

Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the Council and the European Parliament: The Hague Programme: Ten priorities for the next five years — The Partnership for European renewal in the field of Freedom, Security and Justice'

(COM(2005) 184 final)

(2006/C 65/22)

On 10 May 2005, the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Employment, Social Affairs and Citizenship, which was responsible for the Committee's work on the subject, adopted its opinion on 14 November 2005. The rapporteur was Mr Pariza.

At its 422nd plenary session, held on 14 and 15 December 2005 (meeting of 15 December 2005), the European Economic and Social Committee adopted the following opinion by 98 votes to two, with seven abstentions.

1. Introduction

1.1 The European Council of 4 and 5 November 2004 adopted the second multi-annual programme for the creation of a common area of Freedom, Security and Justice in the European Union — the Hague Programme ⁽¹⁾. The programme sets out general and specific orientations for the next five years (2005-2009) with regard to policies developing the area of Freedom, Security and Justice (AFSJ).

1.2 The European Council invited the European Commission to draw up an action plan in which the orientations set out in the Hague Programme were to be translated into concrete actions. On 10 May 2005, the European Commission published a communication entitled *The Hague Programme: Ten priorities for the next five years — The Partnership for European renewal in the field of Freedom, Security and Justice* ⁽²⁾, which sets out strategic objectives for the next five years and includes a timetable for the adoption of a package of policies and legislative initiatives in these areas.

2. Conclusions

2.1 Five years after Tampere, the objectives have not been achieved. The EU is not a common area of Freedom, Security and Justice. Although the Hague Programme is lacking ambition, its objectives are very important.

2.2 The creation of a common area of Freedom, Security and Justice must strike the right balance between the three dimensions. The Hague Programme does not maintain a proper balance. Security policies should protect the values of freedom and justice. The EESC believes that the protection of basic freedoms and fundamental rights guaranteed by the European

Convention on Human Rights, and the EU Charter of Fundamental Rights should form the basis of these policies.

2.3 The EESC believes that security policy should be effective, protecting citizens in a free and open society within a framework of justice, under the rule of law. The day that disproportionate legislation is adopted in the name of the fight against terrorism, sacrificing human rights for the sake of security, is the day we hand terrorists their first victory. European civil society should play a critical and active role in this.

2.4 The EESC wants active citizenship of the European Union to be developed. We propose a higher quality, more open, egalitarian, inclusive citizenship, without discrimination.

2.5 It is essential that the European Union establish a common asylum procedure and a uniform status, based on the Geneva Convention.

2.6 The EU needs to draw up a common immigration policy with harmonised laws, not only to prevent illegal immigration and combat criminal networks trafficking in human beings, but also to admit legal immigrants through transparent and flexible legal procedures.

2.7 Immigrants and asylum seekers should be assured of fair treatment, compliant with humanitarian law, the Charter of Fundamental Rights and anti-discrimination law. Reception and integration policies must be developed.

2.8 The Hague Programme should strengthen freedom, security and justice and consolidate effectiveness, legitimacy, mutual trust, equality and proportionality; to this end, EU law and all available institutional mechanisms should be used.

⁽¹⁾ The Hague Programme: strengthening freedom, security and justice in the European Union, Council, OJ C 53 of 3.3.2005.

⁽²⁾ Communication from the Commission to the Council and the European Parliament: The Hague Programme: Ten priorities for the next five years — The Partnership for European renewal in the field of Freedom, Security and Justice COM(2005) 184 final, Brussels, 10.5.2005.

2.9 It is essential to respond to the current judicial and institutional complexity of these policies. The persistence of this complexity at intergovernmental level (third pillar) limits the effectiveness and scope of the Community method. The draft Constitutional Treaty provides an effective and coherent response to many of the problems of cooperation in matters of freedom, security and justice.

2.10 Although the draft Constitutional Treaty contains new legal bases for the development of these policies, the current Treaty contains useful instruments which should be utilised.

2.11 The European Area of Justice should be founded on trust and the mutual recognition of court rulings. New legislative instruments are also needed.

2.12 All legislative measures relating to security should be subject to thorough and regular evaluation, as well as democratic monitoring by the European Parliament and the Court of Justice of the European Communities. Only in this way can a real common area of Freedom, Security and Justice be established.

2.13 None of the objectives set out in the Hague Programme and in the Action Plan can be achieved without sufficient funding. The European Commission has submitted proposals for three framework programmes (April 2005); the EESC is drafting opinions⁽³⁾ on these.

3. General comments

3.1 After Justice and Home Affairs were incorporated into the Community system with the entry into force of the Treaty of Amsterdam, the Tampere European Council (15 and 16 October 1999) adopted the first multi-annual programme relating to these policy areas — the Tampere Programme.

3.2 Five years later, substantial progress has been made towards the creation of a common area of Freedom, Security and Justice. According to the Council: *the foundation for a common asylum and immigration policy have been laid, the harmonisation of border controls have been prepared, police cooperation has been improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgements has been well advanced*⁽⁴⁾.

3.3 However, the European Commission's most recent biannual report or 'scoreboard' assessing the progress made in the first half of 2004⁽⁵⁾, suggests that the level of convergence achieved between the different policy areas was less than expected.

⁽³⁾ See opinions SOC/210211212 (rapporteurs: Ms King, Ms Le Nouail Marlière, Mr Cabra de Luna).

⁽⁴⁾ The Hague Programme, op.cit. Introduction.

⁽⁵⁾ Communication from the Commission to the Council and the European Parliament - Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations COM(2004) 401 final, Brussels, 2.6.2004.

3.4 It must be realised that there are major obstacles to adopting common policies and harmonised standards on matters of freedom, security and justice: legal systems, political orientations and sometimes national interests all differ. Experience of European integration in other policy areas shows that with a strong political will among Member States and clear leadership from the Commission, it is possible to overcome these obstacles.

