrate biometric identifiers in travel documents. Furthermore, it asks the Commission and the Council to establish minimum standards for national identity cards.

### Visa Policy

The Programme, outlines the need for further development of the common visa policy as a way to facilitate legitimate travel and tackle illegal immigration. Among the very ambitious objectives are:

- The establishment of common visa offices in the long term.
- The establishment of common application centres. In this perspective, the Commission is asked to present a draft in 2005 and table the appropriate proposal at the latest by 2006.
- The implementation of the Visa Information System (VIS) by the end of 2006 or by the end of 2007 at the latest.
- The streamlining of procedures to issue short stay visas to third country nationals as part of developing stronger partnerships.

## II. Strengthening Security

This section covers, among other things, the exchange of information, effective prevention and combating of terrorism, crime prevention, operational cooperation and police cooperation. The Programme calls for enhanced support and implementation of what has already been adopted rather than for the launch of new initiatives, except for terrorism and information exchange.

The "*prevention and repression*" of terrorism is regarded as the key objective. The European Council calls on Member States not to confine their activities to maintain internal security but to focus on the security of the Union as a whole. The Programme stresses the need for an enhanced role of Europol, Eurojust and the EU counter-terrorism coordinator in order to boost the fight against terrorism. Also from January 2005, SitCen, the intelligence analysis unit of the Council will provide analysis of the terrorist threat based on intelligence from Member States and input from Eurojust and the Police Chiefs Task Force.

Measures to combat the financing of terrorism and a long-term strategy to address factors which contribute to radicalisation and recruitment for

terrorist activities, are also envisaged. Furthermore, the European Council insists on cooperation with and assistance to third countries be offered by EU Member States. For this purpose, the Council is invited to set up a network of national experts on terrorism in conjunction with Europol and the European Border Agency, to respond to requests for assistance from third countries.

The Dutch Presidency has been very intent on information exchange and has proposed the adoption of the "*principle of availability*" of information by 2008. This will allow police to obtain information from other Member States on the same terms as national police services. The Commission should submit proposals by the end of 2005. It should be noted, however, that while Member States support the importance of information exchange, issues regarding confidentiality and data protection are still problematic. Nevertheless, the plan is to have information and data on terrorism and other crimes accessible to law enforcement services in all Member States by 2008.

The Hague Programme also calls for an enhanced role for Europol and Eurojust to combat serious cross-border crime. Europol will be issuing "*threat assessments*" on a yearly basis on serious forms of organised crime, based on Member State information and input from Eurojust and the Police Chiefs Task Force. These analyses will be used to establish yearly strategic priorities.

Furthermore, for the effective management of major cross-border crisis within the Union, the Council and the Commission are requested to set up a new centre for the management of crisis with cross-border effects by July 2006 at the latest.

Finally, the Programme calls for public-private partnerships on crime prevention and ask the Commission to make proposals in 2006.

### **III. Strengthening Justice**

This is a very difficult area due to the lack of agreement between those Member States that want to move forward, such as Spain, France, Belgium and Luxembourg and those that are less ambitious like Ireland, the UK, Denmark and Germany. This section envisages further efforts to facilitate access to justice and judicial cooperation, as well as for measures to

implement the mutual recognition of judicial decisions. Among other things, the Programme calls for the European Evidence Warrant and the framework decision on procedural rights in criminal proceedings to be adopted by the end of 2005.

The Programme also recognises the role of the European Court of Justice in the new Area of Freedom, Security and Justice and welcomes the increase of its powers, as envisaged in the Constitutional Treaty. With a view to complementing these developments, the Programme ask the Commission to formulate proposals to speed up and ensure the appropriate handling of requests for preliminary rulings in the area of freedom, security and justice.

With respect to judicial cooperation in civil matters, the Presidency proposed pushing forward mutual recognition on questions of family law, while excluding harmonisation of terms such as 'family' or 'marriage.' It also stresses the question of further enhancing mutual trust and therefore the progressive development of a European judicial culture. Furthermore, family law legislation on maintenance decisions, inheritance laws and matrimonial property should be established by 2011. Family law aspects of civil law would still remain subject to unanimous voting, including consultation of the European Parliament.

#### **IV. External Relations**

This very short section highlights the need to develop a coherent external dimension of the policy on Freedom, Security and Justice and to link it with the Hague Programme's external relations policies.

In order to achieve this, the European Council calls upon the Commission and the Secretary-General/ High Representative to present a strategy covering all the external aspects of the Union's policy on Freedom, Security and Justice by the end of 2005.

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<sup>1</sup> This body has been set up for the limited purpose of gathering information on refugees and establishing which Member State is responsible for a particular asylum seeker.



## 2. Border controls, Visa Policy and Biometrics

*By Giuseppe Callovi*

### Introduction

Five years after the political guidelines and objectives agreed in Tampere in October 1999, the Hague Programme reflects the intention to take stock of the achievements of the Amsterdam Treaty, to implement the unfinished Tampere roadmap, and to anticipate the ambitions of the new Constitutional Treaty by improving "*the common capability of the Union(...)to regulate flows and to control the external borders of the Union(...)*" (cf. Introduction). Starting from a largely shared political analysis of the absolute need for a joint approach to cross-border problems<sup>1</sup> (point 14 of the Presidency Conclusions), the Hague Programme follows an existing trend regrettably still in operation in the European Union for historical, institutional, technical and political reasons<sup>2</sup> namely to assemble – at least at operational level – the pieces of a jigsaw puzzle, sometimes termed 'variable geometry.'

At his press conference on 5 November 2004, the Dutch EU President, Jan Peter Balkenende, described the Hague Programme as a new 'ambitious' milestone. It seems more accurate, however, to qualify it as a prudently updated five-year agenda, where on issues relating to border controls, visa policy, biometric identifiers in travel documents and interoperable information systems it will have to be seen whether or not Member States have the actual political will to act as one body, rather than a disparate group. Overall, the proposals and regulations are not new. However, the Hague Programme deserves credit for giving a new impetus to adopt and implement measures that have already been proposed as well as for setting a new agenda, that fills in gaps and lends support to still unfinished actions. Thus, the term 'ambitious' can only be applied to the very narrow time frame in which the objectives are to be realised (see below).

Without wanting to compare the Hague Programme with the Tampere Agenda, it might be useful to recall essential elements to facilitate comprehension.

## Tampere in short

*"Freedom, which includes the right to move freely throughout the Union (...) should not be regarded as the exclusive preserve of the Union's own citizens (...)" (point 2). "It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances led them justifiably to seek access to our territory." This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a "consistent control of external borders" (point 3). "Close cooperation and mutual technical assistance between the Member States' border control services (...) especially on maritime borders" is needed (point 24), as well as a "common active policy on visas and false documents...including closer cooperation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices" (point 22). "Assistance to countries of origin essentially concerns the promotion of voluntary return, re-admission obligations and help to effectively combat trafficking in human beings" (point 26).*

As we can see, the Tampere Agenda already contains almost all of the basic objectives that are confirmed and extended by the Hague Programme.

## The framework of the Hague Programme

The Hague Programme seems to lack rigorous coherence between the variety of proposals dispersed throughout the Programme and the ongoing activities, as well as between the priorities that set out a very tight timetable and the technical and financial means available.

Border management and its relevant topics figure under the title Management of Migration Flows. This choice seems rather misleading and not in line with the expressed ambition to take into account the Constitutional Treaty. The terms 'management of migration flows' is used in Article III-267 of the new Treaty, with reference to a common immigration policy, legal and illegal migration; and, indeed, the Hague Programme itself develops those items somewhere else as, for instance, in points 1.4, and 1.6.4.

Regretfully, all aspects linked to the management of cross-border movement of persons are not dealt with in a single, consistent and clear chapter. Some topics related to cross-border controls are spread over several chapters:

- in point 1.6 "*external dimension of asylum and migration*," it is suggested that EU know-how and funds be used to "*build border-control capacity and to enhance document security*";
- in point 2.2, in the chapter entitled "*strengthening security and combating terrorism*" the use of passenger data for border and aviation security is encouraged;
- further on, the setting up of a network of experts on combating terrorism and on border control is suggested, to respond to third countries' requests for assistance;
- in point 2.3 "*police cooperation*," intensified cooperation between police and customs authorities to combat cross-border crime (without mentioning the border guards) is proposed;
- the same concept is repeated further, with a request to further the Schengen *acquis* with respect to cross-border police cooperation.

Of course, everybody welcomes these proposals, but the impact of the Programme would have been unequivocal if framed otherwise, in a comprehensive concept that responds to a coherent capacity for common action, embracing the whole spectrum from its preventive dimension to repressive measures.

A final observation on the structure concerns the insertion of border controls, visa policy and biometrics in the chapter entitled Strengthening Freedom. One could interpret this decision to mean that better control should ensure a better quality of freedom. This was the basic concept running through the from the Single European Act to the Palma de Majorca document, the Schengen *acquis* and the Amsterdam Treaty. Common controls and surveillance of the external borders were thought of as compensation for a Europe free of internal borders. The common accompanying measures had to guarantee mutual trust and understanding among Member States that accepted this policy of open internal borders. But the Constitutional Treaty abandons the earlier clear Amsterdam Treaty link (see Art. 61) between free movement of persons and flanking measures with respect to external border controls. The Constitutional Treaty addresses external border control and visa policy as policy issues *per se* (cf. Art. III-257 and Art. III-265). This latent development may eventually prove regrettable, but the Hague Programme could have taken the new conceptual approach to border controls and surveillance into account and moved it to the chapter entitled Strengthening Security.

In most of the latest EC/EU instruments, the Amsterdam Treaty link is abandoned and security is dealt with as an independent objective without reference to the existence or lack of open internal borders. This explains, for example, why the United Kingdom and Ireland will participate in the board management deliberations of the European External Border Agency. This also explains why Member States tend to justify specific controls around the internal border areas. Indeed, the strict interpretation of the rule that internal borders may be crossed at any point, without being the occasion for formalities, including random checks or checks inside the territory justified only by the border vicinity, is presently under discussion in the Council and is partially challenged by some Member States. This is underlined by the recent approval of a *"Recommendation with a view to enhancing police cooperation in areas surrounding internal borders of the EU"* (Council Justice and Home Affairs of 2 December 2004). Undoubtedly, the 11 September terrorist attacks in the US and the global willingness to reinforce counter-terrorism measures influenced these developments (see also the Brussels European Council of 16/17 December 2004, point 28, third bullet point).

## **The Hague Programme: evaluation of the proposals related to borders, visa, biometrics**

The Hague Programme structures its main proposals using three sub-titles: *a) border checks and the fight against illegal immigration (1.7.1); b) biometrics and information systems (1.7.2); c) visa policy (1.7.3).*

Targets and priorities are not clearly grouped in logical sequences: some actions and measures figure in the introductory sentences, while others are highlighted by bullet points. Our comments will follow the Programme's presentation structure.

### (a) Border checks and the fight against illegal immigration

The Hague Programme sets unfinished objectives defined at Tampere that are still under discussion or not yet fully implemented side-by-side with new objectives scarcely defined by the Programme. The expectation that the Commission will make these proposals more concrete likely underpins this logic, as the latter is invited to draw up an Action Plan in 2005 *"with proposals for concrete action and a timetable for their adoption and implementation."* The proposals are gathered in four groups.

1. The European institutions are invited to take all necessary measures to abolish controls on persons when crossing internal borders with and between the ten new Member States. The provisional date for these changes to come into force would be 2007, when the second generation of Schengen Information System (SIS II) is expected to be operational. Of course, the implementation of SIS II is not the only pre-condition. The Council will not decide on the removal of internal borders controls until it is convinced that the new Member States are satisfactorily implementing the entire Community/Union acquis. To this end, an evaluation process "*should start in the first half of 2006*" through "*the existing Schengen evaluation mechanism.*" There is no reference in the Programme to the fact that it is very likely that a number of new rules will be in effect by that date, as the Council and the European Parliament are working towards the adoption of a Regulation establishing a Community Code on the rules governing the movement of persons across borders, with the intention to consolidate, clarify and develop rules and practices presently contained in the former Schengen Common Manual and in not binding Recommendations of best practices. In this context, one could also reference the entry into force of a specific regime for local border traffic between EU and third countries.

