

Opinion of the European Economic and Social Committee on the

Proposal for a Decision of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008-2013 as part of the General programme 'Solidarity and management of migration flows'

Proposal for a Decision of the European Parliament and of the Council establishing the External Borders Fund for the period 2007-2013 as part of the General programme 'Solidarity and management of migration flows'

Proposal for a Council Decision establishing the European Fund for the Integration of Third-country Nationals for the period 2007-2013 as part of the General programme 'Solidarity and management of migration flows'

Proposal for a Decision of the European Parliament and of the Council establishing the European Return Fund for the period 2008-2013 as part of the General programme 'Solidarity and management of migration flows'

(COM(2005) 123 *final* — 2005/0046 (COD) — 2005/0047 (COD) — 2005/0048 (CNS) — 2005/0049 (COD))

(2006/C 88/05)

On 20 July 2005 the Council, under Article 262 of the Treaty establishing the European Community, decided to consult the European Economic and Social Committee on the abovementioned proposals.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 24 January 2006. The rapporteur was Ms Le Nouail-Marlière.

At its 424th plenary session, held on 14 and 15 February 2006 (meeting of 14 February), the European Economic and Social Committee adopted the following opinion by 125 votes to 2 with 11 abstentions.

1. The Commission proposals and the objectives of the Communication

1.1 The Communication establishing a Framework programme on 'Solidarity and Management of Migration Flows' is part of a package of proposals ⁽¹⁾ providing for the setting-up of a programme for implementing the Financial Perspective for the period 2007-2013 ⁽²⁾ and the measures set out in the Communication on the policy challenges and budgetary means of the enlarged Union 2007-2013 ⁽³⁾ (see EESC opinion; rapporteur: Mr Dassis ⁽⁴⁾), which proposed the granting of commitment appropriations totalling EUR 1,381 million for the European area of freedom, security and justice in 2006 (Heading 3: Citizenship, freedom, security and justice), rising progressively to EUR 3 620 million in 2013.

1.2 Overall, the aim should be to further the three objectives of freedom, security and justice to the same degree of intensity, as part of a balanced approach based on the principles of democracy and respect for fundamental rights and freedoms.

1.3 Of the total amount (EUR 9,500 million) initially proposed, the overall amount foreseen for the framework programme *Solidarity and Management of Migration Flows* was EUR 5 866 million for the period 2007-2013, of which EUR 1 184 million was earmarked for asylum; EUR 759 million for the Return Fund; EUR 1 771 million for integration of third-country nationals; and finally EUR 2 152 million for external borders management. The amounts allocated to the Member States and direct Community action (NGOs and projects) will not be transferable from one Fund to another.

1.4 The framework programme on solidarity does not include the agencies and other Community instruments falling within the sphere of freedom, security and justice, viz.: the European Agency for the Management of Operational Cooperation at the External Borders, which will operate in the area covered by the proposed framework programme and the new financial perspective; the EURODAC system (for the comparison of digital fingerprints); the Visa Information System; and the Schengen Information System (SIS II). These information systems are long-term commitments, and the legislative acts establishing them do not contain provisions limiting their duration.

1.5 The present framework programme aims, inter alia, to provide for the necessary coherence between relevant interventions in each policy area by clearly linking political objectives and the resources available to support them. The Commission intends to simplify and rationalise existing financial support. The framework programme also seeks to improve transparency and increase flexibility in the setting of priorities.

1.6 According to the Commission document, the financial solidarity of the European Union should thus be able to enhance and support the four pillars of a comprehensive and balanced approach to migration flows by:

⁽¹⁾ COM(2005) 122, COM(2005) 124.

⁽²⁾ COM(2004) 487 of 14.7.2004 (not adopted by the Council).

⁽³⁾ COM(2004) 101 of 10.2.2004.

⁽⁴⁾ EESC opinion of 15.9.2004 on the *Communication from the Commission to the Council and the European Parliament. Building our common future – policy challenges and budgetary means of the enlarged Union 2007-2013* (COM(2004) 101 *final*) (OJ C 74/2005).

— establishing a common integrated border management system under the framework of the Schengen Convention for the Member States which are parties to the Convention: External Borders Fund for the period 2007-2013;

- adopting the European Return Action Programme, approved in 2002 ⁽⁵⁾: European Return Fund for the period 2008-2013;
- providing a 'credible response' to the multidimensional issue of 'integration' of third-country nationals: European Fund for the Integration of Third-country Nationals for the period 2007-2013;
- balancing efforts between the Member States with regard to receiving refugees and displaced persons: European Refugee Fund for the period 2008-2013.

