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European Union Committee

10th Report of Session 2004-05

**The Hague
Programme: a five
year agenda for EU
justice and home
affairs**

Report with Evidence

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Q refers to a question in oral evidence

p refers to a page of written evidence

ABSTRACT

The Hague Programme is a blueprint for EU action in the sensitive area of Justice and Home Affairs over the next five years. It is regrettable that the Government saw fit to withhold from scrutiny drafts of the Programme prior to its adoption by the European Council.

The Commission is preparing an Action Plan to implement the Hague Programme. We make our recommendations in this Report so that they can be taken into account in the drafting of the Action Plan. In particular, the Committee considers that:

- The emphasis that the Programme places on respect for the principles of subsidiarity and proportionality and for the legal traditions of Member States is welcome.
- The emphasis placed on the evaluation of these policies is also welcome. Such evaluation must be independent and its results made public.
- The Commission and Member States must give full weight to the need to protect fundamental rights when developing and implementing the Action Plan.
- The concept of a Common European Asylum System remains valid to ensure consistent standards across the EU and prevent “asylum shopping”, but any new EU standards on asylum must ensure a high level of protection in accordance with international human rights and refugee law.
- Effective EU action to counter irregular migration is hard to achieve without a common EU policy on legal migration.
- There is a need for much improved co-ordination between national law enforcement authorities and better use of Europol by Member States, but this must be accompanied by the development of specific EU data protection standards for the Third Pillar.
- A degree of harmonisation of the criminal laws of Member States may be necessary to facilitate the development of the mutual recognition programme and to protect the rights of individuals. However, before any further expansion of harmonisation there needs to be a full examination of its implications for Member States.
- EU action in civil law is acceptable only if it adds value and is absolutely necessary to improve the daily life of EU residents in situations having a cross-border dimension. Such action must respect the limits of EU competence in this area and the principle of subsidiarity.

The Hague Programme: a five year agenda for EU justice and home affairs

CHAPTER 1: INTRODUCTION

1. The Tampere European Council, held under Finland's EU Presidency in 1999, produced a series of detailed Conclusions intended to serve as a blueprint for the development of the European Union as an "area of freedom, security and justice" (AFSJ). The Conclusions set out a work programme in Justice and Home Affairs (JHA) for the five years up to the end of 2004. Discussions took place over the second half of 2004 on how to follow up the Tampere Programme. In June the Commission published a Communication setting out its views on the future of EU action in JHA. This was followed by a recommendation by the European Parliament and discussions in the autumn Justice and Home Affairs Councils. These discussions culminated in the adoption, by the European Council of 4–5 November 2004, of a new five-year Programme for EU action in Justice and Home Affairs, the so-called Hague Programme.
2. The Committee had the opportunity to examine the Commission Communication last September and asked for clarification of the Government's position on a number of issues. The Government replied on 4 November, the very day of the European Council. However, the Government declined to deposit for scrutiny a draft copy of the Hague Programme (although it had already been in the public domain), a decision hardly consistent with the Government's statements on the importance of parliamentary scrutiny. After the adoption of the Hague Programme, the Government wrote to the Committee on 21 December and 21 January providing a copy of the Programme and outlining their views on the text.¹
3. As the Committee was unable to scrutinise the Programme before it was adopted by the European Council, Sub-Committees E (Law and Institutions) and F (Home Affairs) decided to undertake a joint *ex post facto* inquiry into it. They issued a call for evidence on 10 December 2004, which is reproduced in Appendix 2. At a joint meeting on 26 January 2005 the two Sub-Committees took evidence from Ms Caroline Flint MP, Parliamentary Under-Secretary of State at the Home Office, on the home affairs aspects of the Hague Programme; and on 9 February Sub-Committee E took oral evidence from Baroness Ashton of Upholland, Parliamentary Under-Secretary of State at the Department for Constitutional Affairs, on the civil law aspects of the Programme and issues related to the proposed Fundamental Rights Agency. We also received written evidence from a number of organisations (a list of witnesses can be found in Appendix 3). We are grateful to all those who assisted our inquiry in this way.
4. **We regret that the Government saw fit to withhold from scrutiny the drafts of the Hague Programme prior to its adoption by the European**

¹ Our correspondence with the Government can be found in Appendix 5.

Council. The Hague Programme constitutes a blueprint for long-term EU action in the sensitive area of Justice and Home Affairs. It is an important policy document that is likely to lead to measures having a direct impact on the daily life of EU residents and those wanting to enter the EU. **It is unacceptable that Parliament was denied the opportunity to examine and comment on proposals of such importance until it was too late to influence their content.** We understand that the Commission will, on the basis of the Hague Programme, produce a five year Action Plan on JHA towards the end of the Luxembourg Presidency this year. The Committee will have the opportunity to examine the Action Plan in detail before its adoption. **We make our recommendations in this Report so that they can be taken into account in the negotiation and drafting of the Action Plan.**

5. **In view of the important issues raised by the Hague Programme, we recommend this Report to the House as a basis for a general debate on Justice and Home Affairs issues.**

CHAPTER 2: THE HAGUE PROGRAMME—GENERAL CHARACTERISTICS

Legitimacy

6. The Hague Programme starts by reaffirming the priority attached to Justice and Home Affairs by the European Council, which responds to a “central concern” of EU citizens. The need to respond to the expectations of EU citizens in this area is emphasised on numerous occasions in the text. According to Dr Helen Xanthaki,² this emphasis represents “a reallocation of the basis of legitimacy for the JHA policy from legitimacy on the basis of an abstract general principle of law common to the laws of the member states to legitimacy deriving directly from the European peoples”.³ This shift from the rule of law to people’s concerns as a basis for legitimacy of EU action in JHA was criticised by Professor Elspeth Guild,⁴ who noted that the language of the Hague Programme was inconsistent with the emphasis of the preamble of the Constitutional Treaty on fundamental rights. She argued that the EU should integrate fundamental rights and freedoms into operational measures in the areas of, for example, border controls, policing and external relations, on the ground that human rights are “an integral part of the legitimacy of operational measures”.⁵ We highlight in paragraph 11 the importance of protecting fundamental rights in this area.