After the lifting of internal border controls with and between the ten new Member States, the Programme invites the Commission (third bullet point) to submit a "*proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism.*" Clarification on this point might prove helpful.

The Standing Committee on the Evaluation and Implementation of Schengen (called *Sch-Eval*) is entrusted, among others, with carrying out two main tasks.

A first task consists in verifying that all pre-conditions for a Council decision to abolish internal border controls of new countries have been met. This exercise has been carried out for Italy, Austria and the Nordic Countries, including Norway and Iceland. The new Member States have to undergo the same thorough screening. This will continue after 2007, bearing in mind that if internal borders are lifted for the new ten Member States, the same will not apply to the two newly admitted Member States, Bulgaria and Romania (if they are ready, they will be welcomed as members in January 2007– see Brussels European Council of 17/18 June 2004, point 20 of the Presidency conclusions).

A second task entrusted to Sch-Eval by a former 1998 decision consists in examining – through a peer-review mechanism – the correct implementation of the Schengen acquis by the Member States that already enjoy the benefits of open internal borders. However, checks are slow, rare and are organised well in advance. Their technical impact is subject to political considerations. The reports are considered confidential and, apparently contain a significant number of cases of non-compliance with existing rules and practices. As far as one knows, they have never triggered an infringement procedure under Community law.

After these clarifications, one can question the meaning of the newly proposed supervisory mechanism, which apparently has to be applied only to Member States belonging to an open-internal border area. The Programme does not contain a clear guideline. This vacuum is compensated by the request to the Commission to submit a legislative proposal in 2007, which shifts the responsibility for its content to that institution. In the meantime, the old system of visits will continue with its proven limited effect. In 2005 Greece will undergo a peer-visit, followed possibly by the Nordic countries *en bloc*.

The Programme could have been more precise on the Council's intentions. Member States can trust each other and keep their internal borders open if they are convinced that all States are committed to fulfilling the same agreed obligations. But divergent interpretations of rules and practices are usual. It would have been advisable to immediately set up a permanent pool of multinational border/visa inspectors, ready to intervene on its own unannounced initiative or upon request by a Member State, or by any other European Institution. The conclusions of this pool of inspectors should be totally autonomous, immediately operational and admissible as justified ground for possible infringement procedures initiated by the Commission. This one possible interpretation of the proposal of a supervisory mechanism, intended to replace and enhance the above mentioned second task entrusted to Sch-eval.

As far as the timing is concerned, there seems to be no reason to wait until 2007 for the application of these measures. Indeed, the old Schengen Member States unevenly apply the common corpus of legislation, while these same States will request to the newest Members to apply rules and practices that they themselves sometimes fail to apply correctly.

2. According to the Programme, the importance given to a “*gradual establishment of an integrated management system for external borders*” consists, firstly, in the implementation of the functioning of the “*European Agency for the Management of Operational Cooperation at the External Borders.*”<sup>3</sup> The latter has to be operational on 1 May 2005, and its functioning shall be evaluated in 2007. Secondly, the “*Council shall establish teams of national experts that can provide rapid technical and operational assistance to Member States requesting it,*” following a Commission proposal to be submitted in 2005.

There is, however, a significant caveat regarding both of the provisions: “*The control and surveillance of external borders fall within the sphere of national border authorities*” the Programme underlines and the Agency Regulation stipulates “*the responsibility for the control and surveillance of external borders lies with the Member States*” in Article 2. This indicates how much Member States want to preserve their national prerogative, despite the proclaimed will to develop an “integrated management system.” Only time will tell if this will jeopardise the intended objectives.

However, there is no doubt that the External Border Agency could boost Union’s capacity to respond to emergency situations immediately, on the one hand, and to fulfil the need for common training, risk analysis, burden sharing and cooperation with third countries, on the other hand. Moreover, the Agency can facilitate and enhance a more pro-active and coherent coordination of the pilot projects and joint operations already initiated by specialised ‘centres’ established in seven different Member States.<sup>4</sup>

Nevertheless, one does have some difficulty in decrypting the Programme logic. For instance, the capacity of the Agency to act toward enhancing cooperation between services operating at the external borders, such as border guards, immigration officers, custom authorities, police, transport, and authorities for ‘goods-related security matters.’ is postponed until after 2007, when a review shall take place. But further down in the Programme, (in the chapter Strengthening Security), it is noted that the Agency shall act immediately: “*The Council should develop cross-border police and customs cooperation on the basis of common principles. It invites the Commission to bring forward proposals to further develop the Schengen acquis in respect of cross border operational police cooperation.*” And in the context of the external

dimension "the Council is invited to set up in conjunction with Europol and the European Border Agency a network of national experts (on preventing and combating terrorism and) on border control, who will be available to respond to requests from third countries (...)." Moreover, the Commission shall submit a proposal to establish "teams of national experts that can provide rapid assistance to Member State requesting it," and they shall act within the framework of the Border Agency in 2005.

The use of the plural in 'teams' might signify the setting up of several homogenous pools of experts according to their expertise: airports, land borders, maritime borders, etc. Nevertheless, the kind of relationship that might exist with the specialised branches provided by Article 16 of the Regulation setting up the Border Agency, or with the deployment of its experts as provided by Article 8,2(b) is not clear for the reader.

According to the Programme, the evaluation of the functioning of the teams of national experts in 2007, if positive, should/could open the door to a possible "creation of a European system for border guards."

But if we truly want to give this politically sensitive and disputed objective a chance, the Programme should have wagered to propose the immediate launch of two full-fledged experiments, one at a sea and another one at a land border, where the 'teams' could enjoy a special statute, as defined by a community instrument.

Similarities with past joint operations that have experienced command and language problems, legal difficulties and a limited scope in the tasks officers were allowed to undertake should be avoided (although these past operations did have the merit of at least having launched an honourable development). The Programme "*welcome(s) initiatives by Member States for cooperation at sea, on a voluntary basis,*" but is not enough. A preferential proposal might be that a two-year experiment of two "EU multinational border guard teams" (sea and land) be introduced to complement the national border guards, which should be given the necessary legal base for action immediately. These teams would have to be given access to common equipment and the use of fixed and mobile infrastructure, have a clear outline of common tasks, a definition of hierarchical structure, common operating language(s), clear operational command, common prerogatives of public authority irrespective of the officer's nationality to check documents, persons and goods and, if the case arises, to apprehend a person and hand him/her over to the national



authorities for subsequent legal measures. Without an immediate gradual tactical preparation to familiarise experts and public opinion with this new reality, the target cannot be reached politically.

To conclude, one is left with the impression that the Hague Programme remains purposely vague, thus leaving the conceptual, political task of adding clarity and coherence to the Programme to the Commission, through the proposals it plans to submit in 2005.

3. The mobilisation of substantial funds is a prerequisite for the implementation of EU border management, *"governed by the principle of solidarity, including its financial implications, between Member States"* (Art. III-268 of the Constitutional Treaty). The Programme recalls the need to provide an adequate fund by the end of 2006, at the latest. This request is already under scrutiny in the financial perspectives framework envisaged for 2007-2013. A decision shall be taken under the current Luxembourg EU Presidency.
4. Finally, the Programme invites the Council and the Commission to develop a plan to prevent and combat trafficking in human beings in 2005. Here again, it is not the objective that is questionable but where this point is placed within the Programme. Certainly, border controls will offer a considerable input to this aim, but it seems more appropriate to prepare and coordinate this plan in the framework of the chapter dedicated to Strengthening Security, where the exchange of information, police cooperation, investigation activities, crime prevention, including judicial cooperation in criminal and civil matters are mentioned. Trafficking in human beings should be grouped with other specific forms of crime. Authorities dealing with border controls and surveillance certainly have the duty to cooperate but they do not seem to be the most qualified bodies to assume leadership with regard to measures to combat trafficking in human beings.

#### (b) Biometrics and information systems

The Programme concentrates the need for action around three core points. First, it is necessary to establish ways and means to ensure that identity/travel/visa documents are authentic and their holder is indeed the person he/she claims to be when crossing the external border. To this end, harmonised biometric identifiers shall be introduced. Secondly, the Programme suggests the creation of interoperability between three EU information systems:

SIS II, VIS<sup>5</sup>, and EURODAC. On this point we can expect some resistance from the European Parliament as the latter will want an assurance that a reasonable balance is maintained between the civil rights of the individual and the obligations of the State to protect its citizens. Thirdly, the introduction of biometric identifiers is also invoked for documents issued to citizens of the EU.

Since the Thessaloniki European Council (June 2003), there has been a common understanding that the EU needs a coherent approach on making travel and identity documents secure against forgery and misuse. Legislative proposals have already been presented to the Council and to the European Parliament on minimum security standards and biometric identifiers in travel documents issued by the Member States to EU citizens (essentially passports) and in the visa stickers and residence permits to third country nationals.

For the passports, the Commission proposed the introduction of the facial image as the primary interoperable biometric identifier and left optional the second identifier, i.e. fingerprints, respectful of ICAO recommendations. Iris recognition has been left out, at least for the time being, in order to ensure coherence with all documents requiring biometrics. However the Council agreed on 26 October 2004 to include fingerprints as a mandatory identifier as well, within three years following the date of adoption of the technical specifications established by an ad hoc Committee composed of Member State experts and chaired by the Commission.

Of course, one cannot expect the Member States to withdraw all valid passports in possession of EU citizens and replace them at the same time! As a consequence, for at least ten years, many citizens will carry old passports with a simple machine readable strip, others with digital facial image (as from mid-2006), and others with additional fingerprint images (as from 2008). At the same time, border guards shall be provided (and trained) with the necessary e-tools to verify the authenticity of these documents and of the identity of the holder. The financial burden for the Member States and for the Union is not negligible!

As regards the uniform format for visa and residence permits, a political agreement has been reached on the introduction of two biometrics identifiers, i.e. the facial image and two fingerprint images. But in practice, there are still technical problems to be solved for the visa format. Indeed, several subsequent visa in a given passport means multiple chips and the machine readers may have difficulties in identifying the valid chip. It remains to be decided if the biometrics shall be stored on a separate smart card or solely in the future Visa Information System database, which is – in principle – to be operational in 2007.

### (c) Visa policy

On the issuance of visa, the Hague Programme confirms the need to reach the missed target already foreseen by the Tampere agenda (point 22) of "*closer cooperation between EU consulates and, where necessary, the establishment of common EU visa issuing offices.*"

An efficient visa policy is the first core element of a comprehensive control system and border strategy.

The Hague Programme introduces a distinction between visa application and visa issuance. The wording has a political significance. Tampere's target was the establishment of common EU visa *issuing* offices. The Hague's target concerns "*common visa offices to be established in the long term.*" The abandonment of the term 'issuing' introduces some ambiguity. Is it only a question of common premises or also of a gradual integration of the consular/diplomatic visa issuing sections? Tampere was more specific, but it missed the target. It has to be recalled that the February 2002 Action Plan had already proposed common administrative structures and joint visa offices.