1.7 The Commission proposal was the subject of an extended impact assessment ⁽⁶⁾, which is appended to the proposal.

2. General comments

2.1 Although the programme builds on the coherence provided by the Tampere Summit and the Hague Programme and on Articles 62 and 63 of the Treaty, the programme framework rests on only a small body of harmonised legislation despite the Council's efforts to adopt some common measures under the Tampere Programme ⁽⁷⁾. Thus, the European Council of 4 and 5 November 2005 adopted the second multiannual programme for the creation of a common area of freedom, security and justice, known as the Hague Programme.

2.2 The Committee notes that, despite the 'Hague Programme', a really satisfactory common political approach does not exist as of yet. In its opinion 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* ⁽⁸⁾, the Committee set out in detail its views on the Commission action plan relating to the Hague Programme. Member States apply very different practices depending upon their geographical location. As a result there are differences between Member States in terms of policy and responsibilities towards Community citizens or third-country nationals, resulting in the juxtaposition of sometimes conflicting and antagonistic policies within the Community, according to whether or not they are parties (in full or in part) to the Schengen I and II conventions, the Dublin I and II conventions ⁽⁹⁾ or, for example, Community programmes for lasting solutions to the resettlement of refugees ⁽¹⁰⁾. Experience shows that in order to pursue policies to improve practices, on the one hand, or bring about a balancing and dovetailing of responsibilities towards a common objective, on the other, the setting-up of new Funds and financial instruments is not enough.

⁽⁵⁾ Approved by the Council on 28 November 2002.

⁽⁶⁾ SEC(2005) 435 of 6.4.2005.

⁽⁷⁾ Presidency Conclusions, Tampere European Council, 15-16 October 1999.

⁽⁸⁾ EESC opinion of 15.12.2005 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* (CESE 1504/2005) (rapporteur: Mr Pariza Castañós).

⁽⁹⁾ EESC opinion of 20.3.2002 on the *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (rapporteur: Mr Sharma) (OJ C 125 of 27.5.2002).

⁽¹⁰⁾ EESC opinion of 15.12.2004 on the *Communication from the Commission to the Council and the European Parliament on themanaged entry in the EU of persons in need of international protection and the enhancement of the protection capacity of theregions of origin — Improving access to durable solutions* (rapporteur: Ms Le Nouail-Marlière) (OJ C 157 of 28.6.2005).

2.3 In the field of political and humanitarian asylum, the drawing up of a list of 'safe' third countries remains a contentious issue, particularly among recognised NGOs in the sphere of human rights which are active in humanitarian aid. The Committee does not think that it is appropriate to treat asylum and immigration within the same framework when there are marked differences in terms of constraints and scope for action.

2.4 Although the Committee is aware of the overarching and holistic objective of the programme, it has reservations about the way in which border protection and integration of migrants are treated under the same initiative. It nevertheless feels that it is necessary to manage the funds in a coordinated and coherent fashion, for the following reasons:

- first, the objectives inherent to the two programmes are not the same. Furthermore, the parties responsible for their implementation (public authorities, public services and immigrant aid associations, etc.), i.e. the beneficiaries of the funds, are different. Unless the Member States intend to entrust the surveillance of external borders to private agencies by way of delegation of public service, which would imply appropriate public debate, they should not therefore be treated in the same way;
- secondly, the integration of migrants not only covers aspects involving states in their capacity as a public authority but also civil aspects, where the implementing bodies are organised civil society players (associations) and, ultimately, citizens themselves. These different levels of intervention and of beneficiaries of the funds set up by the framework programme call for differentiated procedures, treatment and guarantees.

Moreover, still mindful of the overall objective of the programme, the Committee stresses the need for the two programmes to be sufficiently distinct from each other so as to prevent any confusion that could arise.

3. Specific comments

3.1 The Committee would point out that the content of the Commission document cannot be the same regardless of whether or not the Constitutional Treaty is ratified or the Charter of Fundamental Rights is **incorporated** in the Treaty.

3.2 The Committee endorses the setting-up of solidarity funds but urges the Commission to adapt this process to the Hague Programme, taking on board the EESC opinion on this subject ⁽¹¹⁾.

⁽¹¹⁾ See footnote 8.

4. Coherence of the proposal

As regards the proposed objectives set out in the Communication, the Committee questions the coherence between the obligations for Member States that derive from the international rule of law, the degree of harmonisation of European legislation and the proposed framework programme.

The Communication and the framework programme contain a number of confusing elements that undermine the credibility of the proposal.

4.1 The Communication

4.1.1 Asylum, immigration, integration, multidimensional aspect, credible response, lasting solution — these are some of the stated objectives. However, to complement the economic approach adopted by the Commission in the Green Paper on an EU approach to managing economic migration⁽¹²⁾, the Communication should pay more attention to aspects of individual and universal rights in the field of migration by establishing links with the General programme *Fundamental Rights and Justice* and draw on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁽¹³⁾.