Consolidation and implementation

7. The Hague Programme states expressly that it builds on ongoing work arising from Tampere. This is most notable in areas such as asylum and mutual recognition in criminal and civil matters. Ms Caroline Flint emphasised the need to consolidate and evaluate what had been achieved following the Tampere Programme, which she characterised as “a building block” in the development of EU JHA policy, a new area of EU activity.⁶ The Minister noted that evaluation and monitoring was one of the issues missing from the Tampere Programme but reflected in the Hague Programme. The Government also welcomed the emphasis placed on evaluation in relation to the civil law aspects of the Hague Programme.⁷ The Commission, too, welcomed the Hague Programme, which in its view “reconciles the various priorities of the Member States while focusing on ways to ensure better control over the practical implementation of measures, improved coherence and co-ordination”.⁸

² Academic Director, Sir William Dale Centre for Legislative Studies, University of London.

³ p 54.

⁴ Professor of European Migration Law, Radboud University, Nijmegen.

⁵ p 28.

⁶ Q 2.

⁷ p 13. For a detailed analysis of the proposals for evaluation see paragraphs 48-52 below.

⁸ p 26.

Relationship with the Constitutional Treaty

8. The Hague Programme states that the Constitutional Treaty has served as a guideline for the level of ambition in the Programme, but that the existing Treaties provide the legal basis for Council action until the new Treaty enters into force. The European Council has decided that the Hague Programme will be reviewed when the Treaty enters into force, which at present is planned for November 2006. Our witnesses agreed that the Constitution had been a decisive factor in the drafting and content of the Hague Programme and that the Programme played a significant part in bringing to the fore and giving priority to action on the lines set out in the Constitutional Treaty—for instance, on measures relating to mutual recognition in criminal matters.⁹

Vision or pragmatism?

9. It is perhaps because of its emphasis on consolidation and building on initiatives brought forward following Tampere that the Hague Programme has been criticised for a lack of vision. The Immigration Law Practitioners' Association (ILPA) characterised it as a “decidedly muted event”.¹⁰ Dr Xanthaki argued that “it fails to propose specific areas where legislation would be welcome”, something that in her view indicated a lack of general consensus among Member States and a lack of clear vision for the immediate future in JHA.¹¹ The Government on the other hand welcomed the general direction of the Programme. Baroness Ashton supported its emphasis on pragmatism and the firm statement that future action in JHA must respect the principles of subsidiarity and proportionality as well as the different legal traditions of Member States.¹² The Law Society similarly noted that EU action in this area must respect the different legal systems of Member States and focus on better law making.¹³ **We too welcome the emphasis that the Hague Programme places on respect for the principles of subsidiarity and proportionality and for the legal traditions of Member States in developing legislation in Justice and Home Affairs. We expect the Government to be vigilant in ensuring full respect for these principles.**

⁹ p 28 (Professor Guild); p 52 (Dr Stefanou); p 54 (Dr Xanthaki).

¹⁰ p 38.

¹¹ p 55.

¹² p 13.

¹³ p 46.

CHAPTER 3: FUNDAMENTAL RIGHTS

Freedom versus security?

10. Many witnesses criticised the Hague Programme for placing undue emphasis on security considerations at the expense of the respect for fundamental rights. ILPA argued that the Programme was characterised by a “securitarian” approach to the movement of persons,¹⁴ while Professor Guild drew attention to the dangers for human rights that linking the internal and the external dimension of the EU’s JHA policy might entail.¹⁵ The Hague Programme does contain a specific section on fundamental rights, and this was welcomed by the Government.¹⁶ However, according to Amnesty International, in spite of these references, “there is too much of a vacuum in the substance of the programme as to how the stated ambition is to be realised” and a growing risk of a one-sided emphasis on “security” at the expense of “justice” and “freedom”.¹⁷
11. **The content of the Hague Programme appears to justify some of these criticisms.** Its main novelty in policy terms is the call for greater exchange of police data and the need to improve surveillance and document security. Large parts of it are devoted to police co-operation and the fight against terrorism, and repeated calls are made to improve efficiency in police co-operation, prosecutions and border controls. Protective elements (such as the protection of fundamental rights, the role of the proposed new Fundamental Rights Agency and the role of the European Court of Justice) are not covered in any detail and appear to be rather peripheral to the Programme. Finally, in comparison to the Tampere Conclusions, there is a striking lack of ambition in “freedom” provisions, such as EU citizenship rights, anti-discrimination measures, the fight against racism, and rights for third country nationals legally resident in the EU. **This emphasis on security may be explicable in the light of recent events, but it is important that measures to protect citizens’ rights are not sidelined in the implementation of the Hague Programme. We urge the Commission and Member States to give full weight to the need to protect fundamental rights when developing and implementing the five-year Action Plan for JHA.**

The Fundamental Rights Agency

12. Following a decision of the European Council in December 2003, the Hague Programme calls for the transformation of the Vienna Centre for Monitoring Racism and Xenophobia into an EU Fundamental Rights Agency (FRA). The exact role of the Agency is not clear. The Commission has launched a consultation on the establishment of the Agency raising a number of questions including:
 - its legal basis (in the light of the Community’s limited powers in the area of fundamental rights)

¹⁴ p 38.

¹⁵ p 28.

¹⁶ p 13.

¹⁷ p 23.

- the Agency’s field of action (whether it should monitor fundamental rights by area of Community action, or Member States’ compliance in general—with the possibility of triggering the procedure in Article 7 of the Treaty on European Union (TEU) for dealing with serious breaches of the principles on which the Union is founded)
 - whether the Agency’s remit should be confined to the scope of Community law or whether it should extend to areas of Union law (these include foreign policy and criminal law)
 - the powers of the Agency and its relationship with other mechanisms of human rights monitoring in the Community (including judicial review in the European Court of Justice (ECJ))
 - the tasks of the Agency and how it will conduct its monitoring exercises
 - the relationship of the Agency with international organisations and civil society
 - the structure of the Agency and its independence and accountability.¹⁸
13. Baroness Ashton said that the Government welcomed the creation of a Fundamental Rights Agency with the role of gathering information and providing advice to EU institutions: it would, in the Minister’s view, fill a gap “as there is not any institution that advises the EU itself on what it is doing”.¹⁹ The Minister stressed that the Government envisaged a role for the Agency in the context of the EU legal framework and not in evaluating individual Member States.²⁰ The Government would be prepared to examine the possibility of the Agency’s intervening as a third party in cases before the European Court of Justice, but would wish to clarify what was meant by “intervention”.
14. Notwithstanding the express commitment in the Hague Programme to the creation of the Agency, Amnesty International was sceptical of the commitment of the EU to protect and promote human rights through the FRA. Amnesty noted that over the past five years the European Council had been unwilling to acknowledge and address human rights problems within the EU and argued that the proposal to create the FRA did not show real willingness to address these issues.²¹ Amnesty also argued that the inclusion in The Hague Programme of the Fundamental Rights Agency proposal left the present position unchanged and did not address the pressing question of collective responsibility at EU level for actual and potential human rights violations in Member States.²²
15. **We believe that the establishment of a Fundamental Rights Agency could be beneficial for the respect and promotion of human rights by the EU institutions and by Member States when applying EU law. Careful consideration must be given, however, to the role and powers of the Fundamental Rights Agency, in order to avoid wasteful duplication of work between the EU and the Council of Europe. The**