The Programme is hesitant in spelling this out further, suggesting merely that the planned European External Action Service (EAS) could be part of the solution. In the meantime the Programme limits itself to welcome initiatives by individual Member States to "*cooperate in the pooling of staff and means for visa issuance.*"<sup>6</sup>

The Hague Programme presents concrete priorities in five bullet points:

- The "*Common Consular Instructions*" (CCI)<sup>7</sup> shall be reviewed and a proposal shall be submitted by the Commission by early 2006.
- The Commission is invited to submit a proposal in 2005 on the establishment of "*common application centres for visa.*" This measure should be operational in concomitance, both with the functioning of the VIS (Visa Information System), and with the issuance of visa carrying the new biometric identifiers (alphanumeric data and photographs by the end of 2006 and biometrics by the end of 2007). Indeed, synergies can be expected, above all on cost-saving, but also in the definition of the main destination and therefore of the State responsible for issuing these visa; moreover, the cooperation between consulates will be facilitated.

- An ad hoc bullet point invites the Commission to submit – without delay – the necessary proposal for implementing the VIS according to the agreed timetable.
- The Commission is invited to obtain from third countries the acceptance of the principle of reciprocity, when a third country appears on the EU common list of countries<sup>8</sup> whose citizens are exempt from the visa requirement. In principle, all EU citizens should be allowed to cross the border – without a short-stay visa – of the third country, whose nationals are exempt from a visa requirement. But this is not the case, for some old and new Member States. A differentiated treatment of EU citizens when travelling to third countries does not comply with the objective of the Treaty to strengthen the protection of the rights and interests of all the EU citizens. In fact the Programme quietly admits that the mechanism enabling the principle of reciprocity, as described in Article 1.4 of the Council Regulation (EC) 539/2001, cannot be implemented for practical and political reasons. This is why the Commission has recently (19.07.2004), submitted a proposal for amendment of this Article<sup>9</sup> to the Council and to the European Parliament. According to the proposal, the Commission shall play a major role as a negotiating partner once a Member State has formally notified its discriminated status. In case of failure, the Council can adopt counter-measures by restoring the visa requirement for nationals of third countries that maintain a discriminatory practice towards EU citizens. In its request to the Commission, the Programme reflects this new situation.
- The last bullet point cautiously advances a future prospect. Until now, the assumption was that the fact that third countries cooperate in matters of migration and re-admission agreements did not entitle them to obtain an *ipso facto* exemption from the visa requirement for their own nationals. Other additional criteria are taken into account for this purpose. The wording of the Hague Programme seems to propose a loose link between the re-admission policy and the visa requirement/issuance. This is a likely reflection of the requests from several third countries to be compensated for their cooperation with a visa-free status or with facilitated visa for their efforts in migration matters. According to the Programme, in exchange for a good partnership in migration related issues, citizens of third countries could enjoy facilitated short-stay visas, on a case by case basis, and on the condition of reciprocity. The innovative angle regarding this question remains elusive in the Hague Programme. Indeed, even today, visas are issued on a case by case basis for all that request a visa, whether or not

his/her country is a 'good' partner. Every *bona fide* citizen can ask for and obtain a visa (even a multi-entry visa, valid for two years or more) as long as the criteria laid down by the EC rules are fulfilled. The outcome of the ongoing negotiations with some third countries may clarify this point.

## External action

External action is addressed in several chapters of the Hague Programme. More precisely, the Commission and the High Representative are invited to submit, by the end of 2005, *"a strategy covering all external aspects on the Union policy on freedom, security and justice."*

A smoother border control system should be able to anticipate events in such a way that the recourse to repression becomes the exception. The Border Agency (cf. Regulation, Art. 14), along with other relevant bodies, is entitled to facilitate the operational cooperation between Member States and third country authorities (priority being given to countries of origin and transit, as determined by a proper risk analysis and in relation to migratory routes and criminal trafficking networks), and to conclude working arrangements with the latter. An added impetus can be expected from the new partnership initiatives, as elaborated in the Presidency conclusions of the Brussels European Council of 17/18 June 2004, in particular as regards a European Neighbourhood Policy and the Strategic Partnership with the Mediterranean and the Middle East.

### Implementation of the Hague Programme and its timetable

The Hague Programme is adopted in a new phase of EU integration. Several aspects may influence the pace of its implementation.

Institutionally, the objectives and proposals of the Hague Programme may be facilitated by the transition to qualified voting majority as foreseen by Article 67 (2) TEC, governed by the co-decision procedure referred to in Article 251. This means that the European Parliament will have a stronger voice in the decision-making procedure with added transparency and stronger means to pressure individual Member States that could delay or possibly derail agreed progress. However, these points should be considered:

- border and visa questions are to be dealt in the framework of variable geometry;
- the internal border controls with and between the ten new Member States will continue at least for another three years and it is still unclear

whether the removal of internal border controls on persons will ultimately happen for all ten new members or only for those countries that effectively fulfil all requested requirements;

- moreover, by 2007, the enlargement to Bulgaria and Romania will further extend internal and external borders in the Union.

The real common political agenda of the Member States will only be fully revealed when the Commission submits an Action Plan to the Council in which *"the aims and priorities of the Hague Programme will be translated into concrete actions,"* in 2005 and following the programme review scheduled to take place after the entry into force of the Constitutional Treaty (possibly on 1 November 2006).

The creation and functioning of the European Agency for the Management of Operational Cooperation at the External Borders on 1 May, 2005 will play a key role. It is likely that before reaching its full potential, the Agency will undergo several preparatory stages. One of its first tasks will be the integration of the existing centres and initiatives currently operating in seven different Member States.

One can only hope that the spirit of the Hague Programme – increasing cooperation, solidarity and mutual support – will provide a decisive contribution to Member States' capability to ensure the effective protection of external borders and the free movement of persons in the Union's internal, open-border area.

## Conclusion

In conclusion, common rules and practices for the legal crossing of EU external borders are not intended to build a fortress Europe. On the contrary: these rules are stipulated to allow any *bona fide* citizen to enter Union territory, on the basis of transparent conditions. However, we shall not forget that the more sophisticated and effective border controls, surveillance, visa policy, and the fight against organised crime becomes the greater the need for attention to the humanitarian component. Many of the people crossing external borders into they EU are innocent victims of human traffickers and in need of greater protection and compassion. This is why a stronger link between security measures and enhanced common migration management is essential.

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- <sup>1</sup> "...to ensure strong and effective working relations between those responsible for migration and asylum policies and those responsible for other policy fields relevant to these areas" (point III, 1.2).
- <sup>2</sup> See in particular the special positions of United- Kingdom, Ireland, Denmark, as well as that of some non-Member States, i.e. Norway, Iceland, Switzerland, Liechtenstein.
- <sup>3</sup> Council Regulation (EC) N° 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349 of 25.11.2004).
- <sup>4</sup> Risk Analysis Centre in Helsinki, Air Borders Centre in Rome, Centre for Land Borders in Berlin, Eastern Sea Borders Centre in Piraeus, Western Sea Borders Centre in Madrid, Ad hoc Centre for Training in Traiskirchen, Centre of Excellence for border checks in Dover.
- <sup>5</sup> Council Decision of 8 June 2004 establishing the Visa Information System (VIS); OJ L 213, 15.06.2004.
- <sup>6</sup> It is significant to mention that after the adoption of the Hague Programme, the Brussels European Council of 16/17 December 2004, has a special mention of "consular cooperation" in the section "Other Issues" (point 69): "The European Council confirmed the importance of intensified consular cooperation. It welcomed the agreement reached in the Council on pooling consular resources and cooperation both in normal times and in times of crises, thus helping Member States to deal more effectively with the increasing demand for consular services." But seemingly the text makes reference essentially to Article 20 of the TEC concerning diplomatic or consular protection for EU citizens.
- <sup>7</sup> OJ L 239 of 22 September 2000.
- <sup>8</sup> The common lists of countries whose nationals must be in possession of visas or are exempt from that requirement are not necessarily the same for the United Kingdom and Ireland, due to their special status.
- <sup>9</sup> Proposal for a Council Regulation amending Regulation (EC) N°539/2001 as regards the reciprocity mechanism (COM (2004) 437 final).

## ANNEX

### Summary of the agreed time frame

<u>Year</u>	<u>Institution</u>	<u>Initiative</u>
2005	Commission	Action Plan with a scoreboard, followed by an annual report
2005	Council + COM	Start of the Agency for External Borders
2005	COM + Council	Teams of national experts assisting MS that require it
2005	COM + Council	Plan to combat trafficking in human beings
2005	COM + Council	Establishment of common application centres for visas
2005	COM + MS	Interoperability between SIS II, VIS, EURODAC
2005	Commission	Proposal for use of passengers data for border and aviation security
2005	COM + Council	Proposals to further develop Schengen in respect of cross border police cooperation
2006	Commission	Proposal to review the Common consular Instructions
2006	COM+Council+MS	Evaluation process of 10 MS to remove internal borders
2006	European Council	Review of progress of the Hague Programme (after 1 Nov.) with proposals for necessary additions
2006	Council + COM	Availability of adequate funds for border management



2006	Commission+MS	Digital facial image in EU citizens passports
2006	COM + MS	Incorporation of alphanumeric data in VIS
2007	Commission	"Supervisory mechanism" to replace Sch-Eval
2007	Commission	Evaluation of the European Border Agency tasks
2007	COM + MS	SIS II to be operational
2007	COM + MS	VIS database to be operational
2007	COM + MS	Incorporation of biometrics in VIS
2007	COM + Council	Evaluation of functioning of the national expert teams in view of a possible creation of a European system of border guards.
2008	COM + MS	Addition of fingerprints to EU citizens passports

### 3. A Common European Asylum System by 2010?

By Steve Peers

#### Introduction

The Hague Programme contains a number of commitments regarding asylum policy, in particular setting a deadline for the assessment of the first stage of creation of the Common European Asylum System (CEAS) and for the adoption of second-stage legislation. This specific commitment to a further development of the Common European Asylum System is an important symbol of political support for the further development of the System. But the time for this further development has been set some years in the future, and important questions such as the direction which future legislation should take and its content (particularly the question of whether it should involve a joint approach to internal processing and/or external processing of asylum-seekers) have been left open for some time to come.

#### Background: The Tampere Programme

The Tampere European Council of 1999 developed a number of principles intended to govern the creation of a Common European Asylum Policy. In fact, the very idea of such a policy was new. Previously the EU and its Member States had agreed the Dublin Convention establishing which Member State is responsible for considering an asylum application, along with non-binding measures on the definition of 'refugee,' asylum procedures and temporary protection.

The key Tampere principles on the creation of the Common European Asylum System were as follows:

*"3. (...) It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration (...)."*

*"4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity (...)."*

## II. A Common European Asylum System

*“13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.”*

*“14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection [note: subsidiary protection is offered to persons who need protection in another country but who do not meet the criteria for refugee status]. To that end, the Council is urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set in the Treaty of Amsterdam and the Vienna Action Plan. The European Council stresses the importance of consulting UNHCR and other international organisations.”*

*“15. In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. The Commission is asked to prepare within one year a communication on this matter.”*

*“16. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States. The European Council believes that consideration should be given to making some form of financial reserve available in situations of mass influx of refugees for temporary protection. The Commission is invited to explore the possibilities for this.”*

*“17. The European Council urges the Council to finalise promptly its work on the system for the identification of asylum seekers (Eurodac).”*

Work on the first phase of the Tampere Programme for the creation of the Common European Asylum System began shortly afterward, with the Commission submitting a proposal for the creation of a European Refugee

Fund in December 1999, and proposals in 2000 and 2001 for legislation on temporary protection, asylum procedures, reception conditions, responsibility for asylum applications and the definition and content of refugee and subsidiary protection status. Negotiations on a proposed Regulation to establish the Eurodac system, concerning the taking and comparison of fingerprints of asylum-seekers and persons crossing the Member States' external borders irregularly, were already underway, following on from an agreement by Member States in principle on the details of the Eurodac system in 1998 and earlier in 1999.