The Committee also urges the Commission to pay more heed to the evaluation report drawn up every four years by an independent committee of legal experts and submitted to the Intergovernmental Committee in the context of the institutional monitoring of compliance with the Council of Europe's Revised European Social Charter and to take this into account in its additional proposals.

The Committee notes that it is intended that the management of these structural funds would for the most part be delegated to the Member States as part of their responsibilities, in compliance with subsidiarity principles. As regards the principle of proportionality and already pointed out in its opinion assessing the Hague Programme and the related action plan, the Committee feels that '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)'⁽¹⁴⁾.

⁽¹²⁾ EESC opinion of 9.6.2005 on the *Green Paper on an EU approach to managing economic migration (COM(2004) 811 final)* (rapporteur: Mr Pariza Castaños, OJ C 286 of 17.11.2005).

⁽¹³⁾ EESC own-initiative opinion of 30.6.2004 on the *International Convention on Migrants* (rapporteur: Mr Pariza Castaños) (OJ C 302 of 7.12.2004).

⁽¹⁴⁾ Point 3.2.20 of the EESC opinion of 15.12.2005 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 (CESE 1504/2005)* (rapporteur: Mr Pariza Castaños).

The Committee is also concerned about the follow-up to be given to the hearing of NGOs and associations representing civil society and the social partners that was held on the above-mentioned Green Paper on 14 June 2005, where a large number of organisations spoke out against the primacy of the economic approach over human rights and on the need to understand all aspects of the human, cultural, social and legal implications for all refugees and host countries.

4.1.2 Finally, the Committee would have liked to see the inclusion in the Commission initiative of the proposals it put forward in its previous opinions on these matters.

4.1.3 The Committee would stress that questions related to the migration of persons should not be treated as a problem a priori. Today's immigration, which comes on top of older immigration, is creating a new political, economic and social situation that society as a whole must address, taking into account the right of people to choose their destiny within the international, European and national legal framework adopted by the Member States and through which they are linked⁽¹⁵⁾.

4.1.4 The returns identified as a 'solution' by the Commission must not mean that a contrast is drawn between the rights of 'legally' and 'illegally' staying third-country nationals. An irregularity is not a permanent situation which has been deliberately chosen so as to allegedly benefit from a hypothetical status. There are many different kinds of irregularity; the Committee has issued several opinions in which it has tried to make the European institutions more aware of what is at stake economically and of the reality of the victims' situation⁽¹⁶⁾. Return policy must always respect human rights and fundamental liberties.

4.1.5 The 'management' of borders and visas should not take precedence over humanitarian, social, political or legal aspects.

Deep-seated persistent causes such as drought in sub-Saharan Africa call for resources for development, cooperation and combating global warming, going well beyond the EUR 759 million allocated to forced returns and the EUR 2.15 billion allocated to management of external borders in

⁽¹⁵⁾ The legal framework includes, in particular, Articles 13 and 14 of the International Charter of Human Rights (the Universal Declaration of Rights), the International Covenants on Political and Civil Rights and their regional protocols of 1966 and on Economic, Social and Cultural rights, also of 1966, which are the translation into secondary law of the Universal Declaration of Human Rights, Articles 6(1) and 6(2) of the Treaty on European Union Article 6(1) (Article 6(1) of the consolidated Nice version of the Treaty on European Union: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common values to the Member States'), Article 13 of the Cotonou Agreement and the provisions of the 1951 Geneva Convention relating to the right of asylum.

⁽¹⁶⁾ EESC opinion of 18 September 2002 on the *Green Paper on the Community return policy* (rapporteur: Mr Pariza Castaños) (OJ C 61 of 14.3.2003) and the EESC opinion of 11 December 2002 on the *Communication on the Community return policy* (rapporteur: Mr Pariza Castaños) (OJ C 85 of 8.4.2003).

the consular field. They require a political assessment and a firm commitment to long-term action. Given that the fight against hunger and drought is unfortunately not even included in the millennium objectives, the Committee calls upon the Commission and the Council to take an active interest in this question and:

- 1) to adopt a policy of correcting the effects (aid for local rural development) especially in the appropriate framework of the Cotonou Agreement and of the development and cooperation policy;
- 2) to formulate any new proposals and support existing proposals in the international cooperation framework, combining improvement of a damaged environment with sustainable development.

The Committee does not regard transferring the responsibility for repatriation to the transit countries as an appropriate or acceptable solution. There is a need to improve coordination between the EU institutions and the authorities in the third countries from which immigrants come. Moreover, the question of immigration should be made an integral part of the Union's external relations.

4.1.6 The free movement of persons cannot be 'managed', to borrow the term used in the Communication, in the same way that financial flows or services can.