¹⁸ The potential role and powers and of the Fundamental Rights Agency were recently debated in the House of Commons (*Official Report*, 2 February 2005, cols. 251ff WH).

¹⁹ Q 52.

²⁰ Q 56.

²¹ p 23.

²² *Ibid.*

latter has well established mechanisms for monitoring human rights compliance, in particular through the European Convention on Human Rights (ECHR) and the post of European Human Rights Commissioner.

CHAPTER 4: ASYLUM

A Common European Asylum System

16. The Hague Programme calls for the development of the second phase of a Common European Asylum System (CEAS). This would follow the adoption of the “minimum standards” instruments in the first phase asylum package (including measures on the definition of a refugee, reception conditions and asylum procedures) and should result in the establishment of a common asylum procedure in the EU and a uniform refugee status. The Programme calls for an evaluation of the first stage measures prior to embarking on the second stage. Our witnesses welcomed the evaluation of the first-stage measures. According to ILPA such evaluation was “crucial”,²³ while JUSTICE emphasised the need for respect of international refugee law and human rights standards.²⁴ The Government also welcomed evaluation as a step to be taken before proceeding with the second phase of the CEAS.²⁵ However, the final element in the first phase package, the Procedures Directive, has not been formally adopted yet and will not come into force until 2007 at the earliest. Evaluation cannot meaningfully begin until there is a record of implementation capable of evaluation.
17. Calls for evaluation of the agreed EU minimum standards on asylum were linked with strong criticism by several of our witnesses of the low standards adopted by some Member States so far. According to Amnesty, “we have witnessed the adoption of a very low common denominator of minimum standards that allows Member States to continue competing with their restrictive policies and that in some respects breach international law”.²⁶ These concerns, directed in particular at the Asylum Procedures Directive, were also shared by ILPA²⁷ and JUSTICE.²⁸ Both organisations stressed the need to include high standards of protection in the second stage of the CEAS—with ILPA calling for “common high standards, rather than common low standards”.²⁹ The Government on the other hand considered that the fact that Member States had reached common ground on these measures was itself important.³⁰
18. **We fully share our witnesses’ concerns regarding some of the standards adopted in the first stage of EU asylum measures. The Committee has repeatedly highlighted in its reports the danger of Member States reaching agreement on the basis of the lowest common denominator, which would not provide an adequate level of protection for asylum seekers and could jeopardise existing levels of protection in those Member States currently observing higher standards than those required by the EU. We believe that a detailed evaluation of the implementation of these instruments is essential to**

²³ p 30.

²⁴ p 41.

²⁵ Q 9.

²⁶ p 23.

²⁷ pp 30-31.

²⁸ p 41.

²⁹ pp 31, 41.

³⁰ Q 8.

ensure that it is consistent with international human rights and refugee law standards.³¹

19. A central question in the development of a Common European Asylum System is how far it is desirable and/or feasible for Member States to harmonise their asylum systems. The Hague Programme calls for the adoption before the end of 2010 of “a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection”. In its paper *Refugees: Renewing the vision*,³² the Refugee Council welcomed this approach, calling for a “single, simple procedure” for all people seeking protection in the EU.³³ Most of our witnesses accepted the move to the second stage of the CEAS envisaged by the Hague Programme, but called for the adoption of higher standards (see above). The Law Society was more sceptical of the creation of a uniform refugee status in the EU, but stressed the need to protect due process and access to justice for the asylum seeker in the development of EU legislation in this field.³⁴ **We believe that the concept of a Common European Asylum System, which has been a central objective of JHA policy since Tampere, remains valid to ensure consistent standards across the EU and to prevent “asylum shopping”.**³⁵
20. However, in view of the difficulties in reaching agreement on minimum standards in the first place, and the tendency to adopt the lowest common denominator, we questioned the Programme’s ambition to achieve a CEAS by 2010. Ms Flint said that the 2010 deadline “was probably unrealistic”.³⁶ The Government’s view was that “to have a system whereby there is one form of processing applicable to all is not something that would work”—emphasis should be placed on implementation and evaluation.³⁷ Despite their willingness to take part in the first stage of the EU asylum system, the Government appear to be reluctant to move towards the development of the second stage³⁸—perhaps because decision-making in these areas has moved, from 1 January 2005, from unanimity to qualified majority voting. The impact of the change in the voting procedures in the Council on the development of the CEAS remains to be seen. **We agree with the Government that proper evaluation of the first stage is essential before embarking on consideration of second stage measures and that the deadline of 2010 is probably too ambitious. We believe that that evaluation should be carried out by an independent body of experts, whose findings should be published. It is essential that any new EU standards on asylum should ensure a high level of protection in accordance with international human rights and refugee law.**

³¹ *Minimum Standards in Asylum Procedures*, 11th Report, Session 2000-01, HL Paper 59; *Minimum Standards of Reception Conditions for Asylum Seekers*, 8th Report, Session 2001-02, HL Paper 49; and *Defining refugee status and those in need of international protection*, 28th Report, Session 2001-02, HL Paper 156.

³² London, June 2004.

³³ Paragraph 12.

³⁴ p 46.

³⁵ “Asylum shopping” in the EU context is used to describe the phenomenon where an asylum seeker applies for asylum in more than one Member State or chooses one Member State in preference to others on the basis of a perceived higher standard of reception conditions or social security assistance.