The Council was able to reach agreement quite quickly on three issues: Eurodac (Regulation 2725/2000, OJ 2000 L 316/1), the European Refugee Fund for 2000-2004 (Decision 2000/596/EC, OJ 2000 L 252/12) and temporary protection (Directive 2001/55, OJ 2001 L 212/12). But Eurodac did not begin operations until 15 January 2003 (see OJ 2003 C 5/2), the Refugee Fund dispensed relatively small amounts of money and the temporary protection Directive, an 'off-the-shelf' system for use in the event of future mass influxes of persons, has never been used in practice.

It proved harder to agree on the other four areas of asylum law, which constitute the core of the subject. The task was complicated by the decision-making rules of the EC Treaty, which required unanimous voting in the Council with mere consultation of the European Parliament on all asylum issues. Eventually, in 2003 and 2004, the Council adopted legislation on three of the four core issues: reception conditions for asylum seekers (Directive 2003/9 on reception, OJ 2003 L 31/18, which Member States must implement by 6 Feb. 2005); responsibility for asylum applications (Reg. 343/2003, OJ 2003 L 50/1, applicable from 1 Sep. 2003); and the definition and content of refugee and subsidiary protection status (Directive 2004/83, OJ 2004 L 304/12, which Member States must implement by 10 October 2006).

On the other hand, the Council has still not been able to adopt a proposed Directive on asylum procedures, initially proposed in autumn 2000 (COM (2000) 578) and revised in June 2002 (COM (2002) 326). It did agree on the proposed Directive in principle in April 2004, after lengthy and difficult negotiations, and then spent seven more months trying to agree on a common list of supposedly 'safe' countries of origin for asylum-seekers, with the result that Member States would in principle have to reject applications from such countries automatically. The Council was unable to agree on any list unanimously, and so decided to adopt the list later by a qualified

majority vote (QMV) after adoption of the Directive. At present, the Council has reconsulted the EP on the Directive, and must await the EP's vote before adopting it. This will likely take place in spring 2005.

The Council also adopted a Decision establishing a second European Refugee Fund, for 2004-2010 (OJ 2004 L 381/52). Moreover, family reunion for refugees was addressed as part of the EU's family reunion Directive (Directive 2003/86, OJ 2003 L 251/12).

Most of the Council's measures have been widely criticised by non-governmental organisations (NGOs) as leaving great flexibility to Member States, thereby achieving little real harmonisation of national laws, and setting an extremely low minimum standard of protection, in particular the reception conditions Directive and the agreed text of the asylum procedures Directive. The latter Directive, once adopted, could well be the subject of legal action before the EU's Court of Justice, brought by the European Parliament or through the national courts of the Member States, arguing that the Directive is partly or wholly invalid for breach of the human rights standards required by Community law. The most controversial provisions in the Directive include the rules on legal aid for asylum-seekers, detention, so-called 'safe countries of origin,' 'safe third countries' (i.e. countries which asylum-seekers transited through), judicial and administrative review standards, including expulsion of asylum-seekers before their initial application or their appeal is decided. It is clear that during negotiations in the Council, Member States were generally unwilling to change their existing national rules, with the result that the final legislation is set in most cases at or near the lowest common denominator of those existing rules. Many NGOs fear that Member States will engage in a 'race to the bottom,' trying to reduce the number of asylum applications by lowering their standards to the absolute minimum required by the EU's legislation.

Although legislation has been adopted (or in the case of the asylum procedures Directive, agreed in principle) on a broad range of asylum issues, several issues remain outside the scope of EU harmonisation. The legislation on procedures, reception conditions, and responsibility applies only to persons applying for refugee status, not for subsidiary protection. Similarly, the family reunion Directive applies only to refugees, not to persons with subsidiary protection. Also, all the legislation concerns persons applying on the territory or at the borders of Member States, so it does not harmonise policy regarding the external aspects of asylum. Finally, the legislation does not set up any kind of common EU administrative or judicial

system concerning asylum; all asylum issues are dealt with by national administrations and courts (subject to the obligation of final courts in the Member States to refer questions about the interpretation or validity of EC asylum legislation to the Court of Justice).

But some of these issues have appeared on the asylum agenda while the first-phase legislative measures were under discussion. Some Member States have argued that the EU should change course and adopt a policy of external processing of some or all asylum applications, so that would-be asylum-seekers have to make their claims and have them considered outside the territory of the Member States. This suggestion is legally and politically highly controversial, and the EU has not (yet) adopted it. But, at the suggestion of the Commission, the Council has agreed to begin the creation in 2005 of Regional Protection Programmes to assist non-EU states with considerable numbers of asylum-seekers, and to consider a proposal in summer 2005 for an EU resettlement system, which would help some recognized refugees in non-EU countries to enter the EU's Member States without recourse to unauthorized entry and residence. Also, the UN's High Commissioner for Refugees (UNHCR) has suggested a system of joint processing of asylum-seekers within the EU. The suggestion has not been followed up by the EU so far.

Finally, it should be noted that the decision-making procedure concerning asylum law is changing. The Treaty of Nice provides that decision-making on all asylum measures, except burden-sharing legislation, shall be subject to QMV in the Council and co-decision of the EP once the EU has adopted legislation concerning the "*common rules and basic principles*" of each issue. This process will presumably be complete once the asylum procedures Directive is adopted. Also, implementing a commitment in the Hague Programme, the Council took a Decision in December 2004 (OJ 2004 L 396/45) to change the decision-making process to QMV and co-decision from 1 January 2005 on a number of asylum and immigration matters, including the issue of burden-sharing.

## The Hague Programme

On the issue of asylum, the Hague Programme provides that:

### 1.3 A Common European Asylum System

*"The aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase. "*

*"The European Council urges the Member States to implement fully the first phase without delay. In this regard the Council should adopt unanimously, in conformity with Article 67(5) TEC, the Asylum Procedures Directive as soon as possible. The Commission is invited to conclude the evaluation of first-phase legal instruments in 2007 and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before the end of 2010. In this framework, the European Council invites the Commission to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union. Furthermore, a separate study, to be conducted in close consultation with the UNHCR, should look into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards."*

*"The European Council invites the Council and the Commission to establish in 2005 appropriate structures involving the national asylum services of the Member States with a view to facilitating practical and collaborative cooperation. Thus Member States will be assisted, inter alia, in achieving a single procedure for the assessment of applications for international protection, and in jointly compiling, assessing and applying information on countries of origin, as well as in addressing particular pressures on the asylum systems and reception capacities resulting, inter alia, from their geographical location. After a common asylum procedure has been established, these structures should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum System."*

On the external aspects of asylum, the Programme states that:

*"The European Council acknowledges the need for the EU to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage. Countries in regions of origin and transit will be encouraged in their efforts to strengthen the capacity for the protection of refugees. In this regard the European Council calls upon all third countries to accede and adhere to the Geneva Convention on Refugees (...)."*

*"The European Council welcomes the Commission Communication on improving access to durable solutions and invites the Commission to develop EU-Regional Protection Programmes in partnership with the third countries concerned and in close consultation and cooperation with UNHCR. These Programmes will build on experience gained in pilot protection Programmes to be launched before the end of 2005. These Programmes will incorporate a variety of relevant instruments, primarily focused on capacity building, and include a joint resettlement programme for Member States willing to participate in such a programme."*

It should also be pointed out that the Constitutional Treaty would also alter the description of the EU's competences in this area. Whereas the present powers permit the EU to adopt minimum standards only (except as regards the rules on responsibility for asylum-seekers), Article III-266 of the proposed Treaty would grant power to legislate for *"a common European asylum system comprising"* in particular, a *"uniform status of asylum(...).valid throughout the Union,"* along with a *"uniform status of subsidiary protection,"* a *"common system of temporary protection"* and *"common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status."* The EU would also have power to legislate for criteria on responsibility and standards on reception conditions applicable to both asylum-seekers and persons seeking subsidiary protection status, and an express power to adopt measures concerning 'partnership and cooperation with third countries for the purpose of managing inflows of people' applying for various types of asylum and protection. All these powers to create the Common European Asylum System are for the purposes of realising the principles of that system, which according to the Constitutional Treaty are the development of a common policy on asylum and protection *"with a view to offering appropriate status to any third-country national requiring protection and ensuring compliance*



*with the principle of non-refoulement.*" This must be, as at present in accordance with the Geneva Convention on refugee status and other international treaties. All these actions would be subject to QMV in the Council and co-decision of the European Parliament. Furthermore, the Court of Justice would gain full jurisdiction over immigration and asylum measures, meaning that all national courts or tribunals could send questions to it concerning the validity and interpretation of EC legislation.

## The Impact of the Hague Programme

First of all, the Hague Programme reiterates the goal of establishing a Common European Asylum System and the key principles underlying that system (although it does not refer to a status "*valid throughout the Union*"). It adds a further political impetus to the legal obligation to adopt the asylum procedures Directive the last outstanding first-phase measure. The most novel parts of the Programme are therefore the dates set for evaluation of the first-phase instruments, for adoption of the second-phase instruments, and for the potential addition of one or two new elements to the existing first-phase legislation.

Taking these issues in turn, much of the EC legislation is already subject to evaluation in 2006 or before (the temporary protection Directive at end 2004; the reception directive in August 2006; the Regulations on Eurodac and responsibility for applications by January and March 2006). Then again, the later measures are not due for evaluation until April 2008 (the refugee definition Directive) and spring 2009 (the procedures Directive). While there will have been enough experience to draw conclusions about the operation of the earlier measures by 2007, following the evaluation of the specific measures, it will be difficult to draw many conclusions at that point about the two later Directives, considering that the Member States will only have been obliged to apply the asylum procedures Directive for a matter of months.

Next, the end of 2010 seems to be more than adequate time to evaluate the operation of the first-phase measures with a view to adoption of the second-phase legislation. But it is striking that there is no suggestion in the Hague Programme concerning the direction that EU policy should take in the second phase (leaving aside the possible addition of external processing and joint internal processing to the mix), in particular the question of whether EU rules on reception and responsibility should be extended to persons with subsidiary protection. In fact, it is not expressly stated that the second phase

will be the final phase; the door is implicitly left open for a third or fourth stage before the Common European Asylum System is finally completed. But at least the agreement on 2010 as a date for the adoption of second-phase measures gives a political impetus, which might otherwise be lacking, for the adoption of those measures.

Finally, there is no detail or direction offered on the separate questions of whether to adopt measures on external processing or joint internal processing as a part of the Common European Asylum System. These issues have in effect been deferred for now, to a later date a few years hence, following the studies on these issues, at which point the political dynamics of the arguments may have changed. The basic question of how joint internal processing would work remains open. Would an EU agency be taking the decisions, and would it be subject to appeal to an EU court? If not, how would responsibility for considering applications between Member States be allocated, including welfare costs, review systems, expulsion costs for unsuccessful applications and the location of settlement for successful applicants? Equally it remains open whether external processing would apply just to those who are already outside EU Member States' territory or also to those who have arrived there already, and how the processing, responsibility and appeal system would function in either case. Of course, unless some non-EU States are willing to become involved, external processing will remain a fantasy.

The other provisions of the Hague Programme concern administrative cooperation and external cooperation. The first issue is apparently going to be addressed in two phases, with the first phase likely adding little to the existing system consisting of contact committees concerning the implementation of legislation, and a Committee on Immigration and Asylum and a Eurasil committee run by the Commission. The Council had already decided in Autumn 2004 to move toward the creation of a single procedure for refugee and subsidiary protection claims, so the Hague Programme only adds political support for the *status quo*, without mentioning the legislation that would be necessary to create a genuine single procedure. The creation of a European support office would change the existing system, depending on its powers and status, but the Hague Programme leaves these questions quite open. Similarly, the Hague Programme largely adds political support for the *status quo* as regards external cooperation, given that (as pointed out above) the Council has already agreed to establish Regional Protection programmes and an EU resettlement programme.