4.1.7 The four financial instruments proposed by the Commission to support action taken by the Member States in the area of immigration should be applied in such a way as to enable policy to be conducted in a coordinated manner in this field, which, besides appropriate management of migratory flows, includes the integration of third-country nationals residing legally in Member States under the same conditions as nationals.

The Committee would take this opportunity to denounce the social dumping that may arise from the provision of cross-border services, which is the primary channel of legal immigration. This problem also concerns workers from the new Member States as a result of the temporary rules applied to them.

The work of the social partners and organised civil society plays a key role in this regard and must be supported and acknowledged.

'Irregular secondary movements': on account of very strict rules and — as the Committee would like to point out — the non-adoption by the Council in 2002 of the Admission Directive (despite the support of the Committee and the European Parliament), 'regular' secondary movements refer in law and in fact to persons who have been resident in a Member State for

more than five years and who apply for residence in a second Member State and to persons who have been residents for less than five years who apply for a stay of short duration in a second Member State. Therefore the Committee assumes that by 'irregular secondary movements', the Commission means movements of illegal residents and asylum seekers whose applications have been rejected in the first host country. Such persons are not only entitled to lodge an application — which they are not always permitted to do in all Member States — but they are also entitled to an individual assessment and a suspensive right of appeal. In some Member States such appeals are non-existent, rendered impossible or are non-suspensive. The Committee understands that it must be possible to use a financial instrument to promote the implementation of the Dublin I and Dublin II conventions (on which the Committee has issued an opinion). But while the Commission must ensure that funds are distributed equitably, it should pay particular attention to the Member States which are most affected by migratory pressure, taking into account not only their position as border states but also their size (e.g. Cyprus, Malta, etc.), their general reception capacities (asylum, resettlement, immigration) and best practices in terms of compliance with their obligations. The Communication does not establish sufficiently precise guidelines for an equitable sharing of the responsibilities. Financial assistance should not be granted to Member States which close their reception centres or reduce their capacity.

4.1.8 'Integrated return management' procedures: the Committee, in its strictly consultative role as the assembly representing organised civil society, would point out that this is about human beings and individuals. It would be more appropriate to develop lasting cooperation that respects peaceful objectives and determine which criteria should be applied to gauge the degree of voluntary return.

4.1.9 The Committee is surprised to read in the proposed text that the specific objectives defined for the European Return Fund include action 'ensuring the provision of specific assistance to vulnerable groups, such as children, ... and those who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'. It should, however, be remembered that the Geneva Convention lays down provisions on the procedures, individual assessments and appeals to which such persons are entitled. With the adoption of the Qualification and Status Directive⁽¹⁷⁾ and in view of the fact that the Member States are parties to the European Convention on Safeguarding Human Rights and Fundamental Freedoms, the Committee finds it hard to believe that persons in such a situation could come under the scope of 'voluntary returns'.

⁽¹⁷⁾ The Geneva Convention is clear in this regard ('For the purposes of this Convention, the term "refugee" shall mean any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'). as is Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.

4.1.10 The Commission should reflect on the criteria to be used to measure the success of a voluntary return programme. The Committee understands that what is at issue here is not cooperation or the development of personal plans for individuals but rather repatriation after a judicial or administrative decision and a decision on return and removal. The Committee defends the necessity of respecting and upholding the European Convention on Human Rights and the Charter of Fundamental Rights and complying with the applicable principles: no one should be forced to return if this would put their life in danger. In this regard, emphasis should be given to means of access to justice. Appeals should always be suspensive. Finally, returns should take place only on an exceptional basis in accordance with the approach laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe. This is not the impression conveyed by certain terms in the proposal (see, for example, section 5.1.3 of the Financial Statement).

The Commission should put forward more detailed implementing provisions which guarantee advice, material assistance and other appropriate forms of support in connection with returns. It should also put forward provisions on, for example, independent and credible monitoring and control arrangements with regard to the safety, protection and well-being of repatriated persons.

Brussels, 14 February 2006.

5. Conclusion

A genuinely democratic European project in the hands of the people, in accordance with the budgetary procedures of the institutions and of the European Union and based on rights:

The Committee:

- supports the proposal to set up a European Fund for the Integration of Third-country Nationals for the period 2007-2013, a European Refugee Fund following on from the existing fund, and an External Borders Fund;
- asks the Council to examine and adopt together the draft Communication defining the framework of the general programme 'Solidarity and management of migration flows' and the decisions setting up specific funds for implementing the general programme;
- calls upon the Commission to take account of the EESC's recommendations in its action plan linked with the Hague Programme;
- recommends that the Council and the Commission ensure the transparency of operation of these new structural funds by making an explicit connection between the Hague Programme and the Communication under consideration;
- calls for practical provisions to be included in the decisions setting up these various funds to ensure that non-state operators are associated at as early a stage as possible in the annual and multi-annual framework of guidelines drawn up by the Member States and by the Commission itself.

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