³⁶ Q 9.

³⁷ Q 8.

³⁸ See also letter of 21 December 2004 from Caroline Flint to Lord Grenfell, Appendix 5.

21. The Hague Programme also invites the Commission to present a feasibility study on the joint processing of asylum applications within the Union. This would entail a move away from the processing of asylum applications nationally to more centralised forms of processing. The Committee examined this option in its Report on extra-territorial asylum processing³⁹ and rejected the idea of joint processing of asylum applications in the EU on legal, human rights, practical and financial grounds. **We do not believe that joint processing of asylum applications in the EU is the right way forward. In our view, regardless of the level of harmonisation reached in the EU, the key lies with improving the asylum process and decision-making in Member States.** UNHCR highlighted this point in its evidence, which stressed that “the harmonisation of asylum systems necessitates more than the adoption of common rules—it requires the introduction of measures to improve the quality of asylum decision-making across the 25 Member States”.⁴⁰ UNHCR referred to the “Quality Initiative”—a joint project it runs with the Home Office, which it recommends that the Government promote during the United Kingdom’s Presidency of the EU.⁴¹ Ms Flint told us that in principle she could agree to that.⁴² **We welcome this approach and will monitor its progress during the Presidency.**

A European Asylum Office

22. The Hague Programme calls for the facilitation of practical co-operation between the national asylum services of Member States culminating in the creation, after a common asylum procedure has been established, of a “European support office for all forms of co-operation between Member States relating to the CEAS”. There are many views on what the powers and tasks of this Office should be. UNHCR said that it would support a European Asylum Office, as an institutional mechanism to provide advice and co-ordinate practical harmonisation and burden-sharing efforts, drawing input from governmental and non-governmental sources.⁴³ ILPA envisaged the European Asylum Office as a system of audit and evaluation, not by Member States but by independent observers.⁴⁴ The Government saw some benefit in the pooling of information and sharing of practice and expertise across the EU, but were against the Office becoming a common point for the processing of asylum applications.⁴⁵
23. **We believe that a European Asylum Office could assist practical co-operation between national asylum authorities, through the exchange of information and best practice. In our Report on extra-territorial asylum processing we recommended the establishment of an independent documentation centre managed on an EU basis.**⁴⁶ The

³⁹ *Handling EU Asylum Claims: New Approaches Examined*, 11th Report, Session 2003-04, HL Paper 74.

⁴⁰ p 53.

⁴¹ p 53.

⁴² Q 15.

⁴³ UNHCR’s recommendations for the new multi-annual programme in the area of freedom, security and justice, paragraph. 27.

⁴⁴ p 31.

⁴⁵ Q 8.

⁴⁶ *Handling EU Asylum Claims: New Approaches Examined*, paragraph 150.

European Asylum Office could take on this role in co-operation with UNHCR. We see less value in the Office taking the role of an auditing/evaluating body. This could cause unnecessary duplication with the work of other structures specifically established to evaluate the implementation of EU measures in the JHA field. Still less should the Office develop a centralised decision-making role.

Extra-territorial processing

24. While making no specific proposals on extra-territorial asylum processing, the Hague Programme calls for an evaluation of existing arrangements and for studies looking at joint processing of asylum applications outside the EU. The prospect of processing asylum claims directed at Member States outside the EU was rejected almost unanimously by our witnesses. The Law Society expressed concern about difficulties in the applicants' access to legal advice and representation;⁴⁷ JUSTICE was "not persuaded" by proposals on such studies, noting that there was no justification for the inclusion of such a reference in the Programme;⁴⁸ and ILPA agreed. It noted that the idea was "highly ambiguous" and pointed to various studies, including by the Commission, which questioned the feasibility, practicality and legality of extra-territorial processing.⁴⁹ **The Committee shares this view. We highlighted all these concerns in our Report *Handling EU Asylum Claims: New Approaches Examined*.⁵⁰ We believe that studies on extra-territorial processing are a distraction from the central objective of improving asylum procedures in Member States.**

⁴⁷ p 46.

⁴⁸ p 41.

⁴⁹ p 31.

⁵⁰ *Op cit*, footnote 46.

CHAPTER 5: MIGRATION

25. Perhaps the slowest moving areas of EU legislative action post-Tampere have been legal migration and the rights of third-country nationals. Member States opted to limit their action on legal migration to the development of best practices and benchmarks, while legally binding measures granting rights to third country nationals were either substantially watered down (such as the Directive on the status of third country nationals)⁵¹ or totally blocked in the Council (such as the draft Directive on the entry and residence of third country nationals for the purpose of paid employment). This stance amply illustrates the Commission's remark that the Union has so far failed to produce a common concept of admission for economic purposes⁵² and is in sharp contrast with the plethora of enforcement measures aimed at combating illegal immigration that have been adopted.
26. This pattern is largely reflected in the Hague Programme. The European Council emphasises the positive role that legal migration can play in the EU, but notes that determining volumes of admission of labour migrants is a matter for Member States. This is also specifically reflected in the Constitutional Treaty.⁵³ As regards third country nationals, the emphasis is placed not so much on their legal rights but on their integration—this is to be achieved by co-ordination of national policies rather than legislation. The Commission is invited to present a “policy paper” on legal migration in 2005.⁵⁴ On the other hand, large sections of the Programme are devoted to border controls (see Chapter 6 below) and maximising controls on third country—and EU—nationals through the insertion of biometrics in identity documents and enhancing the effectiveness and interoperability of databases such as the Visa Information System (VIS), the second generation Schengen Information System (SIS II) and Eurodac. These controls are also considered important for crime control and counter-terrorism purposes.
27. The Hague Programme's policy steer on migration was criticised by a number of witnesses. ILPA regretted the very low priority given to measures on legal migration and argued that “the fight against illegal immigration” was once more to be conducted without any concerted EU efforts to address the lawful admission of third country nationals for employment.⁵⁵ ILPA drew attention to the threats to the human rights of third country nationals that might be posed by enforcement measures, and criticised the association in the Hague Programme of irregular migration with crime and terrorism.⁵⁶ These concerns were shared by Professor Guild, who noted that there was no common definition in EU law of illegal immigration or of an irregular

⁵¹ On the Commission proposal on this Directive see our Report *The Legal status of long-term resident third-country nationals*, 5th Report, Session 2001-02, HL Paper 33.