## Conclusion

The most important aspect of the Hague programme as far as asylum is concerned is the agreement to evaluate the first phase of asylum legislation in 2007, to study two key issues on the scope of the Common European Asylum System and to adopt the second-phase legislation by 2010. These dates, taken together with the process of implementing the first phase rules, establishing more cooperation between Member States, including the initiation of moves towards a single procedure for claims, and beginning the process of external cooperation, create a dynamic that should feed into the development and adoption of second phase legislation.

To some extent, the development of the second phase of the Common European Asylum System is dependent on ratification of the Constitutional Treaty, which would extend and clarify the EU's competences over asylum. But even the existing Treaty framework would allow for the adoption of a second phase of legislation; although the EC, as it stands cannot fully harmonise national asylum law, it could set minimum standards at a rather higher level if it wished. In any event, the extension of QMV and co-decision as set out in the current Treaty framework and confirmed by the Constitutional Treaty would create a new political dynamic involving the prospect of Member States being outvoted, the European Parliament having a far greater role, and (particularly if the Constitution is ratified) likely an extensive involvement of the Court of Justice.

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## 4. Migration Policy: A Missed Opportunity?

By Steve Peers

### Introduction

The Hague Programme contains a number of commitments regarding migration policy, particularly on the subject of irregular (illegal) migration. This important issue should be seen in light of the difficulties in reaching agreement on much of the legislation on legal migration during the period both before and after the Tampere European Council in 1999, and the controversy over the human rights impact of legislation on irregular migration, which could prevent asylum-seekers with legitimate protection needs from reaching or remaining in the territory of the European Union.

### Background: The Tampere Programme

The Tampere European Council developed a number of principles intended to govern the development of an EU migration policy, which up to that point consisted only of a small number of Resolutions and Recommendations.

The key Tampere principles on legal migration were as follows:

*“18. The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens (...).”*

*“20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission. These decisions should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.”*

*“21. The legal status of third country nationals should be approximated to that of Member States’ nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens;*

*e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident."*

As regards irregular (illegal) immigration, the principles provided:

*"23. The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime. The Council is invited to adopt by the end of 2000, on the basis of a proposal by the Commission, legislation to this end. Member States, together with Europol, should direct their efforts to detecting and dismantling the criminal networks involved. The rights of the victims of such activities shall be secured with special emphasis on the problems of women and children (...)."*

*"26. The European Council calls for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States."*

*"27. The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission."*

The practical application of these principles was subject to the transitional rules for decision-making applicable for the first five years after entry into force of the Treaty of Amsterdam. This required unanimous voting in the Council with mere consultation of the European Parliament. Also, the Commission shared its normal monopoly over proposals with the Member States for this period. In practice, the Commission proposed all the measures dealing with legal migration, while the Member States proposed most of the measures dealing with irregular (illegal) migration.

The result of the requirement for unanimous voting in the Council was that in spite of the Tampere principles' call for swift action, it proved difficult (and on some subjects, impossible) to agree on legislation on legal migration. Furthermore, the legislation which has been finally adopted has been criticized in many quarters for setting standards too low, often at the level of the lowest common denominator of Member States' existing policy, and arguably in violation of the substance of the Tampere principles. There have been disputes over both policy and the scope of the EC's powers, which as set out in Article 63(3)(a) and 63(4) of the EC Treaty, are arguably ambiguous. For example, does the EC have the power to regulate access to employment by third-country nationals?

Despite these difficulties, some legislation has been adopted. Nearly four years after a Commission proposal, the Council adopted Directive 2003/86 on family reunion (OJ 2003 L 251/12), which set standards much lower than the Commission had initially proposed – so much so that the European Parliament has sued to annul several provisions of the Directive in the Court of Justice, claiming that the Directive breaches the human rights standards of EC law. Shortly afterward, the Council adopted Directive 2003/110 (OJ 2004 L 16/44), concerning long-term resident third-country nationals who have resided legally for over five years in a Member State. This Directive confers a number of equality rights on long-term residents, in line with the Tampere conclusions, along with the right to move between Member States, but the extent of these rights falls well below the levels which the Commission proposed. The Council has also adopted Directive 2004/110 (OJ 2004 L 375/12) on the entry and residence of students, volunteers, school pupils on exchange programmes and unpaid trainees, and has agreed in principle on a proposed Directive on a special procedure for admission of researchers (COM (2004) 178), but was unable to agree on a proposed Directive on admission for employment or self-employment (COM (2001) 386). Furthermore, the Council has adopted two Regulations in this area: Regulation 1030/2002 establishing a uniform residence permit (OJ 2002 L 157/1) and Regulation 859/2003 on social security rules for third-country nationals (OJ 2003 L 124/1), extending most of the EC rules coordinating social security for migrant EU citizens to third-country nationals who move within the Community. A 2003 proposal to amend the first Regulation to insert biometric data (photos and fingerprints) into the residence permit is under discussion. Finally, in 2004 the Council adopted detailed principles governing national policy on integration of migrants.

It proved easier to agree legislation on irregular (illegal) migration. Taking into account the Tampere principles and based on French initiatives, the Council adopted Directives 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34, implemented by a later Decision on financing expulsion measures: OJ 2004 L 60/55), Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45) and Directive 2002/90 on smuggling of migrants (OJ 2002 L 328/17), with an attached Framework Decision harmonizing criminal law sanctions for smuggling (OJ 2002 L 328). In the same vein, the Council also adopted a Framework Decision on trafficking in persons (OJ 2002 L 203). Directive 2004/81 (OJ 2004 L 261/19), as provided for in the Tampere conclusions, concerns the welfare of victims of trafficking. In particular, it provides for Member States to grant residence permits to victims of trafficking or facilitation of irregular migration in order to facilitate those victims' participation in criminal proceedings against the perpetrators.

Furthermore, the Council adopted a number of measures to assist operational cooperation on expulsion between Member States, in particular Directive 2003/110 on assistance for expulsions via air transit (OJ 2003 L 321/26), Regulation 377/2004 on immigration liaison officers' network (OJ 2004 L 64/1) and a Decision on joint flights for expulsion (OJ 2004 L 261/28). In order to prepare for the creation of a second-generation of the Schengen Information System, the Council adopted conclusions on the management of SIS II and its operational requirements, along with Regulation 2424/2001 (OJ 2001 L 328/4), which provides for funding SIS II from the EC budget and confers project management powers on the Commission, within the first pillar, Regulation 871/2004 which provides for future functionalities for the SIS (OJ 2004 L 162/29) and Regulation 378/2004 (OJ 2004 L 64/5), which confers powers on the Commission to amend the Sirene manual, which governs the supplementary exchange of data between national authorities following a 'hit' in the SIS. Finally, the Council adopted Directive 2004/82 (OJ 2004 L 261/24) concerning the transmission of passenger information by carriers to border control authorities, and agreed a treaty with the United States on the same subject. The European Parliament has sued to annul the latter measure in the Court of Justice.

Externally, two EC readmission treaties are in force (with Hong Kong and Macao), and two others (with Sri Lanka and Albania) have been agreed and are now subject to the ratification process. But it has proved difficult to make headway on negotiations with other countries (such as Russia, China,

Morocco and Algeria) with which the EC is keen to negotiate such agreements. The EC has also established a budget line to fund assistance for migration projects in third countries; in practice the funds are largely directed toward third countries willing to enter into readmission commitments with the EU.

## The Hague Programme

On the issue of legal migration, the Hague Programme provides that:

*“Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy. It could also play a role in partnerships with third countries. ”*

*“The European Council emphasizes that the determination of volumes of admission of labour migrants is a competence of the Member States. The European Council, taking into account the outcome of discussions on the Green Paper on labour migration, best practices in Member States and its relevance for implementation of the Lisbon strategy, invites the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005.”*

A further set of conclusions concern integration of third-country nationals:

*“Stability and cohesion within our societies benefit from the successful integration of legally resident third-country nationals and their descendants (...).”*

*“While recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU, the European Council calls for the creation of equal opportunities to participate fully in society. Obstacles to integration need to be actively eliminated.”*

*“The European Council underlines the need for greater coordination of national integration policies and EU initiatives in this field. In this*



*respect, the common basic principles underlying a coherent European framework on integration should be established.”*

A number of key principles are set out in the Hague Programme. The Programme then states that:

*“A framework, based on these common basic principles, will form the foundation for future initiatives in the EU, relying on clear goals and means of evaluation. The European Council invites Member States, the Council and the Commission to promote the structural exchange of experience and information on integration, supported by the development of a widely accessible website on the Internet.”*

On the issue of irregular migration, the Programme provides that:

*“Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, compulsory basis. The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity.”*

*“The European Council considers it essential that the Council begins discussions in early 2005 on minimum standards for return procedures including minimum standards to support effective national removal efforts. The proposal should also take into account special concerns with regard to safeguarding public order and security (...).”*

The European Council calls for:

- closer cooperation and mutual technical assistance;
- launching of the preparatory phase of a European return fund;
- common integrated country and region specific return programmes;
- the establishment of a European Return Fund by 2007 taking into account the evaluation of the preparatory phase;
- the timely conclusion of Community readmission agreements;
- the prompt appointment by the Commission of a Special Representative for a common readmission policy.

On the external aspects of migration, the Programme states in particular:

*"The European Council calls upon the Council and the Commission to continue the process of fully integrating migration into the EU's existing and future relations with third countries.(...)."*

*"Policies which link migration, development cooperation and humanitarian assistance should be coherent and be developed in partnership and dialogue with countries and regions of origin. The European Council welcomes the progress already made, invites the Council to develop these policies, with particular emphasis on root causes, push factors and poverty alleviation, and urges the Commission to present concrete and carefully worked out proposals by the spring of 2005 (...)."*

It should also be recalled that the Hague Programme asked for the decision-making process regarding irregular migration measures to change, so that the Council adopts those measures by a qualified majority vote with the co-decision of the European Parliament. This change was put into place by a Council Decision adopted in December 2004, taking effect from 1 January 2005. On the other hand, decision-making regarding legal migration remains subject to unanimous voting in the Council and mere consultation of the European Parliament until the EU's proposed Constitutional Treaty (OJ 2004 C 310) enters into force (if it does). At that point decision-making – even on legal migration – will be subject to QMV and the co-decision procedure.

The Constitutional Treaty would also alter the description of the EU's competences in this area. According to Article III-267 of the proposed Treaty, EU powers over migration would then comprise powers to create a 'common' immigration policy, based on the Tampere principles, expressly aimed at ensuring *"efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States,"* and prevention and combating of irregular migration and trafficking of migrants. The Treaty powers would expressly include the power to regulate *"[t]he definition of rights of third-country nationals residing legally in a Member State,"* and competence over irregular migration would also be clarified. EU powers to negotiate and conclude readmission treaties and to adopt measures assisting Member States' integration policies would also be expressly mentioned. However, the EU will not have the competence to adopt measures concerning the volumes of admission of third-country nationals coming from third states in order to seek employment or self-employment.

## Impact of the Hague Programme

As regards the issue of legal migration, it is difficult to see what impact the Hague Programme will have. It is notable that the Programme does not ask the Commission to propose, or commit the Council to adopt, any legislation on legal migration, whether in the area of economic migration (not yet addressed by EC legislation) or in the other areas addressed by EC legislation already, where that legislation is often limited in scope and, as noted above, has been criticised for setting low standards. Compared to the Tampere conclusions, there appears to be far less political will to address the issue in the Hague Programme; and as we have seen, the outcome of the Tampere conclusions fell well below the goals set by the Tampere principles.