3.5 The EESC finds that, overall, too little progress has been made. Many of the specific objectives agreed upon in Tampere have not been achieved, and many of the policies adopted have been of a sub-standard quality.

3.6 The Hague Programme now has the difficult task of consolidating and promoting the creation of a common area of Freedom, Security and Justice. This presents wide-ranging and complex challenges⁽⁶⁾.

3.7 Unlike Tampere, the Hague Programme does not put forward any innovative policies. The unambitious scope of the programme is based on the need to more effectively implement and evaluate existing policies relating to freedom, security and justice.

3.8 Furthermore, there are no provisions for the instruments needed to successfully overcome the obstacles that have thus far prevented greater convergence of policies. The EESC believes that due to the Hague Programme's lack of ambition, it will be impossible to establish a consistent, high quality, broad and effective legislative framework which strikes the right balance between freedom, security and justice.

3.9 These obstacles continue to stem from the policies of Member States, which lack effectiveness, solidarity, transparency, mutual trust, proportionality and a balance between freedom, security and justice.

3.10 The EESC welcomes the fact that the European Commission has made defence of and respect for fundamental rights and citizenship the first of the ten priorities for the next five years set out in its action plan for the development of an area of Freedom, Security and Justice.

3.11 More positively, it should be stressed that alongside the adoption of the Hague Programme, the decision was taken to apply the co-decision procedure and qualified majority voting to all Title IV measures, which enables, at least, the removal of one of the most significant obstacles to date. However, we regret that regular immigration has been excluded from this measure.

⁽⁶⁾ Denmark, Ireland and the United Kingdom negotiated special protocols to the Treaty of Amsterdam, allowing them an opt-out from the policies adopted under Title IV of the EC Treaty.

3.12 In its specific orientations, the Hague Programme confuses aspects relating to 'security' with aspects relating to 'freedom'. Policies directly relating to security clearly take priority and interfere with aspects concerning freedom and justice. This is the case for instance with initiatives based on the introduction of biometrics systems and new technologies, the interoperability of databases, greater control of internal and external borders and more effectively fighting irregular immigration, all of which are paradoxically included under the heading 'Strengthening Freedom'.

3.13 A comprehensive strengthening of freedom, security and justice must rigorously respect the need for a fair balance between the three dimensions, so as not to encroach on the fundamental values (human rights and civil liberties) and democratic principles (rule of law) shared throughout the Union. Freedom should not take second place to security. Some political proposals only repeat a past error: sacrificing freedom for the sake of improving security. History has shown us that it is open and free societies that most effectively defend security. The protection of fundamental human rights is at the heart of the values that we Europeans share today. The day that disproportionate legislation is adopted in the name of the fight against terrorism, sacrificing human rights for the sake of security, is the day we hand terrorists their first victory. It is the values of freedom that give us the strength to face terrorists. European policies should provide effective security and protection of fundamental rights and freedom.

3.14 This imbalance between Community policies is also evident in the financial perspectives; security accounts for most of the budget (7).

3.15 The Hague Programme should promote, strengthen and consolidate effectiveness, legitimacy, mutual trust, equality and proportionality and strike the right balance between freedom, security and justice. It is essential to overcome the current judicial and institutional complexity and give a firm guarantee that security policies are subject to adequate democratic control by the European Parliament and to judicial supervision by the European Court of Justice in Luxembourg.

3.16 The promotion and strict protection of freedom is the most effective way to confront the challenges facing the European Union in the 21st century, including the terrorist threat.

3.17 Human rights organisations and all civil society organisations have a very important part to play in developing the policies stemming from the Hague Programme.

3.18 The EESC continues to promote a policy of working together with the social partners and civil society organisations to ensure that the development of the Hague Programme

strikes the right balance in the European Union, since freedom, security and justice are in the general interest of the society, and thus of businesses, social partners and NGOS.

3.19 The period of uncertainty following the referendums in France and the Netherlands is a new challenge to progress on migration and asylum policies and all other issues addressed in the Action Plan implementing the Hague Programme. Although the draft Constitutional Treaty contains new legal bases for the development of these policies, the Treaty currently in force contains useful instruments which should be utilised.

4. Specific comments on strengthening freedom, security and justice

4.1 Strengthening freedom

4.1.1 Respect for fundamental rights and civil liberties is one of the pillars of European integration and a principal objective of the Union. The creation of a common area of Freedom, Security and Justice requires full respect for the dimension of freedom comprising, amongst other key instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union and the Geneva Convention relating to the Status of Refugees.

4.1.2 The Hague Programme states that the European Council welcomed the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Fundamental Rights Agency, to protect and promote fundamental rights. At the end of June 2005, the European Commission published a Proposal for a Regulation (8) establishing the Agency. The Agency will play a key role in the respect of freedom issues, providing Community institutions and Member States with the means to ensure respect for fundamental rights in the drawing up and implementation of Community policies. Furthermore, the Agency will be an excellent point of contact with civil society.

4.1.3 Citizenship of the Union

4.1.3.1 To develop a better, more active, more open, inclusive and egalitarian European citizenship, the continuing obstacles to the exercise of established rights must be eliminated, and rights must be extended in certain respects.

4.1.3.2 It is still difficult to exercise some rights connected with European citizenship, such as the right to free movement within the EU or the right to vote or stand in local and European elections. Measures to eliminate these difficulties must be developed. Furthermore, in some national legislation, the anti-discrimination directives have not been properly transposed.

(7) See opinions SOC/210-211-212 (rapporteurs: Ms King, Ms Le Nouail Marlière, Mr Cabra de Luna).

(8) See the Commission Communication COM(2005) 280 final, on which the EESC is drawing up an opinion (SOC/216).