⁵² *Communication on the results of the Tampere programme and future guidelines*, staff working paper (SEC (2004) 680, p.17).

⁵³ Article III-267(5) states that the development of a common EU immigration policy will not affect the right of Member States to determine volumes of admission of third country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

⁵⁴ It recently produced a Green Paper on economic migration (COM (2004) 811 final, 11 January 2005). Sub-Committee F (Home Affairs) has recently launched a separate inquiry into the issues raised in it.

⁵⁵ pp 37-38.

⁵⁶ pp 36-37.

migrant, which in her view made illegal immigration “a phantom ill”.⁵⁷ Professor Guild added that this failing was compounded by the preventive approach towards countering illegal immigration—since “before an individual can be an illegal immigrant he or she must find himself within a state which has laws which define his or her presence as illegal”.⁵⁸ We raised this point with the Minister during her oral evidence but did not receive a clear-cut response.⁵⁹ In our Report on a common EU policy on illegal immigration, we stressed that it is important to recognise that the term “illegal immigrant” covers people in a very wide range of different situations.⁶⁰

28. **We share the view of our witnesses that effective EU action to counter irregular migration is hard to achieve without a common EU policy on legal migration and the admission of third country nationals for paid employment. We welcome the invitation by the European Council to the Commission to prepare a policy paper on legal migration, and urge Member States to examine the issue as a matter of priority.**
29. EU Member States have recently focused on the issue of integration of third country nationals in their territory. The Hague Programme stresses the need to prevent the isolation of certain groups and calls for the creation of equal opportunities. The Council has already produced a series of integration guidelines for Member States and we welcome this. But action in the field will succeed, and equal opportunities will be created, only if third country nationals enjoy certain rights in their host Member State. **We urge Member States to revisit the issue of the rights of legally resident third country nationals.**
30. The Hague Programme proposes a raft of measures involving controls on third country nationals (and in some cases EU nationals) through the use of central databases and the introduction of identification mechanisms based on new technologies including biometrics. The Council has already adopted a Regulation introducing biometrics in EU passports, and proposals are on the table for the use of biometrics in Schengen visas and residence permits. These measures may ensure greater efficiency in the identification of persons, but they also have potentially enormous implications for privacy and data protection. **We urge Member States to take these considerations fully into account when negotiating such measures and to give public opinion, and national parliaments, enough time for meaningful scrutiny and debate.**

⁵⁷ p 29.

⁵⁸ *Ibid.*

⁵⁹ QQ 18-19.

⁶⁰ 37th Report, Session 2001-02, HL Paper 187, paragraph 19.

CHAPTER 6: BORDER CONTROLS AND THE EUROPEAN BORDER AGENCY

31. In endorsing the Hague Programme the European Council called for the swift abolition of internal border controls (with the new Member States) as soon as possible, provided all requirements to apply the Schengen *acquis* had been fulfilled and after SIS II becomes operational in 2007. As a “compensation” for the abolition of border controls the Programme calls for the strengthening of external border controls. This involves the start of operations of the European Border Management Agency by 1 May 2005. There is a series of recommendations on the future evaluation and development of the Agency including the possibility of the creation in the future of a “European System of Border Guards”. (Earlier drafts referred to a “European Corps of Border Guards” but this has been replaced with the seemingly more neutral “system”.) It is also proposed to set up a Community border management fund. We examined the issues arising from proposals to create a European Border Guard in 2003 in our report *Proposals for a European Border Guard*.⁶¹
32. The key issue here is the future direction of the European Border Agency. In spite of the fact that the Agency is not operational yet, there appears to be a lively debate, as demonstrated by the Hague Programme, on what its future role will be. ILPA appeared to welcome the establishment of an evaluation and supervisory mechanism within the structures of the Border Agency.⁶² It stressed that the Agency’s orientation must be to carry out the policy of the EU “not only as understood within the framework of security but also as part of the internal market and external relations, and in accordance with the *non-refoulement*⁶³ principle”. UNHCR put forward similar views calling for greater emphasis to be placed on ensuring that persons seeking international protection in the EU were able to access its territory and its asylum procedures.⁶⁴ UNHCR expressed particular concern about interception of movements of third country nationals at sea.⁶⁵
33. Ms Flint noted that Member States considered that it was important to have some oversight via the Agency of difficulties relating to border controls, for example by means of a rapid response if a particular crisis emerged. She noted that “a system” of European Border Guards “does not necessarily mean that we will have a European border guard as a multi-national border guard agency, but rather we will look at how border guards across Europe will work and share best practice and identify problems”. The future feasibility study would provide an opportunity for new Member States to express their views on the role of the Agency.⁶⁶
34. **We remain of the view, expressed in our Report on *Proposals for a European Border Guard* that the case for a centrally managed, multi-national European Border Guard has not been made.** We believe that

⁶¹ 29th Report, Session 2002-03, HL Paper 133.

⁶² p 34.

⁶³ *Ibid.* The principle of *non-refoulement* is the obligation not to return a person to a State where he or she has a well founded fear of persecution on any of the grounds specified in the 1951 Refugee Convention.

⁶⁴ *Recommendations on the Hague Programme*, paragraph 34.

⁶⁵ *Op cit*, paragraph 41.

⁶⁶ Q 20.

before discussing any future developments regarding the Agency, it is important to evaluate in detail how it will function from 1 May 2005 under its current powers and legal base. In its operations the Agency must respect fundamental rights and take into account the EU's policy towards its near neighbours.