At least the Programme does call for a 'policy plan' to be proposed by the Commission on economic migration in 2005, following the Green Paper on this subject which the Commission was already planning to propose in order to restart discussions on legislation on the topic. The Green Paper was released in January 2005, and it makes clear that the Commission still intends to propose legislation on this subject. But the experience to date is that as long as unanimous voting is applicable to this area, it is impossible for the Council to agree wide-ranging horizontal legislation on this topic even at the level of the lowest common denominator. There was some success, however, at agreeing rules on admission of a particular category of economic migrants (researchers). It is possible that the Council can make progress on the topic if it examines particular categories or groups of workers, particular those who are highly skilled in general or who have skills in high-technology areas where admission would most directly contribute to advancing the goals of the Lisbon strategy. Alternatively or additionally, the Council might make progress if the Commission makes revised proposals leaving greater flexibility to Member States to regulate the process of admission, for example by permitting Member States to issue work permits and residence permits separately.

The key issue here may be the imposition of qualified majority voting in the Council. Even the imminent application of QMV, as the Constitutional Treaty nears its planned date of entry into force in November 2006, may be enough to convince those Member States who have traditionally been reluctant to see EC legislation in this area to moderate their opposition and accept a compromise, rather than risk being outvoted by more liberal Member States or the European Parliament in the co-decision procedure (the EP usually supports a relatively liberal migration and asylum policy).

It remains to be seen whether the Council is willing to widen the scope or increase the standards set out in its existing migration legislation. In particular, the Commission is due to make a proposal in 2005 to apply the long-term residents' Directive to refugees and persons with subsidiary protection. Also, the EC has no family reunion rules governing persons with subsidiary protection or the admission of family members of EU citizens who have not exercised free movement rights; such persons are likely to be members of ethnic minorities. Again, only the imposition of qualified majority voting in the Council may lead to adoption of legislation. The failure to mention these issues in the Hague Programme may mean that they will struggle to be adopted in light of the EU's other priorities.

On the issue of integration, the Hague Programme is simply a political commitment to endorse the *status quo*, for at the time of the Hague Programme, the Council was already completing its work on providing guidelines for national policy (later officially adopted by the Council in mid-November 2004), and the Commission had already established a pilot funding programme. The Constitutional Treaty would in future set out an explicit legal provision for the *status quo*. It remains to be seen whether the EU's principles on integration have a significant impact on national policies.

As for irregular migration, the key issue is likely to be the proposed Directive on return procedures which the Commission has long been planning. The proposal is likely to be issued, as the Hague Programme notes, in 2005. Originally, Member States had been lukewarm about the prospect of this proposal, but its mention in the Hague Programme, along with the imposition of QMV in Council, has increased the likelihood that it will be agreed soon. The extension of co-decision may also mean that difficult disputes between the Council and EP lie ahead on the level of human rights protection that must be provided for during expulsion proceedings and operations. There may be similar disputes over the planned Return Programme, and the details of the legislation to establish the second-generation Schengen Information System (SIS), also expected in early 2005.

Finally, the Hague Programme does not engage fully with the issue of the external dimension of migration policy. The EU's focus to date on coercing and bribing non-EU states to assist with the application of its migration policy would not really change fundamentally. It is time to rethink the EU's navel-gazing approach and to take the lead, as the EU has done in many other areas, in developing an internationalist strategy. The EU should be urging Member States and third states to ratify the UN Convention on

migrant workers, supporting the creation of international institutions which can address the issue of migration on a genuinely shared basis, and rethinking aspects of its trade policy (particularly the Common Agricultural Policy) and Member States' policy in international financial institutions which contribute to the poverty which leads to international migration.

## Conclusions

The Hague Programme has contributed very little to the development of legal migration policy in the EU. EU policy on this subject could likely only move forward significantly once the Constitutional Treaty enters into force, or in light of its imminent entry into force. The failure to rethink the EU's external migration policy fundamentally is a missed opportunity. On the other hand, the change to the decision-making procedure for irregular migration will likely change the political dynamics of discussions on that subject, making it even easier than it has been already to agree legislation but opening the possibility that the most liberal or most conservative Member States may be outvoted, and adding the factor of the EP's position as well. In raising the likelihood of the adoption of the planned proposal on standards for expulsion procedures, the Hague Programme will likely result in substantially greater EU involvement in many more national expulsion proceedings in practice.

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## 5. A Fresh Wind From The Hague? Thoughts on Strengthening Security in the EU

*By Prof. Dr. Monica den Boer*

### Introduction

The launch of the Area of Freedom, Security and Justice (AFSJ) in the Amsterdam Treaty on European Union in 1997 was followed by the Vienna Action Plan in 1999, which contained the decision to convene an entire summit devoted solely to Justice and Home Affairs (JHA) Cooperation. The Extraordinary Council was held in Tampere on 14 and 15 October 1999, which concluded with an agreement on the progressive establishment of a number of objectives. Article 61(a) of the Amsterdam Treaty had ruled that the completion of the Area of Freedom, Security and Justice had to be achieved by 1 May 2004. This date coincided with the accession of ten new Member States to the EU, and gave the Council the necessary momentum to unanimously agree on the transfer of certain competences in Justice and Home Affairs Co-operation to the Community Pillar. The 1999 Tampere Programme was set to be evaluated in June 2004. Moreover, it was to be succeeded by a new strategic Programme, which was originally entitled Tampere II. However, perhaps confusingly so, the Dutch EU Presidency decided to change its name to the The Hague Programme, with the subtitle of Strengthening Freedom, Security and Justice in the European Union.

The adoption of this new Programme took place at the European Council Meeting on 4 and 5 November 2004.<sup>1</sup> To put this programme into perspective, it is necessary to keep in mind that the Dutch EU Presidency was simultaneously at work preparing a new European strategy on drugs, and a revised EU strategy on organised crime. At the same time, the Hague Programme ought to be evaluated in light of the EU Security Strategy (ESS), adopted in December 2003, and of the European Neighbourhood Policy (ENP), which contains an important internal security component. Last but not least, the Programme can be read in conjunction with the recently signed EU Constitutional Treaty.

This contribution focuses on the security dimension in the Hague Programme, with particular attention given to police and judicial cooperation in criminal matters, as well as to the exchange of information and operational cooperation.

## The Tampere agenda

The Tampere agenda had already given a significant legal and institutional boost to criminal justice cooperation: with hindsight, the marker was set pretty high. On the legal side, the objectives included the realisation of a system of joint definitions, incriminations and sanctions for certain forms of crime. On the institutional side, several ambitions were launched. These included the objective to let Europol come to full fruition, to create Eurojust (which was to become an intergovernmental agency, and not a European Public Prosecutor), to launch joint investigation teams on drugs, people smuggling or terrorism, to establish a European Police Chiefs' Task Force, and finally, to establish a European Police College. These institutional ambitions were in line with one of the core objectives of the Multi-Annual Strategic Programme,<sup>2</sup> namely to reinforce the operational dimension of law enforcement cooperation. Tampere also outlined the political ambition to establish a crime prevention programme. The fight against terrorism only figured in a close reading between the lines. Ironically, the 11 September 2001 attacks in the USA provided the political window of opportunity necessary to push ahead with several JHA-instruments, particularly those based on the new cornerstone of EU criminal justice cooperation introduced by the Tampere agenda: mutual recognition.

The Tampere agenda was evaluated in June 2004<sup>3</sup> with a balance sheet showing both a lot of pluses and minuses. EU Commissioner for Justice and Home Affairs, Antonio Vitorino almost characteristically qualified the progress as: "*Much has been done, but much also remains to be done.*" The evaluation report underlined "*substantial progress*" in most JHA areas, "*even if not all the original aims were achieved.*" Cynics have commented that at closer inspection, the Commission Scoreboard reveals that progress has been close to zero. The Commission's evaluation report also quite justifiably bemoans a number of institutional and procedural obstacles which are to blame for its inaction. Overcoming unanimity voting in the Council is regarded as difficult, and qualified majority voting (QMV) is seen as the panacea for expediting and facilitating the rate and success of progress on the Tampere priorities. Moreover, the Commission blames the shared right of initiative for the fact that it was overruled in its views by the priorities of Member States, which prevailed in the end. The shared right of initiative is particularly hard to change as the management of internal security is often prompted by ad hoc responses to security crises, which in the Member States is a technique to please the electorate.

The report did highlight three main achievements in the field of security, however, including the establishment of Eurojust, the adoption of the EU Arrest Warrant (EAW), and the approximation of legislation in the field of cross-border crime. As mentioned above, these positive developments were largely facilitated by the urgency felt following the terrorist attacks in the US. Other objectives remained on the wish-list: a coherent policy on crime has yet to be adopted and implemented and the operational side of law enforcement cooperation still needs to be strengthened, while counter-terrorism has seen only few very concrete advances but remains a priority. The European Council which convened on 17 and 18 June 2004 formally requested a follow-up to the Tampere agenda. The (then) incoming Dutch EU Presidency took a pragmatic line and sought to strengthen the already existing programme, without wanting to impose a new and ambitious vision.

## **The Hague Programme: Strengthening Security**

A first draft of the Hague Programme was already discussed on 19 July 2004 before the Union's traditional summer break in August. The European Commission had also opened a public consultation process that ran until 31 August 2004. However, no synthesis of these consultations was drafted for inclusion in the Hague Programme. A second draft of the Programme was discussed at an informal JHA Council meeting on 30 September/1 October 2004. A revised document passed through Coreper on 14 October 2004, and the next JHA Council which met on 24 and 25 October 2004 reached broad agreement on the substance of the programme, but the approval of the application of QMV on certain asylum and migration issues was postponed to discussions at the General Affairs Council.

The Security chapter in The Hague Programme, which includes drugs, terrorism, police and criminal justice, focuses on rapid information exchange between law enforcement authorities, on combating terrorism, and on the removal of judicial obstacles which hinder effective law enforcement cooperation. The chapter itself will be affected by the general EU principles of subsidiarity and proportionality which should take the legal traditions of the Member States into account. At the same time, the functionality of the legal instruments in the field of criminal justice and cross-border crime will be influenced by the impact of the EU Charter on Fundamental Rights (fully incorporated in the EU Constitutional Treaty), and by the stronger emphasis on the implementation and evaluation of AFSJ measures.



In this Hague Programme chapter, criminal justice is portrayed as an EU-wide concern, in which mutual recognition remains the cornerstone. Critics have noted that the principle of mutual recognition has remained untested by the European Court of Justice thus far. Mutual recognition is based on mutual trust between law enforcement authorities and implies a direct contact between these authorities. The attraction of mutual recognition is that it does not require preliminary legislative transformation in domestic criminal (procedure) laws and limits the grounds for refusal (e.g. of extradition). The Hague Programme remains vague about the destiny of the future criminal justice space, and whether it should embrace harmonisation of criminal offences and criminal procedures, or not. Instead, the concept of 'approximation' – which was first introduced in the Amsterdam Treaty – has been used again, which is regarded as a facilitating means to mutual recognition. The big IF is used in the context of the European Public Prosecutor: if the EU is to be considered an area of justice, there ought to be an institutionalised form of prosecution throughout the EU.

In substantive terms, EU criminal justice legislation will only be applicable to a select number of criminal offences, which include money laundering, counterfeiting, corruption, theft, drugs trafficking, human trafficking and environmental crime. This seems to be a soothing gesture towards those EU Member States who have reservations about a creeping harmonisation from within the EU. But it is a rather weak guarantee, given the history of JHA: not only was the competence of Europol extended several times by the Council by means of soft law instruments (and hence without the parliamentary scrutiny of national parliaments or the European Parliament), but when one takes into account the breadth of application of the EU Arrest Warrant to cover 32 offences, one might begin to wonder whether the list of 'Eurocrimes' is not infinite.

In procedural terms, the Hague Programme seems to be a slightly more cautious, as it announces a Green Paper by the European Commission on sanctions, and a Commission proposal on procedural rights. The double jeopardy initiative (*ne bis in idem*) has been halted.