4.1.3.3 Citizens of the new Member States should be accorded all the established rights for citizenship of the Union without delay. The temporary restriction on their rights is an anomaly that should be removed as soon as possible. These restrictions cause then numerous employment and social problems and, by treating them as 'second-class citizens', constitute unacceptable discrimination.

4.1.3.4 The EESC has proposed⁽⁹⁾ that citizenship of the Union be granted on the basis of a new criterion: that third-country nationals who are long-term, stable residents of the European Union be granted citizenship. Citizenship rights, in particular political rights in municipal elections, are fundamental to the integration of migrants.

4.1.3.5 The integration of migrants is vital to the social cohesion within Member States. Otherwise there is the risk of social exclusion and alienation of these migrants and their children and grandchildren who are born and raised within the EU.

4.1.4 A common asylum area⁽¹⁰⁾

4.1.4.1 The European Union has given itself five more years to achieve an objective that was already set out five years ago: to establish a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. Five years seems long enough to achieve this objective, but it is clear that some resistance still has to be overcome for the necessary steps to be taken. Furthermore, while it is important to make progress without delay, it is just as important for this progress to be based on provisions which are consistent with the fundamental rights relating to asylum. The system of qualified majority voting in the Council and co-decision with the Parliament will raise the quality of the legislation adopted.

4.1.4.2 The Action Plan provides for an evaluation in 2007 of the transposition and implementation of existing asylum-related instruments. Such an evaluation is undoubtedly becoming crucial, in light of the disparities currently appearing in the transposition and implementation of the directives in force (temporary protection; minimum standards for reception conditions; Dublin II, etc.) The evaluation should focus on the objective of ensuring that the implementation of the current instruments is consistent with the obligations stemming from international conventions on human rights and the 1951 Geneva Convention.

4.1.4.3 With regard to the new instruments proposed, the EESC believes they represent positive steps towards the coordination of asylum practices between Member States, the development of long-term resident status for refugees, the evaluation of the implementation of the European Refugee Fund, etc.

4.1.4.4 However, we cannot expect asylum applications to be dealt with outside the EU. The EESC agrees that the EU should promote the improvement of humanitarian protection standards in third countries, but the internationally recognised right of people who need protection to enter the EU to submit their application for asylum should not be limited or obstructed.

4.1.5 Legal migration and admission procedures

4.1.5.1 Five years have passed since the Tampere European Council and yet the objective of giving the European Union a common immigration policy has still not been achieved. Some progress has been made — the Commission has drafted numerous political and legislative proposals, while the Parliament has adopted numerous resolutions and initiatives — but these have not been adequately discussed by the Council. The EESC has worked actively with the Commission and the Parliament, and has drawn up a number of opinions aimed at contributing to a real common policy and harmonised legislation.

4.1.5.2 The European Union's common immigration policy must bring benefits for all concerned:

- so that those who come to the EU may find opportunities and be treated fairly;
- for the European host societies;
- and for the development of the countries of origin.

4.1.5.3 In the years to come, Europeans will need new economic migrants to contribute to social and economic development⁽¹¹⁾. The demographic situation indicates that the Lisbon Strategy could fall apart if we do not change immigration policies. We need active policies for the admission of both highly skilled and less skilled workers. Although each Member State has its own needs and characteristics, all the Member States lack political and legislative instruments enabling new migrants to enter legally, maintaining the balance of labour markets.

4.1.5.4 It is incomprehensible that in the Council of the European Union some governments have vetoed the Commission's legislative proposals and are perpetuating the restrictive policies of old. Meanwhile, the black economy and illegal employment are growing, creating a real 'pull factor' for undocumented migrants. In the absence of common European legislation, the Member States are adopting new legislation with very different political agendas, adding further barriers to harmonisation. These different political agendas and legislative disparities cause confusion and uncertainty amongst citizens.

⁽⁹⁾ See opinion on Access to European Union citizenship, in OJ C 208 of 03/09/2003 (rapporteur: Mr Pariza Castaños).

⁽¹⁰⁾ See the EESC opinions on asylum (drawn up since Tampere).

⁽¹¹⁾ See the opinion on the Commission Communication on Immigration, integration and employment (COM(2003) 336 final) in OJ C 80 of 30/03/2004 (rapporteur: Mr Pariza Castaños).

4.1.5.5 The Council of the European Union should abandon the unanimity requirement and adopt its decisions by qualified majority and co-decision with the Parliament. This is the only way to draft good legislation. This change must take place now, before the study of new legislative proposals. The legislation adopted should have a high degree of harmonisation. European legislation that takes a minimalist approach and delegates key aspects to national law will serve to perpetuate the current problems.

4.1.5.6 For the new admission legislation, an overall, horizontal legislative framework is preferable to sectoral legislation⁽¹²⁾. The proposal for a Directive on admission drawn up by the Commission and supported by the EESC, with a few changes⁽¹³⁾, remains a good legislative proposal. Additionally, specific rules could be drawn up for sectoral issues and particular situations. If the Council of the European Union were to opt for a sectoral approach, geared only towards the admission of highly skilled migrants, it would not apply to much of migration, and would also be discriminatory. This option might be easier for the Council, but it does not respond to European needs.

4.1.5.7 The draft Constitutional Treaty sets the limits for common legislation, including the right of Member States to 'determine volumes of admission' of migrants to their country. This limit does not prevent a high degree of legislative harmonisation from being reached. Rather, it is an incentive for national management of economic migration to be dealt with using transparent procedures. The power to issue work and residence permits would belong to authorities in the Member States, within the framework of Community legislation. Thus, each Member State could decide, in cooperation with the social partners, on what kind of migrants it requires: highly skilled or less skilled, for the industrial sector, farming, construction or services, or for all of these.

4.1.5.8 Economic immigration is strongly linked to labour markets; it is therefore necessary to involve the social partners sufficiently in the process of drawing up and managing these policies.

4.1.5.9 Only when the European Union has common legislation for the admission of third-country nationals for work purposes, will there be improved cooperation between all Member States over the management of migratory flows and more transparent procedures.