CHAPTER 7: POLICE CO-OPERATION AND THE ROLE OF EUROPOL

35. The Hague Programme places great emphasis on enhancing the effectiveness of police action in the EU. It calls on Member States to improve the exchange of information between police authorities on the basis of the principle of “availability” and contains proposals to enhance the interoperability of databases. Placing strong emphasis on counter-terrorism, the Programme calls for greater inter-agency co-operation and co-ordination between competent authorities. It also calls on Member States to co-operate with Europol, which will develop “threat assessments” on serious forms of organised crime. Addressing the increased flow of information that these proposals are likely to generate, the European Council asked the Commission to present proposals by the end of 2005 outlining the key conditions for data exchange. Some references are made to safeguards, but there are no detailed plans for data protection supervision and data exchange controls.
36. The law enforcement authorities which submitted evidence to us unanimously welcomed the provisions of the Hague Programme on police co-operation, and in particular the emphasis on inter-agency co-operation and intelligence-led policing via the development of threat assessments.⁶⁷ The National Criminal Intelligence Service (NCIS) noted that, following lobbying by the United Kingdom, the Hague Programme had adopted principles of intelligence-led policing and that the wording of the Programme provided an “extremely helpful boost” to attempts by NCIS to develop a European Criminal Intelligence Model based on the UNITED KINGDOM national intelligence model.⁶⁸ On the other hand, NGOs such as JUSTICE and the Law Society stressed the need for an effective data protection regime.⁶⁹ The Government also appeared to see some value in strengthening data protection, but as a means of enhancing trust between national police authorities and thus facilitating the exchange of data.⁷⁰
37. **We have examined these issues in detail in our recent Report on EU counter-terrorism activities.⁷¹ Here we reiterate that it is important to improve co-ordination between Member States, and with international bodies such as Interpol, without necessarily creating yet more structures in the EU. We believe that Europol has an important role to play but is still underused by Member States.⁷² Before attempting to redefine its role, it is essential to convince Member States of the need to co-operate with Europol fully. Any proposals to enhance the exchange of information must be accompanied by high standards of data protection. As we noted in our Report, there is a clear need for specific EU data protection standards for the Third**

⁶⁷ p 25 (ACPOS); p 27 (Europol); p 50 (NCIS).

⁶⁸ p 50.

⁶⁹ p 48 (JUSTICE); p 48 (Law Society).

⁷⁰ Q 23.

⁷¹ *After Madrid: the EU's response to terrorism*, 5th Report, Session 2004-05, HL Paper 53.

⁷² See our Report *Europol's role in fighting crime*, 5th Report, Session 2002-03, HL Paper 43.

Pillar.⁷³ The Commission is planning to produce a proposal to that effect later this year, and we expect to examine it fully.

⁷³ We have also expressed concern about the absence of specific data protection provisions in the draft Council Decision on the exchange of information and co-operation concerning terrorist offences currently under consideration in the Council (the most recent text is contained in document no. 15999/04).

CHAPTER 8: CRIMINAL LAW

Approximation or mutual recognition?

38. In line with the Tampere conclusions, the Hague Programme continues to place particular emphasis on mutual recognition as the cornerstone of judicial co-operation in criminal matters in the EU. This has been welcomed by the Government.⁷⁴ The European Council called for the 2001 EU mutual recognition programme to be completed and stated that further attention might be placed on “additional” areas, without specifying what they were. A central question in developing further the mutual recognition programme is to what extent it should be accompanied by some approximation of the criminal laws of Member States. In the Hague Programme approximation of criminal laws is envisaged in order to facilitate mutual recognition. This wording seems narrower than the approach in the Constitutional Treaty, according to which approximation can take place also in areas where it is necessary to ensure implementation of a Union policy.⁷⁵
39. The Law Society expressed concern about the development of EU action on criminal law, stating that “mutual recognition must not be used as a means by which to introduce harmonisation of substantive law and procedure ‘through the back door’”.⁷⁶ JUSTICE, on the other hand, supported some approximation—it believed that “the approximation of certain aspects of criminal procedural law is necessary both to legitimise and facilitate the EU’s mutual recognition programme”.⁷⁷ Ms Flint told us that “there may be some specific areas such as self-incrimination or burden of proof where agreed minimum standards could be possible, and which might be beneficial”, but she was more sceptical about further EU work on the admissibility of evidence.⁷⁸
40. **Approximation of the criminal laws of Member States is likely to have a significant impact on Member States’ legal cultures and traditions and on national sovereignty. We are pleased to see that the Hague Programme views such approximation as being necessary only if it facilitates mutual recognition. However, the more progress that is made on developing the mutual recognition programme, the greater the need will be for some sort of minimum standard across the EU of procedures in the legal processes for which mutual recognition will be claimed. Such approximation is necessary not only to facilitate mutual trust and justify mutual recognition, but, more importantly, to protect the rights of the individuals affected. However, we would urge caution in the further development of harmonisation in sensitive areas such as the admissibility of evidence. Before any further expansion of harmonisation there needs to be a full examination of the implications of such a development for Member States. This is an area where the principle of subsidiarity will come prominently into play and due observance of it will be necessary.**

⁷⁴ Q 32. See also Caroline Flint’s letter of 21 December 2004 to Lord Grenfell (Appendix 5).

⁷⁵ Article III-271 (2).

⁷⁶ p 47.

⁷⁷ p 42.

⁷⁸ Q 34.

The protection of the rights of the defendant

41. One of the main criticisms of EU action in criminal law, and of the development of the mutual recognition programme, has been that it has focused primarily on enforcement measures at the expense of human rights and civil liberties. A prime example of this imbalance was the adoption in 2002 of the European Arrest Warrant, which may have a significant impact on the rights of the individual but has not been accompanied by an EU measure aiming at protecting these rights. A recent attempt to address this gap is a draft Framework Decision on procedural rights in criminal proceedings, currently being negotiated in Brussels, which our Committee has examined in detail.⁷⁹ We concluded that setting clear standards at the right level was needed to improve public perception of criminal procedures in other Member States and to enhance mutual trust between the authorities in Member States executing mutual recognition requests.
42. The Committee remains concerned that the outcome of the negotiations may not ensure a sufficiently high level of protection for suspects and defendants. This concern was echoed by some of the witnesses to this inquiry, who noted that Member States' commitments to protect the rights of the individual were vague and subordinate to the drive to intensify judicial co-operation.⁸⁰ We note that unlike earlier drafts, the final version of the Hague Programme contains a deadline—the end of 2005—for the adoption of the proposal on defence rights. **We welcome the commitment towards the swift adoption of this important measure, but, as we said in our earlier Report, it should not jeopardise the adoption of adequate standards of protection for suspects and defendants. Standards must not be lowered in order to obtain agreement.**
43. With the exception of defence rights, the Hague Programme does not contain any specific proposals or deadlines for “protective” measures for the individual in criminal proceedings. This is particularly regrettable as regards measures related to bail. The Commission has recently published a Green Paper on bail, but it appears that developing legislative measures in this area is not a current priority for the United Kingdom Government. The Commission will be proposing a legislative initiative later this year, but Ms Flint was non-committal as to whether the United Kingdom would promote this proposal during its Presidency of the EU.⁸¹ **We regret this. Any legislative proposals on bail should in our opinion be treated as a matter of priority during the UNITED KINGDOM Presidency.**

Judicial co-operation in criminal matters and the role of Eurojust (and the European Public Prosecutor)

44. The Hague Programme emphasises the need to reduce legal obstacles and strengthen the co-ordination of investigations “with a view to increasing the efficiency of prosecutions”. This, along with the absence of any reference to individual rights in this context, seems to bear out concerns that the main objective of EU criminal policy is prosecutorial efficiency. The development of Eurojust is crucial here. The Hague Programme gives a good deal of attention to Eurojust, largely emphasising the issues that we highlighted in

⁷⁹ 1st Report, Session 2004-05, HL Paper 28.