On the institutional side, the Hague Programme wants to strengthen the position of Europol, and this agency will be asked to put forward recommendations concerning the improvement of law enforcement data in the Member States. It will not be an easy task for an agency to rid itself of the pejorative undertone of this new mission, as it has already been struggling to gain credibility and support from the national law enforcement agencies. Europol will also advance common investigation techniques

(among which undercover ones) – this refers to Article III-257 of the EU Constitutional Treaty, and will primarily embrace forensic investigation techniques and information technology security). As of 1 January 2006, Europol has to replace its situation reports on crime with threat assessments on serious forms of organised crime, following a recent trend toward drafting anticipatory analytical reports on crime-phenomena. Europol will also be encouraged to exploit its co-operation with Eurojust to the full, and to stimulate the use of or participation in Joint Investigation Teams (JIT). As the experience with joint investigation teams has been limited thus far, national experts are to be appointed in each Member State.

## **Ambitions for Eurojust**

The ambitions for Eurojust are less detailed and merely point toward a full implementation of the Eurojust decision. Eurojust's primary task remains the co-ordination of judicial investigations in the Member States. A controversial thus far unsolved question is whether Eurojust should undertake the preparatory work for a European Prosecutor.

A Committee on Internal Security is to be created (also in line with Article III-261 of the EU Constitutional Treaty), consisting of the chairpersons of Strategic Committee on immigration, borders and asylum (SCIFA), the Article 36 Committee (CATS), and representatives from the European Commission, Europol, Eurojust, the European Border Agency (EBA), the Task Force Heads of Police, and SitCen. Its role and powers are, however, still unclear as is its relationship to the above mentioned Article 261 of the EU Constitutional Treaty. In addition, the EU is to create its own Crisis Management Centre to cover civil protection, public order and security. CEPOL, the European Police College, has been given the task of organising systematic exchange programmes, while another post-Tampere development, the Joint Investigation Teams, still faces practical problems which need solving in addition to the insecurities that derive from the fact that not all Member States have yet adopted the implementing law.

The Hague Programme reiterates the need for a crime prevention programme, but focuses on genuine policy and instruments that have proven to be effective within the EU context. One of the specific issues raised concerns public-private cooperation. Similar to the EU strategies against organised crime, corruption and drugs, it seems that all forums have to interact with one another in order to develop a programme. The European Commission has been charged with taking the lead on most of these initiatives.

## The Fight Against Terrorism

A core element in the security chapter of the Hague Programme is the fight against terrorism. Along with the core elements concerning the bolstering of legal instruments and EU-agencies, the fight against terrorism should also be built more explicitly on the basis of mutual solidarity. Concrete objectives include that the competences of state security services ought to be used also to protect the safety of other Member States, that information concerning threats to another Member State are communicated without delay, and that undercover surveillance of persons suspected of terrorist activities is not to be hindered by national borders. Noble and refreshing as these objectives may sound, one might wonder if this is not already existing practice, as counter-terrorism practices have proven to be very successful when performed on a bilateral or multi-lateral basis. Another comment one could make on this range of proposals is that this 'soft' list of normative demands on Member States lacks the potency to force Member States to take action, as there is no sanctioning power involved. The remainder of objectives on counter-terrorism in the EU are an amalgamation of plans which are in the process of being implemented, including the Action Plan adopted by the European Council on 25 March 2004 and the reminder that the European Commission is due to deliver a proposal for a joint EU-approach to passenger data.

Moreover, counter-terrorism measures are part of an important argument in a cluster of proposals to improve the exchange of law enforcement data, including biometric data and information systems. As of 1 January 2008, the exchange of information across national borders has to be possible on the basis of availability. Although this section is reasonably explicit in stating a number of conditions which would allow direct information-exchange across borders, it remains hazy on what kind of information is suitable for such direct exchange. Many national legal systems draw a distinction between information and intelligence, between pro-active and reactive information, and between police intelligence and state security intelligence. Hopefully the Commission proposals on this matter – which are ultimately expected by the end of 2005 – will be far more detailed on these aspects.

Unless an added value can be demonstrated, no new information systems are to be created alongside the already existing operational systems (Schengen Information System SIS, Eurodac, Visa Information System VIS, the Europol data-exchange system TECS and the Customs Information System CIS). There is to be more attention given to the coherence of those

systems and for a harmonised approach of biometric identification means and biometric data. A problem is, as feared by many, a spill-over between migration issues and crime-control issues, but the challenge is – according to the Hague Programme itself – to find the right balance between the interests of law enforcement and the basic rights of individuals. The downside of accumulated information systems in Europe is that their remits may either interfere or overlap, and that the operationalisation of those systems is made dependent on national (and hence diverse) working procedures and practices. In addition, the absence of a coherent legal framework on data protection (which would also introduce guarantees in the domains of police and immigration data) is potentially worrisome, but the fact that an EU Data-protection Supervisor was created a couple of years ago is a promising step in the right direction. Moreover, the creation of a Fundamental Rights Agency in Vienna – which was also recommended by the European Parliament<sup>4</sup> – will bolster the protection of citizens.

Laudable elements in the security chapter of the Hague Programme include the evaluation and implementation of EU-instruments in the field of criminal justice and security, which is a formal step towards “good” implementation. There is also a need for greater coherence among these instruments as well as for an upgrading of the existing *acquis*. Greater coherence with the international legal order, which is seen as an element of EU external relations, is also needed.

## Conclusion

Although the ambitions of the Hague Programme do not read like the ‘Tampere milestones,’ the Programme has provided a fresh impetus to the establishment of the Area of Freedom, Security and Justice. Instead of being a visionary blueprint, the Hague Programme tends to consolidate the instruments that are under construction. This strength may also be its weakness. The main problem with the lack of a fixed horizon is that we do not know (and nor do the European leaders, apparently) what it will all lead to. As yet, there is no vision of a future coherent legal and political framework in the domain of security. The apparent eschewing of the “H”-word (harmonisation) by means of a continued usage of the word “approximation” perpetuates the ambiguity about whether the AFSJ merely seeks to facilitate or to enhance cooperation, or whether this might lead to the creation of a genuine European Judicial Space.

The European Council will ask the European Commission to submit an Action Plan in 2005 with measures to be adopted, including deadlines for the implementation of the multi-annual programme. Progress on aspects of this dossier is to be monitored by the Council on the basis of an annual report (Scoreboard) of the European Commission. It is unclear to what extent this scoreboard is different from, or has to be read in conjunction with, the already existent scoreboard which monitors progress on the signature, ratification and implementation of JHA instruments.

The Hague Programme has been influenced by the EU Constitutional Treaty. In an almost cautious manner, the Hague Programme is based on the Constitutional Treaty but it does not quite dare to anticipate its entry into force on 1 November 2006, if ratified by all Member States. However, at the same time, the Hague Programme acknowledges that the multi-annual programme should make maximum use of the possibilities afforded by the current (Nice) Treaty. If the EU Constitutional Treaty does enter into force, it will imply a few important changes for the AFSJ. The most significant changes are the abolition of the Third Pillar; while QMV and co-decision will be introduced for most issues. The EU-institutions will gain more influence, and the incorporation of the fundamental rights Charter into the Constitutional Treaty and accession to the ECHR have a substantial impact on JHA-matters. However, with respect to internal security co-operation, the Constitutional Treaty has less drastic consequences: issues such as criminal matters and police cooperation will remain subject to a shared right of initiative between the European Commission and the Member States. The introduction of a single European Criminal Justice system remains suspended, and the eventual introduction of a European Prosecutor (Chapter IV, Article III-175) is rather tentative, to say the least.

In conclusion, EU policy-making on (internal) security is 'neither here nor there,' – moving between purely intergovernmental and semi-federalist governance. For the time being, Justice and Home Affairs co-operation has remains a hybrid, underlined by the phased implementation of the Schengen *acquis*, the variable geometry in the operationalisation of border controls, and the opt-out privileges enjoyed by the United Kingdom, Ireland and Denmark. The EU Constitutional Treaty has not truly facilitated decision-making on internal security, as the power of the Council (and hence of the Member States) remains intact, and a varied application of the unanimity principle is upheld. Rather than waiting for the renewed political momentum that comes with a new intergovernmental conference (IGC) or await the advent of the EU Presidency charged with assessing the Hague

Milestones, the Council and the European Commission could initiate a Joint Permanent Reflection Group with the intellectual capacity to create crisis-proof scenario's on EU internal security matters.

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<sup>1</sup> Presidency Conclusions, 14292/04, CONCL 3, Brussels, 5 November 2004.

<sup>2</sup> 15896/03, POLGEN 85. The Multi-Annual Strategic Programme stretched over six Presidencies: Ireland, Netherlands, Luxembourg, United Kingdom, Austria and Finland.

<sup>3</sup> Commission Communication 02.06.2004 (COM (2004) 4002 final).

<sup>4</sup> See Report including a proposal for a recommendation of the European Parliament to the Council and to the European Council on the future of the area of freedom, security and justice as well as on the measures required to enhance the legitimacy and effectiveness thereof (2004/2175(INI), FINAL A6-0010/2004, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Jean-Louis Bourlanges.

## 6. The Hague Programme – Strengthening Justice?

By Susie Alegre

### Introduction

The Hague Programme is designed to build on the achievements of Tampere and to meet the future challenges of developing the area of freedom, security and justice. The objective in the field of justice is *"to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, (...) to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications."* Whether or not it will be able to fulfil these objectives will depend, to a great extent, on the political will to translate these words into reality, backed up with adequate resources and, crucially, on the ratification of the new Constitutional Treaty.

This paper will look at what a 'European Area for Justice' could mean in the criminal law sphere and whether or not the Hague Programme provides an adequate basis upon which to build that area.

### European Court of Justice (ECJ)

One of the complaints raised against the development of legislation in the field of criminal justice in the EU has been the relative lack of judicial accountability for EU actions in this area. Under the current treaties, Member States may choose to opt out of ECJ jurisdiction in this sensitive area entirely, leaving a significant gap in judicial protection for individuals and in the enforceability of legislation across the EU. That said, where the ECJ does rule on the interpretation of legislation in this area, these rulings become EU law and must thus be applied even in Member States that have not given the ECJ competence for cases emanating from their own legal system.

The question of giving the ECJ competence over the area of EU criminal law is one which is very politically sensitive in some Member States, as it touches the 'raw nerve' of national sovereignty in the criminal justice sector. While some believe that a European Area of Justice can only be developed if there is a competent court to rule on issues arising from EU criminal law, others feel that allowing the ECJ to potentially rule on questions of

procedural criminal law is a step too far in handing over power over criminal justice to the EU. The argument against giving the ECJ jurisdiction has often been couched in terms of it leading to excessive delays in criminal proceedings while preliminary rulings are sought, which could in turn lead to a breach of the right to a fair trial under Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

The Commission is invited to consult with the Court and bring forward a proposal to create a solution for *"the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice."* In particular this is envisaged as a way of enabling the Court to respond quickly as it will be required to by Article III-369 of the Constitutional Treaty. Whether or not this consultation will bear fruit will be, to a great extent, dependent on the eventual ratification of the Constitutional Treaty – if it is not ratified, the competence of the ECJ will remain unchanged although its efficiency within the limited scope of its competence may be improved.

While rulings from the ECJ on the Area of Freedom, Security and Justice have been few – primarily due to the limited competence in the field – a recent Advocate-General's opinion in the Pupino<sup>1</sup> case shows signs of potential judicial muscle-flexing in this area. This opinion suggests that national courts are obliged to interpret relevant national law as far as possible in the light of Framework Decisions, whether the national law existed before the relevant Framework Decision or was enacted subsequently. In this case, the Framework Decision in question relates to the standing of victims in criminal proceedings and, in particular, to the treatment of child victims in criminal proceedings. The main issue was whether or not the Italian courts were obliged to interpret the Italian legislation governing the procedure for taking testimonies from children who were victims of a crime (though not a sexual crime) under the guise of the provisions of the Framework Decision regarding the treatment of particularly vulnerable victims in criminal proceedings. The Advocate-General's view was that the courts were obliged to apply special procedures in relation to child victims in accordance with the Framework Decision despite the fact that the Italian legislation did not contain any explicit transposition of this provision that would have applied in this case.