4.1.5.10 Admission procedures should display a twofold approach: the economic needs test and a six-month to one-year temporary permit for seeking work, which each Member State would manage in cooperation with social partners.

⁽¹²⁾ See opinion on the Green paper on an EU approach to managing economic migration (COM(2004) 811 final). OJ C 286 of 17.11.2005 (rapporteur: Mr Pariza Castaños).

⁽¹³⁾ See the EESC Opinion on the Directive on the conditions of entry and residence (COM(2001) 386 final in OJ C 80 of 3.4.2002) (rapporteur: Mr Pariza Castaños).

4.1.5.11 Those who come to Europe deserve to be treated fairly. Community admission legislation should include migrants' rights. Immigration legislation should comply with the international conventions on human rights, the ILO standards and the EU Charter of Fundamental Rights. In accordance with anti-discrimination directives, migrant workers should have the same economic, labour and social rights (including social security) as Community workers.

4.1.5.12 The Directive on long-term resident status covers a wider range of rights, relating to security of status and mobility within the EU. The EESC has proposed that these people should also have citizenship rights. The Committee drew up an own-initiative opinion addressed to the Convention, proposing that EU citizenship be granted to third-country nationals residing on a stable basis or with long-term resident status.

4.1.5.13 It is essential to strengthen cooperation with countries of origin, not only to prevent illegal migration, but also so that migration can become a factor for the economic and social development of these countries. The EESC agrees with the words uttered last year in the European Parliament by the UN Secretary-General, Kofi Annan, who proposed that the international community address the issue of migration using a multilateral approach.

4.1.5.14 The EESC drew up an own-initiative opinion⁽¹⁴⁾ proposing that Member States sign the International Convention for Migrant Workers and their Families. This was adopted by the UN General Assembly in 1990 and entered into force in 2003, but has not yet been ratified by EU Member States.

4.1.5.15 The common immigration policy desired by the EESC goes further than admission legislation. It is necessary to implement a Community method of coordination to improve:

- the fight against the black economy and illegal employment;
- border control and the fight against criminal networks trafficking in human beings;
- integration policies, on which the EESC has drawn up various proposals.

4.1.5.16 It is a mistake to believe that migrant workers will remain in Europe as temporary guests. Some will return to their home countries voluntarily, but others will establish residence on a long-term or stable basis. In 2002, the EESC organised a conference with a view to making integration a fundamental aspect of the new European immigration policy. Numerous experts, social partners and the largest NGOs of the 25 Member States all participated in the conference. In the conference conclusions, it was proposed that the European Commission establish an integration programme.

⁽¹⁴⁾ See the EESC Opinion on the International Convention on Migrants, OJ C 302, 7.12.2004 (rapporteur: Mr Pariza Castaños).

4.1.5.17 The EESC is delighted that the European Commission has proposed a European Framework on Integration, and that objectives for integration are included in the Hague Programme. It also supports the inclusion of a large budget for integration policies in the 2007-2013 financial perspective.

4.1.5.18 Integration⁽¹⁵⁾ is a two-way process between the host society and immigrants. But it is governments, local and regional authorities and the European Union who have the political and budgetary instruments.

4.1.5.19 An integration programme should include, *inter alia*:

- initial welcome: information and advice, teaching of language and customs;
- integration into the labour market with equal treatment. The role of the social partners here is crucial, and therefore the European social partners have been called upon to incorporate this issue into the social dialogue agenda;
- access to education without discrimination;
- integration in cities, avoiding impoverished, segregationist urban ghettos. Local and regional authorities must make new political commitments;
- access to healthcare and other public services with equal treatment;
- the new European society is multicultural; cultural identity should not be used for segregationist or xenophobic purposes.

4.1.5.20 The anti-discrimination directives that have been adopted are excellent judicial instruments, but do not solve all the problems. Active policies and new commitments must be made by civil society in order to promote social attitudes that support integration. The EESC will continue to encourage dialogue between civil society organisations; to this end and in the months ahead, we will draw up a new own-initiative opinion promoting new commitments to integration by local and regional authorities.

4.1.6 The fight against illegal immigration

4.1.6.1 The Hague Programme addresses the fight against irregular immigration in the section on border checks. The EESC has expressed its approval of the

⁽¹⁵⁾ See the opinions on Immigration, integration and the role of civil society organisations in OJ C 125 of 27.5.2002 (rapporteur: Mr Pariza Castaños) and Immigration, integration and employment in OJ C 80 of 30.3.2004 (rapporteur: Mr Pariza Castaños).

establishment of the Border Management Agency⁽¹⁶⁾, the creation in the medium-term of a European system of border guards and improved coordination of national border authorities. The objective must be two-fold: greater effectiveness both in the fight against criminal networks smuggling and trafficking in human beings, and in providing the humanitarian attention and fair treatment that people deserve.

4.1.6.2 The EESC fully supports the instruments established by the European Union to combat the smuggling and trafficking of human beings, particularly the Council Directive defining the facilitation of illegal immigration⁽¹⁷⁾, the Framework Decision on combating trafficking in human beings⁽¹⁸⁾ and the Directive on the issue of residence permits for those victims cooperating with the judicial authorities⁽¹⁹⁾. While the EESC has criticised certain aspects of these instruments, it has supported their comprehensive approach.

4.1.6.3 However, to prevent illegal immigration, action in other areas is needed. It is essential that migrants are offered legal, transparent and flexible admission procedures. We must also fight the black economy and illegal employment, putting an end to the exploitative working conditions often suffered by many illegal immigrants.

4.1.6.4 It is also necessary for the prevention of illegal immigration and the fight against trafficking in human beings that cooperation with neighbouring and transit countries is improved.