⁸⁰ Amnesty p 23; JUSTICE p 43.

⁸¹ QQ 40-42.

our Report on Eurojust⁸²—the need for proper implementation of the Eurojust Decision, and the need for Eurojust to focus on complex, multilateral cases. The Programme calls for new legislation further defining the tasks of Eurojust, but, unlike in earlier drafts, there is no reference to studying the possible creation of a European Public Prosecutor.

45. **We welcome the deletion from the final version of the Hague Programme of the reference to the potential establishment of a European Public Prosecutor. We believe that Eurojust has a pivotal role to play in enhancing judicial co-operation in criminal matters in the EU, and welcome the commitment of Member States to revisit its role in order to achieve greater efficiency. In developing Eurojust’s role in dealing with multilateral cases, care must be taken that the rights of the individual are not jeopardised for the sake of “prosecutorial efficiency”.**

Mutual trust and the judiciary

46. One of the goals identified in the Hague Programme is the “progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law”. We asked both Ms Flint and Baroness Ashton to explain what was meant by this phrase. Ms Flint linked it with the importance of mutual recognition and proper implementation of EU measures and explained that the Government were aiming during the UNITED KINGDOM Presidency to promote networking and the exchange of best practice by bringing together prosecutors and people from other parts of the judiciary from EU Member States.⁸³ Baroness Ashton echoed these comments, stressing the central role of mutual recognition and saying that “what we are looking for is an understanding of individual states’ legal systems, a respect for those, trust and recognition of the kind of culture that goes alongside that”.⁸⁴ Baroness Ashton also referred to the role of the European Judicial Training Network.⁸⁵
47. The emphasis on building trust among the judiciary was welcomed by JUSTICE. It noted that “if insufficient efforts are made to build genuine trust between Member States’ judiciaries, not only are attempts to expedite co-operation likely to fail, but there will be increasing tension between the executive and the legislature on one hand and the judges who are at the sharp end of enforcing foreign judgments on the other”.⁸⁶ **We too welcome the emphasis on bringing together prosecutors and judges from Member States in order to promote understanding of the different legal systems in the EU. Better understanding should lead to enhanced trust and consequently better implementation of mutual recognition measures.**

⁸² *Judicial co-operation in the EU: the role of Eurojust*, 23rd Report, Session 2003-04, HL Paper 138.

⁸³ QQ 31-33.

⁸⁴ Q 60.

⁸⁵ QQ 66-67.

⁸⁶ p 43.

Evaluation

48. The Hague Programme states that, in an enlarged EU, mutual confidence will be based on the certainty that all European citizens have access to judicial systems meeting high standards of quality. The Programme therefore emphasises the need for objective and impartial evaluation of the implementation of EU policies, “while fully respecting the independence of the judiciary”. The emphasis on evaluation and implementation was welcomed in principle by the Government⁸⁷ and most of our other witnesses.⁸⁸ But as we discovered during our inquiry into the Commission proposals on defence rights,⁸⁹ the issue of how exactly such evaluation will take place, what will be evaluated, by whom and to what effect is controversial.
49. We received a range of views on the details of the evaluation process. The Law Society was “keen to see effective monitoring and reporting practices in place to ensure mutual trust between national judicial authorities principally covering the definition of fundamental guarantees and the adherence to high standards in the administration of justice” and believed that this could be done without compromising the independence of the judiciary.⁹⁰ According to JUSTICE, independent monitoring and evaluation must specifically assess compliance with the EU Charter and other international human rights instruments and must not focus exclusively on improvements in efficiency.⁹¹ Amnesty expressed concern about the effectiveness of such an evaluation without a mechanism to address any shortcomings that might be found.⁹²
50. The Government supported the emphasis placed on evaluation, but did not appear to have a final view on what this should entail. Ms Flint told us that there was no single way to carry out an evaluation and the issue needed to be looked at on a case-by-case basis. In some cases evaluations by independent bodies might be appropriate, in other cases peer reviews (like the Schengen evaluation mechanism) would do.⁹³ Baroness Ashton told us that she had not seen any firm proposals on precisely how evaluations would be done, but believed that evaluation must be impartial in order to generate confidence in Member States.⁹⁴ According to Ms Flint, the Government would not accept an evaluation of the UNITED KINGDOM legal system as a whole, but there would not be the same objection to an evaluation of the implementation of a specific EU instrument such as the European Arrest Warrant.⁹⁵
51. **As we noted in our Report on procedural rights in criminal proceedings, it is very important that proper monitoring and evaluation procedures should be put in place. Evaluation must not be limited to the collection of statistical data, but must also be based on information coming from the practical experience of the individuals**

⁸⁷ See oral evidence cited in paragraph 50 below and correspondence in Appendix 5.

⁸⁸ Including Amnesty (p 24); JUSTICE (p 43); the Law Society (p 46); and Dr Xanthaki (p 51).

⁸⁹ 1st Report, Session 2004-05, HL Paper 28.

⁹⁰ p 47.

⁹¹ p 43.

⁹² p 24.

⁹³ QQ 44, 46.

⁹⁴ QQ 61, 63.

⁹⁵ Q 44.

involved (such as suspects and defendants) and the legal profession. Assessment must be made by an independent body, reporting publicly.