It will be interesting to see how the ECJ will eventually rule on this issue that goes to the heart of national criminal procedural law and to the protection of victims in criminal proceedings. If the ECJ follows the Advocate-General's opinion, this could lead to a strengthening of the effect of existing Framework Decisions in practice but could also have the adverse effect of



making Member States reticent about agreeing to future Framework Decisions which, if implemented thoroughly, would imply significant changes to their national laws.

The Constitution, in Article III-369 extends the jurisdiction of the ECJ to give preliminary rulings concerning:

- a) *the interpretation of the Constitution.*
- b) *the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union.*

Although the jurisdiction of the ECJ is limited in relation to the area of freedom, security and justice in Article III-377, which states that the ECJ:

*“shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding or internal security,”*

Article III-369 does go on to state that:

*“If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.”*

Which seems to indicate that it is clearly envisaged that requests for preliminary rulings could be made in national criminal proceedings.

It is clear from the Pupino case that these kind of questions may increasingly arise in ordinary national criminal proceedings, where issues of the status of victims and, potentially, the rights of suspects and defendants (in the light of ongoing and planned work in this field) need to be interpreted in accordance with EU law. The kind of delays that are currently to be expected in proceedings before the ECJ would not be acceptable in relation to criminal proceedings, particularly not where a defendant is in custody pending the conclusion of a trial. Article 6 of the ECHR guarantees the right to a fair trial *within a reasonable time*. Some EU Member States already have significant problems with the length of criminal (and civil) proceedings with Article 6 ECHR cases on this issue, the volume of which blocks action in the European Court of Human Rights. Adding another level of judicial review

into the proceedings will require swift responses from the ECJ if it is not to exacerbate the problem. The request for a proposal from the Commission to provide a solution for the *"speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice"* is, therefore timely as we may start to see more cases of this kind before the ECJ, whether or not the Constitutional Treaty comes into force as expected.

### **Confidence-building – mutual recognition based on mutual trust**

The Hague Programme seeks to further the use of the principle of mutual recognition – by which judicial decisions in one Member State must be recognised and enforced by judicial authorities in other Member States on the understanding that, while legal systems may differ, the results reached by all EU judicial authorities should be accepted as equivalent – identified as *"the cornerstone of judicial cooperation in the Union"* at Tampere. The idea that:

*"In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality"*

is crucial to the development of the principle of mutual recognition. In reality, however, judicial authorities in some Member States may be hesitant in the execution of decisions emanating from other Member States if they have doubts as to the quality of those decisions or, more particularly, if there are concerns that the safeguards applied in coming to those decisions fall significantly short of those required by the Constitution of the executing Member State.

The proposal to establish *"a system for objective and impartial evaluation of the implementation of EU policies in the field of justice"* is a welcome step towards translating policies into reality on the ground. The question remains, however, as to what would be done if such an evaluation were to reveal serious flaws in implementation in a Member State which could undermine the principle of mutual recognition, if not addressed. The evaluation mechanism must lead to the potential for a corrective mechanism, whether through technical assistance – to correct problems identified in particular Member States – or, in extreme cases, through temporary suspension of relevant legislation (such as the European arrest warrant) until the problem is resolved. Without the possibility of providing a remedy, a system of evaluation may well result in a weakening of mutual trust as Member States become aware that the differences in reality are much wider than those on a political level.

It may be, as well, that such an evaluation would need to go beyond the fairly limited area of implementation of EU policies in the field of justice if it is to have added value for the functioning of the principle of mutual recognition. Some areas, while not directly within the implementation of EU policies, could have a detrimental effect on the functioning of the European judicial space. For example, the conditions of detention in a Member State could be of such a standard that they would result in the refusal of a European arrest warrant by another Member State on the grounds that a return would lead to a breach of the person's right to freedom from cruel, inhuman and degrading treatment under Article 3 ECHR. Prison conditions are not, per se, within the competence of the EU but if prison conditions in a Member State fall below an acceptable standard in other Member States, this could seriously undermine the functioning of the European arrest warrant and would result in a serious blow to mutual trust.

The idea that mutual confidence must rely on mutual understanding is met by the Hague Programme through the possibility of exchange programmes for judicial authorities, the creation of an effective European training network for judicial authorities and support for networks of judicial authorities to improve understanding between the legal systems. In many cases, such promotion of mutual understanding should provide a boost to cooperation between Member States. There is, however, a risk that when judicial authorities become better acquainted with each others' systems they will realise the extent of difference between legal cultures and that this will, in fact, create an obstacle to closer cooperation.

In theory, more knowledge of another legal culture would lead to better understanding. In practice, however, better understanding does not necessarily lead to greater trust. Where, for example, a judge in one Member State discovers that in another Member State the right to silence in criminal proceedings is severely curtailed, he may be less, rather than more likely to happily return a suspect to face criminal proceedings in that Member State. What will be required to ensure mutual trust between judicial authorities is a degree of harmonisation on certain key procedural rights issues so that standards of protections in Member States can be seen to be equal in fact rather than merely in principle.

This is recognised in the Hague Programme which states that:

*"The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings (...)"*

The draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union could potentially go some way to improving mutual trust. The original proposal addresses a number of core issues relating to the protection of the rights of suspects and defendants such as the right of access to a lawyer, the right to communicate the fact of one's detention, the right to free translation and interpreting and the right to consular assistance. The Hague Programme asks for this to be adopted by the end of 2005 but whether or not this will have much of an impact on mutual trust will depend more on the quality of its content than on the speed with which it is adopted.

The Commission proposal does not really take the protection of rights in these areas beyond what already exists under the ECHR but does, at least, make an attempt to codify the existing rights and raise their visibility. It does, however, contain some worrying indications that exceptions from the application of even these basic rights may be sought during the negotiations now ongoing in the Council. Paragraph 8 of the preamble of the proposal allows that:

*"The proposed provisions are not intended to affect specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime, in particular terrorism."*

The areas of "*serious and complex crime and in particular terrorism*" are precisely the areas where cooperation between Member States risks breaking down due to the often controversial national measures relating to restrictions on access to a lawyer and the right to communicate which may adversely affect the right to a fair trial in such cases (even where such measures are used in relation to a third party in order to obtain evidence). A number of extradition cases<sup>2</sup> between Member States have demonstrated that judicial authorities will be prepared to refuse to surrender in those cases where there is a clear risk that the person would not receive a fair trial if returned despite the political pressure to cooperate. If these areas, and particularly terrorism, were removed from the remit of the draft Framework Decision it would do little, in practice, to enhance cooperation and improve mutual trust as these are precisely the areas where Member States most need to cooperate and the areas which are most sensitive to a breakdown in mutual trust.

There is a danger that Member States will water down the scope and standard of rights contained in the Commission proposal to achieve

agreement. This is one of the problems of the requirement of unanimity in the area of criminal justice and as the EU comes to discuss increasingly sensitive areas, such as the admissibility of evidence and the rights of suspects and defendants, there is a risk that legislation in these fields will do nothing to improve the protection of rights and access to justice but rather will establish a declaration of the lowest common denominator in order to facilitate cooperation between Member States at the expense of procedural safeguards for the individual.

The comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters<sup>3</sup> has a very long way to go before it is completed. While the Hague Programme reinforces the need to complete this programme and develop further proposals in this context, the difficulties likely to be encountered in reaching agreement on such sensitive issues as the gathering and admissibility of evidence should not be underestimated. It is all very well to state that this programme should be completed but the question remains – how can it be completed if Member States are unwilling to move forward in the field of procedural law, where to do so would involve any change in their current national law and practice? As the Union expands, this approach to the European judicial space becomes increasingly untenable.

## **Effective cooperation and Eurojust**

Eurojust is clearly identified in the Hague Programme as one of the keys to improving effective cooperation in multilateral prosecutions. It is telling, however, that even at this stage, the European Council still needs to urge Member States to effectively implement the Council Decision on Eurojust and to ensure full cooperation between their competent national authorities and Eurojust.

The main development in this area which the Hague Programme envisages is dependant on the ratification of the Constitutional Treaty, which in turn provides for the possibility of European laws to determine Eurojust's structure, operation, field of action and tasks which may include the initiation of criminal investigations. In its Articles III-273 and III-274, the Constitutional Treaty clearly foresees an expansion in judicial cooperation to create a genuine European judicial space with Eurojust at its heart and the possibility of a European Public Prosecutor's Office to grow from that base. In some Member States, the issue of the European Public Prosecutor's Office is a highly sensitive point in the debate over the Constitutional Treaty. By the

same token, the possibility for Eurojust to initiate criminal investigations may also provoke a suspicion of the erosion of national sovereignty in some areas for those who do not wish to see the EU progress in this way in the field of criminal justice. The question of whether or not the Hague Programme will result in an enhancement of judicial cooperation in this sense will ultimately be decided by the European people, when they take the decision of whether or not to ratify the Constitutional Treaty.

It is clear that if a European judicial space is to become a reality, the advances embedded in the Constitutional Treaty will be needed to move towards this goal. The step towards centralised initiation of criminal investigations and prosecutions, however, needs to be balanced with a clear set of procedural rules, including safeguards for suspects and defendants and a competent court to rule on the legality of proceedings. The need for a criminal chamber in the ECJ may evolve alongside this development and could be considered in the consultation on improving the efficiency of the ECJ to deal with preliminary rulings in the area of freedom, security and justice. Currently, Eurojust national members have widely differing levels of competence, as their competence is governed by national law. This kind of asymmetry leads to an extremely confusing set of applicable laws and cannot realistically be carried over into a new system where Eurojust is given more operational powers. These disparities could lead to the possibility of "*forum shopping*" where the choice of Member State for conducting a prosecution is made on the basis of questions such as which jurisdiction has the lowest threshold for admissibility of evidence. For a European judicial space is to be credible, balancing the need to effectively prosecute transnational crime with the protection of the rights of the individual, it must be couched in legal certainty. This will require a degree of codification and clarity in the laws to be applied to investigations and prosecutions emanating from Eurojust and eventually a European Public Prosecutor's Office.

## Conclusion

The Hague Programme sets up the parameters for the advancement of a genuine European judicial space for criminal proceedings but it will not be capable of fulfilling its potential unless the Constitutional Treaty is ratified and the possibilities that it contains for the development of Eurojust and the extension of the competence of the ECJ and legislation on procedural rights can be realised. The importance of the Constitutional Treaty can be seen throughout the Hague Programme and it will be interesting to see how that

potential is harnessed through eventual Commission proposals if and when the Constitutional Treaty is ratified. These are very interesting times in the field of criminal justice at EU level. The period covered by the Hague Programme should permit the EU to see whether or not there is sufficient political will throughout the Union to move forward in creating the area of freedom, security and justice or whether it is time for some Member States to move towards this vision while others fall behind. The Hague Programme contains key elements for strengthening justice in the EU. However, it will do little by itself if it is not backed up by the political will to create strong judicial mechanisms and legislation to protect the individual in criminal proceedings, along with the democratic legitimacy of a 'yes' vote for the Constitutional Treaty across the EU.

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<sup>1</sup> Affaire C-105/03, Conclusions de l'Avocat General Mme Juliane Kokott du 11 novembre 2004.

<sup>2</sup> E.g. UK case - R v Secretary of State for the Home Department, ex parte Rachid Ramda (2002) [2002] EWHC 1278 Admin. And French case - Irastorza Dorronsoro, (No 238/2003), judgment of the Court of Appeal of Pau, 16 May 2003.

<sup>3</sup> OJ C 12, 15.1.2001, pages 10-22.

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