4.2 Strengthening security

4.2.1 The Hague Programme states that 'the security of the European Union and its Member States has acquired a new urgency' in the light of the attacks in the USA (11 September 2001) and Spain (11 March 2004). The Programme proposes a coordinated action that is more effective faced with common cross-border problems, particularly in the field of security.

4.2.2 The European Security Strategy of 12 December 2003⁽²⁰⁾, which set out the role and responsibility of the EU within the new global security situation, identified terrorism as one of this century's main threats. The Strategy also emphasised the permanent link between internal and external aspects of security, in a Europe with common external borders and the free movement of people without internal borders.

⁽¹⁶⁾ See opinion on the Agency in OJ C 108 of 30.4.2004 (rapporteur: Mr Pariza Castaños).

⁽¹⁷⁾ Council Directive 2002/90/EC of 28 November 2002.

⁽¹⁸⁾ Council Framework Decision of 19 July 2002.

⁽¹⁹⁾ Directive 2004/81/EC of 29 April 2004.

⁽²⁰⁾ See *A Secure Europe in a Better World: European Security Strategy*, Brussels, 1 December 2003, Javier Solana, EU High Representative for the Common Foreign and Security Policy.

4.2.3 Terrorism attacks the very pillars of democracy and the rule of law: citizens' human rights and civil liberties — including the right to life. In reality, concerted action by the EU is vital. To ensure the full exercise of freedoms and rights, the European Union should guarantee a high level of security. According to Article 29 of the TEU, the Union should 'provide citizens with a high level of safety within an area of freedom, security and justice'. No Member State can combat the phenomenon of 'terrorism' on its own. European cooperation and coordination against crime and cross-border organised crime must be strengthened through the establishment of a common strategy.

4.2.4 The attacks of July 2005 in London have once more highlighted one of the biggest challenges of our times: how to prevent and combat terrorism effectively, whilst fully respecting fundamental rights and civil liberties and strengthening democracy and the rule of law.

4.2.5 On 13 July 2005 in an extraordinary session, the Council of the European Union adopted the Declaration on the European Union's response to the London bombings, in which it stressed the need to accelerate the implementation of the EU Action Plan on Combating Terrorism, adopted on 21 September 2001. Many of the legislative initiatives proposed in this Declaration have been criticised by the European Parliament, NGOs and civil society. These criticisms stem from doubts over its compatibility with the principles of legitimacy, proportionality and effectiveness ⁽²¹⁾.

4.2.6 There are many factors contributing to the ineffectiveness of a common European Security Strategy: the ineffectual judicial framework underlying the development of these policies; the exclusion of the European Parliament and the European Court of Justice; the complexity of the roots, causes and modes of operation of international terrorism and organised crime; some Member States' lack of willingness to recognise and study specifics; the absence of a common European/international definition of what constitutes terrorism; the lack of mutual trust between law enforcement and judicial authorities of Member States.

4.2.7 The implementation of security policies that do not strike a proper balance with respect for human rights is an error which weakens the effectiveness of the fight against terrorism.

⁽²¹⁾ Amongst others, the proposal of the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom for a Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism (8958/2004 of 28 April 2004) for the detection, investigation and prosecution of criminal offences, 2004/8958 of 28 April 2004. The European Commission has presented a parallel proposal for a Directive on the retention of data processed in connection with the provision of public electronic communication services (COM(2005) 438 final, 21.9.2005), which offers more assurances than the intergovernmental proposal and guarantees the involvement of the European Parliament.

4.2.8 One of the biggest weaknesses of European cooperation in the field of security is the fact that these policies remain outside the Community framework and are drawn up mainly according to the intergovernmental method (the third pillar of the EU). The role of the European Union is therefore very limited. This has had a series of adverse consequences, such as a lack of both efficiency (mainly due to the unanimity requirement) and transparency in the decision-making process, and the exclusion of the European Parliament and the European Court of Justice. With regard to the Court of Justice's jurisdiction in the third pillar, Member States would have to accept this in a declaration to that effect ⁽²²⁾.

4.2.9 A clear example of the fact that the dimensions of 'freedom, security and justice' continue to be developed within a purely governmental ambit is the Treaty of Prüm (Schengen III) of 27 May 2005, on stepping up cross-border cooperation, particularly in the fight against terrorism, cross-border crime and illegal immigration. This treaty was negotiated and adopted exclusively by seven Member States ⁽²³⁾. The decision-making process was not transparent, despite the importance of the policies and themes being addressed ⁽²⁴⁾.

4.2.10 This type of solely intergovernmental cooperation weakens the European project and the entire common area of Freedom, Security and Justice, leading to 'less Europe'. It is necessary to promote and ensure 'more Europe' in these policy areas through the use of the Community method and the appropriate institutional framework. Community arrangements provide a more integrated, effective, comprehensive and consistent approach and system with which to meet the challenges of our time.

4.2.11 Involving the European Parliament in the decision-making process and giving the European Court of Justice general jurisdiction over these policies is vital to respecting democratic values and the rule of law. There is a need for parliamentary and judicial monitoring of all legislative acts relating to security adopted and proposed under the third pillar of the EU, as well as the activities and operations of European agencies (Europol, Eurojust, the European Police College — CEPOL, the EU Police Chiefs Task Force, the European Border Agency, etc.).

⁽²²⁾ See Article 35 of the TEU. To date, only the following 14 Member States have accepted the Court of Justice's jurisdiction in matters relating to the third pillar of the EU: Germany, Austria, Belgium, Greece, Luxembourg, the Netherlands, Sweden, Finland, Spain, Portugal, Italy, France, the Czech Republic and Hungary.

⁽²³⁾ Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria.

⁽²⁴⁾ *Inter alia*: measures to prevent terrorist attacks, DNA databases, the use of air marshals, cross-border assistance in connection with major events, crises, disasters and serious accidents, and assistance with repatriation of illegal immigrants.

4.2.12 Security is the Hague Programme's central concern and constitutes the main strategic objective for the next five years in the AFSJ. Security has been incorporated into the Programme's sections on freedom and justice. Thus the following have been erroneously included under the heading 'Strengthening freedom': the fight against illegal immigration, biometrics and information systems (development and synergy of databases), the policy of repatriation and readmission, improved border control, visa policies, etc.

4.2.13 Furthermore, the Hague Programme prioritises the need to implement and assess the measures already in place relating to freedom, security and justice more effectively and appropriately⁽²⁵⁾. Before framing and promoting any policy relating to one of these three fields, a study should be carried out on the effectiveness, proportionality and legitimacy of these measures, i.e. high-quality legislation is needed.

4.2.14 A clear and coherent legislative framework for the full protection of personal information and judicial and parliamentary monitoring is necessary. The European Commission's proposal to allow their departments to check systematically, regularly and thoroughly (through an impact assessment) compliance with the Charter of Fundamental Rights in their legislative proposals is very positive⁽²⁶⁾. However, this should also be carried out for the final version of the measures adopted by the Council. The balance between respect for the right to privacy, protection of information (freedom) — Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Directive 95/46/EC⁽²⁷⁾ for example — and security when sharing information between law enforcement authorities and other security services should be respected at all stages of decision-making and practical implementation.

4.2.15 Extending the remit of the European Union Agency for Fundamental Rights to include the third pillar of the EU (Title VI of the TEU) would be a key element in maintaining a proper balance between freedom, security and justice in the policies developed by the Union⁽²⁸⁾.

4.2.16 The Hague Programme accords great importance to a series of measures relating to terrorism, mainly aimed at strengthening the exchange of information about threats to internal and external security between the intelligence and security services of the Member States; the fight against the financing of terrorism; the strategic analysis of the terrorist threat by the intelligence and security services and Europol; protection of critical infrastructures and consequence management.

⁽²⁵⁾ Council Decision establishing a European Judicial Network in civil and commercial matters, 2001/470/EC, 28 May 2001, OJ L 174, 27/6/2001.

⁽²⁶⁾ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.04.2005.

⁽²⁷⁾ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23 October 1995.

⁽²⁸⁾ Proposal for a Council decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM(2005) 280 final, 30 June 2005, 2005/0125/CNS.

4.2.17 One of the most innovative proposals made in the Hague Programme, in the section on 'Strengthening security', is the principle of availability of information. This principle marks a new approach to improving the cross-border exchange of law enforcement information in the EU, based on enabling a law enforcement officer of one Member State to obtain from another Member State all the information he needs to carry out his investigation⁽²⁹⁾. The exact content, the real impact, the scope and the conditions of use of this revolutionary principle are not yet clear. For it to work, a high level of trust between the law enforcement authorities of the respective Member States will be needed. The lack of such trust has been one of the biggest obstacles to European cooperation thus far. Cooperation between the European Union agencies, institutions and actors dealing with freedom, security and justice must be strengthened. Furthermore, judicial monitoring of the operations and activities stemming from the principle of availability should be ensured. The EESC supports the European Commission proposal on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters⁽³⁰⁾.

4.2.18 The EESC calls for appropriate cooperation between European agencies in matters of freedom, security and justice. The Hague Programme calls for stronger practical cooperation and coordination at a national level between law enforcement, judicial and customs authorities as well as between these authorities and Europol. Member States need to promote Europol as a European agency and enable it to play a decisive role, together with Eurojust, in the fight against organised crime and terrorism. It is unacceptable that the Protocols amending the Europol Convention have still not been ratified or implemented by all Member States. This is especially urgent if Europol is to receive the support and resources needed to function effectively as a cornerstone of European law enforcement cooperation. Before redefining Europol's remit, the Member States must be convinced of its benefits and the need to cooperate with it fully. Furthermore, the Programme indicates that from 1 January 2006, Europol will replace its annual European Union crime situation reports with 'threat assessments' on serious forms of organised crime. This increase in the practical relevance of the role played by Europol should be accompanied by a comprehensive democratic assessment of its activities. The European Parliament and the national parliaments, along with the European Court of Justice, should play a central role in the democratic supervision and judicial monitoring of its activities.

⁽²⁹⁾ On 12 October 2005, the European Commission submitted a Proposal for a Council Framework Decision on the exchange of information under the principle of availability. COM(2005) 490 final, 12.10.2005.

⁽³⁰⁾ Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, COM(2005) 475, 4.10.2005.

4.2.19 Another series of issues that have taken clear priority within the political agenda are those relating to biometrics and information systems. The incompatibility of the majority of these measures with the principles of legitimacy, proportionality and effectiveness has been regularly criticised by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs⁽³¹⁾ and by human rights organisations. The lack of adequate safeguards and effective means of legal redress reinforces these arguments. Despite the criticisms of these instruments, the Declaration on the European Union's response to the London bombings, adopted on 13 July 2005 in an extraordinary session, has highlighted the need to adopt them urgently⁽³²⁾.

4.2.20 The Hague Programme makes setting up arrangements for the assessment of existing policies a clear priority. Before adopting these initiatives it is necessary to carry out a detailed and independent study of their effectiveness, added value, proportionality and legitimacy (compliance with human rights and civil liberties). The fight against terrorism is no justification for drafting a policy that could cause irreparable damage to the protection of freedom and democracy, and consequently lead to more insecurity for all.

4.2.21 Regarding measures to combat the financing of terrorism and money laundering by criminal organisations, what is needed is a more focused approach and the transposition of the legislative acts which facilitate more effective monitoring of suspicious financial flows that could be funding criminal activities, particularly as part of the fight against money laundering⁽³³⁾.

4.2.22 The European Commission recently proposed a code of good practice for preventing the use of NGOs to finance criminal organisations. The EESC is pleased that the Commission has launched a consultation process with civil society and NGOs on this topic, but is concerned by the disturbing link drawn by the Commission between NGOs and terrorism, since it creates confusion and leads to unfair preconceptions. NGOs and organised civil society play a central role in the fight against terrorism and organised crime⁽³⁴⁾.

⁽³¹⁾ Report on the initiative by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom for a Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism (8958/2004 – C6-0198/2004 – 2004/0813(CNS), Committee on Civil Liberties, Justice and Home Affairs, European Parliament, Rapporteur: Alexander Nuno Alvaro, 31.5.2005.

⁽³²⁾ These proposals, which constitute a development of the Schengen acquis, include: the improvement of interoperability and synergy between the databases created by the second generation Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC; the integration of biometric identifiers in travel documents, visas, residence permits and information systems; the retention of data processed in connection with the provision of public electronic communication services for the detection, investigation and prosecution of terrorist offences; the use of Air Passengers' Data (PNR) for aviation security by the USA, Canada and Australia; the mutual consultation of DNA and fingerprint databases, etc.

⁽³³⁾ EESC Opinion on the Proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing, COM(2004) 448 final. OJ C 267 of 27.10.2005 (rapporteur: Mr Simpson).

⁽³⁴⁾ See the opinion of the Section for Employment, Social Affairs and Citizenship on the **Proposal for a Council Decision establishing the specific Programme Prevention, Preparedness and Consequence Management of Terrorism, for the Period 2007-2013. General Programme Security and Safeguarding Liberties** SOC (212), Rapporteur Mr Cabra de Luna, Brussels, 14 December 2005.

4.2.23 In accordance with and as an essential complement to the European Security Strategy, and in line with the priority given to the development of a coherent external dimension to the security policy, the Hague Programme sets out the development of integrated and coordinated EU crisis-management arrangements for crises with cross-border effects, to be implemented by 1 July 2006. These arrangements should include the assessment Member States' capabilities, stockpiling, training, joint exercises and operational plans for civilian crisis management. By the end of 2005, the European Commission will submit a Decision creating a secure general rapid alert system (ARGUS) and a Commission Crisis Centre to coordinate existing alert systems, as well as a Proposal creating a Critical Infrastructure Warning Information Network.

4.2.24 The EESC believes that the EU needs a new, efficient, effective, legitimate and proportional approach to the Common Security Strategy. Different forms of terrorism require different solutions and instruments tailored to the nature of the crime.

4.2.25 Furthermore, we need to study the many roots of the violent radicalisation of vulnerable groups, and terrorist recruitment methods in order to prevent their proliferation. This should go hand in hand with promotion of and political commitment to an ongoing and open dialogue between religions and cultures, combating intolerance, racism, xenophobia and violent extremism.

4.2.26 The Commission should study the possibility of including terrorism in those crimes which come under the jurisdiction of the International Criminal Court.

4.3 Strengthening justice

4.3.1 In line with the philosophy put forward in the Conclusions of the Tampere European Council in 1999, the Hague Programme gives priority to creating a common European Area of Justice founded on the principle of mutual recognition of judicial decisions and access to justice.

4.3.2 In a number of areas ⁽³⁵⁾, it has become evident that the development of mutual trust between the different judicial authorities and systems is necessary. It is one of the major preconditions for more far-reaching judicial cooperation in criminal and civil matters. Judicial authorities and all bodies involved in legal proceedings should consider the decisions of other Member States' authorities as equivalent to their own. Neither judicial competence and quality, nor the right to a fair trial, should be questioned. However, a lack of trust, the differences between Member States' legal systems in both criminal and civil matters, and the lack of a full and reciprocal knowledge of each others' systems still obstructs the development of a cross-border approach in these policies and the strengthening of judicial cooperation at a European level.

4.3.3 The Hague Programme proposes the creation of a 'European judicial culture' based on the inherent diversity of national legal systems and traditions. Furthermore, the programme calls for greater efforts to facilitate both access to justice and judicial cooperation. In addition, mutual trust ⁽³⁶⁾ should be based on the certainty that all European citizens have access to a high quality judicial system ⁽³⁷⁾.

4.3.4 The spirit of the Hague Programme is generally less ambitious than the multi-annual programme set out in Tampere. Instead of offering numerous new measures and legal proposals, priority is given to establishing a system of objective and impartial evaluation and implementing existing measures in the field of justice, while respecting the independence of the judiciary.

4.3.5 In addition to the lack of mutual trust between the Member States' judicial authorities, another of the most significant obstacles to judicial cooperation in criminal matters is the fact that this comes under the third pillar of the EU, and therefore falls outside Community jurisdiction (Community method). Hence, the EU's role is somewhat limited. This has had a series of negative effects, such as a lack of efficiency and transparency, the exclusion of the European Parliament from the legislative process; in addition, the European Court of Justice does not have overall jurisdiction. Under the third pillar, Member States must accept the jurisdiction of the Court to give a ruling on the interpretation and validity of the policies developed, through a declaration to this effect.

4.3.6 With regard to judicial cooperation in criminal matters, priority has clearly been given to measures aimed at enforcing this principle (security) at the expense of all protection of minimum procedural rights at a European level

⁽³⁵⁾ See Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302 19.10.1992 pp. 1-50).

⁽³⁶⁾ The Hague Programme, op. cit. 1, paragraph 3.2. Confidence-building and mutual trust.

⁽³⁷⁾ In the Action Plan implementing the Programme, the European Commission states that 'the Union must envisage not only rules on jurisdiction, recognition and conflict of laws, but also measures which build confidence and mutual trust among Member States, creating minimum procedural standards and ensuring high standards of quality of justice systems, in particular as regards fairness and respect for the rights of defence'.

(freedom). A good example of this imbalance between freedom and security is the European arrest warrant, which represents the first step, within the field of criminal law, towards developing the principle of mutual recognition of judicial decisions ⁽³⁸⁾. Despite the direct impact of this 'Euro-warrant', three years after its adoption there is still no parallel legislative framework protecting the procedural rights of suspects and defendants in criminal proceedings in the EU.

4.3.7 In view of the existence of this legislative gap, in April 2004 the European Commission submitted a Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (2004/328). The Decision provides for common minimum standards as regards procedural rights applying in all proceedings throughout the EU aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence or to decide on the outcome following a guilty plea in respect of a criminal charge. This also includes any appeal resulting from these proceedings ⁽³⁹⁾. Although many criticisms may be levelled regarding the limitations that this Decision imposes on procedural rights, its adoption would strengthen mutual trust and the protection of citizens' fundamental rights, including their right to a fair trial. The obstacles to achieving a political agreement within the Council are proving immense. It is unacceptable that Member States' representatives have not come to an agreement on this initiative ⁽⁴⁰⁾. However, special care should be taken not to regard the urgent need to reach an agreement as justification for reducing still further the level of protection afforded suspects and defendants in legal proceedings in criminal matters as part of the package of rights set out in the proposal.

4.3.8 The European arrest warrant is also a good example of the lack of mutual trust and the judicial complexity that often plagues the EU at a time of judicial cooperation in criminal and civil matters. While the Framework Decision has been undergoing the arduous process of transposition in the majority of Member States, the acts transposing the Euro-warrant into national law have been challenged before the constitutional courts in Germany and Poland due to its alleged incompatibility with their respective constitutional provisions. The Constitutional Court of the Federal Republic of Germany (Bundesverfassungsgericht) finally declared in its judgement of 18 July 2005 ⁽⁴¹⁾ that the law transposing the Euro-warrant into the German legal system was void because it infringed upon German constitutional guarantees since there is no possibility of challenging the judicial decision that grants extradition.

⁽³⁸⁾ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, of 13 June 2002, 2002/584/JHA, OJ L 190, 18.7.2002, p. 1.

⁽³⁹⁾ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328 final, 28.4.2004.

⁽⁴⁰⁾ The Proposal includes the following rights: access to legal advice, access to free interpretation and translation, ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention, the right to communicate with consular authorities in the case of foreign suspects and notifying suspected persons of their rights (by giving them a written 'Letter of Rights'), Articles 2-16 of the Proposal.

⁽⁴¹⁾ Judgement of 18 July 2005, 2 BvR 2236/04, Bundesverfassungsgericht.

4.3.9 The European Commission's Proposal for a Council Framework Decision on the European Evidence Warrant also forms part of the complex puzzle that constitutes a system for judicial cooperation in the EU ⁽⁴²⁾. The objective of this Decision would be to replace current mutual assistance arrangements with the principle of mutual recognition. The initiative provides for the possibility of issuing a 'European Warrant' with a view to obtaining objects, documents and data for use in criminal judicial proceedings. This Proposal has been openly criticised and labelled premature, due to the absence of a parallel legislative framework offering effective legal protection of fundamental rights.

4.3.10 The lack of ambition displayed by the Hague Programme with regard to the justice dimension could be remedied through the recognition of the European Court of Justice's general jurisdiction over these political areas that are such sensitive issues for Member States. The Court of Justice has generally taken an innovative and proactive position on the interpretation and development of European policies. With specific regard to law enforcement and judicial cooperation in criminal matters, we should point to one of the Court's most recent and significant judgements — the Pupino case C-105/03 of 16 June 2005 ⁽⁴³⁾.

4.3.11 With regard to judicial cooperation in civil matters, the Hague Programme reiterates the importance of borders between countries no longer constituting an obstacle to the

settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters. It is necessary to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications, to ensure the protection and exercise of citizens' rights. The Programme encourages the continuation of work on the conflict of laws regarding non-contractual obligations (Rome II) and contractual obligations (Rome I), a European payment order and instruments concerning alternative dispute resolution and concerning small claims.

4.3.12 Strengthening and reinforcing cooperation through mutual recognition of procedural rights and family and inheritance law also features in the priorities for the next five years. However, this is an area where the diversity of legal traditions and cultures hinders real and solid progress towards a common area of justice. Therefore, it is of particular importance to study in detail the different measures that could promote mutual trust and the idea of a common legal culture in the EU ⁽⁴⁴⁾.

4.3.13 The Hague Programme states that 'the effective combating of cross-border organised and other serious crime and terrorism requires the cooperation and coordination of investigations and, where possible, concentrated prosecutions by Eurojust, in cooperation with Europol'. The Council should adopt the European law on Eurojust, taking account of all tasks referred to the body. The relationship (cooperation) between Eurojust and Europol should also be clarified.

Brussels, 15 December 2005.

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

⁽⁴²⁾ Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters COM/2003/0688 final, 14 November 2003, CNS 2003/0270.

⁽⁴³⁾ The reference for a preliminary ruling concerned the interpretation of various articles of the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The judgement was presented in the context of criminal proceedings against Mrs Pupino, a nursery school teacher in Italy, charged with inflicting injuries on pupils aged less than five years. The Pupino judgement represents a revolutionary step in the construction of an area of Freedom, Security and Justice, since it is the first time that the Court of Justice has recognised openly the direct effect of Framework Decisions and that the binding character of such Decisions places on national courts an obligation to interpret national law in conformity with Community law. Furthermore, the Court stated that 'It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States'. The relationship between (and compatibility of) this judgement by the Court of Justice and the judgement by the German Constitutional Court annulling the legislation transposing the European arrest warrant is open to interpretation.

⁽⁴⁴⁾ Opinion of the European Economic and Social Committee on the 'Proposal for a Council Decision establishing a European Judicial Network in civil and commercial matters' (OJ C 139, 11 May 2001) and Opinion of the European Economic and Social Committee on the 'Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters' (OJ C 139, 11 May 2001).