52. We recognise that there are a number of issues that remain unresolved and require careful examination. These include the scope of evaluation in practice: will it focus only on the implementation of a specific measure, or will it extend to the legal/criminal justice systems of Member States? In cases such as the European Arrest Warrant evaluation of the former may inevitably lead to evaluation of the latter. If this happens, what will the impact be on the independence of the judiciary? As to the independent monitoring body, will it be the Fundamental Rights Agency, the Network of Independent Experts on Human Rights or some other body led by the Commission? And as regards the effect of evaluation what, if any, sanctions will be available in cases of non-compliance? **These are issues requiring careful, but urgent, examination by Member States in order to establish an effective evaluation system.**

Judicial protection in the ECJ

53. The Hague Programme stresses the need for the Court of Justice to respond quickly to questions related to the interpretation of EU law in the area of Justice and Home Affairs. It refers to Article III-369 of the Constitutional Treaty, which provides 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”. The Hague Programme states that, in view of this provision, thought must be given to creating a solution for the speedy handling of requests for preliminary rulings concerning JHA, where appropriate by amending the Statutes of the Court. The European Council invited the Commission to bring forward, after consulting the Court, a proposal to that effect.
54. We asked for the Government’s comments on this matter and were told that, in their view, there were already mechanisms enabling the ECJ to expedite particular cases, so it was not clear that such a move was absolutely necessary at this stage.⁹⁶ **The Government’s response is very disappointing. In view of the far-reaching effects that measures such as the European Arrest Warrant will in many cases have on the rights of individuals, it is essential that any disputes arising from the interpretation of these instruments are resolved as soon as possible. We welcome the commitment by the European Council to establish a mechanism to expedite proceedings in the Court of Justice in JHA cases, and urge that priority be given to any relevant proposals tabled during the United Kingdom Presidency of the EU.**

⁹⁶ Q 48.

CHAPTER 9: CIVIL LAW

Mutual recognition or approximation?

55. The Hague Programme contains a very ambitious section on civil law. It calls for the mutual recognition programme in civil law to be completed by 2011 and puts forward ideas for action on mutual recognition in the field of family and succession law. It emphasises, however, that the concepts of “marriage” and “family” will not be harmonised. As in the field of criminal law, the question arises as to how far mutual recognition should extend in civil matters and whether mutual recognition can be achieved without a degree of approximation of Member States’ laws.
56. We received detailed comments on the civil law aspects of the Hague Programme from the Law Society. They were in favour of developing the EU mutual recognition agenda, believing that “the completion of the mutual recognition programme and the development of an effective cross-border litigation regime should go a long way to eliminate the problems inherent in cross-border litigation—principally high costs and lengthy and complex procedures”. Mutual recognition and enforcement “will significantly enhance the rights of litigants”.⁹⁷ On approximation, the Law Society stressed that “any proposals for the development of minimum standards for aspects of procedural law or ‘standardisation’ should be measures that are designed to facilitate mutual recognition rather than those that are designed to harmonise or approximate rules across the board”.⁹⁸
57. The Government supported this view. According to Baroness Ashton, it was clear from the Hague Programme that “mutual recognition is what we do, that we look across to see how we support mutual recognition”.⁹⁹ Harmonisation of procedural matters may be necessary to enable better mutual recognition.¹⁰⁰ But neither the Government, nor other Member States, would support harmonisation “as a good in itself”.¹⁰¹ **This is reassuring. We expect the Government to look most critically at the need for any harmonisation measures that the Commission may propose.**

The limits of EU competence

58. A related issue, which the Committee has examined in detail in its Report on the Rome II Regulation,¹⁰² is the extent to which the Community has competence, under Article 65 TEC, to adopt legislation in the field of civil law. That Article requires a cross-border dimension and also that the legislation is necessary for the proper functioning of the internal market. Baroness Ashton took the view that Article 65 indeed limited Community competence to cross-border cases and that there was no competence beyond cross-border issues, with the exception of matters which would facilitate

⁹⁷ p 48.

⁹⁸ *Ibid.*

⁹⁹ Q 79.

¹⁰⁰ Q 76.

¹⁰¹ Q 72.

¹⁰² *The Rome II Regulation*, 8th Report, Session 2003-04, HL Paper 66.

mutual recognition.¹⁰³ **This exception is a matter of considerable concern, as our Report on defence rights shows. The draft Rome II Regulation also shows the Commission's temptation to legislate universally. Any EU action in the civil law field under Article 65 of the EC Treaty must respect the conditions set out in that Article. There must be a clearly identifiable and substantial cross-border dimension. The legislation must also be necessary to enable the proper functioning of the internal market.**

Subsidiarity

59. It may be argued that action in many aspects of civil law, including most of the aspects mentioned in the Hague Programme, are not matters where action at the EU level is most appropriate, but are best left to Member States. We questioned Baroness Ashton on the necessity of EU action in the civil law field, and she justified EU action as providing benefits to EU citizens in their everyday lives.¹⁰⁴ The examples the Minister gave were legislation relating to small claims, maintenance and matrimonial disputes, especially those involving assets.¹⁰⁵ **We agree that there are some issues where EU action in civil matters may be beneficial to EU citizens. But it is essential that the benefit that EU action may confer is fully substantiated before any proposals in civil matters are tabled. National parliaments can be expected to examine closely the subsidiarity implications of proposals aiming to harmonise civil law.**

Family law

60. The Hague Programme calls for the development of EU action in family and succession law. The Commission is invited to submit a series of proposals, covering matters such as maintenance, succession, matrimonial property, and divorce, and to propose instruments such as a European certificate of inheritance and a European register of wills. Instruments in this area should be completed by 2011. As mentioned above, the European Council stresses that action will not be based on harmonised concepts of "family" or "marriage". But the Programme then goes on to add that "rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary to effect mutual recognition of decisions or to improve judicial cooperation in civil matters".
61. The Law Society expressed concern about this wording. It appeared to the Society that "a broad interpretation of 'necessary to improve judicial co-operation in civil matters' would lead to proposals that impact significantly on the domestic systems of Member States".¹⁰⁶ It believed that, in the light of the significant and deep-rooted differences in the laws and procedures of Member States, any approximation of substantive family law was premature.¹⁰⁷ But at the same time it recognised the existence of "forum shopping" in the family law field and the need to solve the issue of competing jurisdictions and the inequalities that might arise for one of the parties, and it

¹⁰³ QQ 76, 77.

¹⁰⁴ QQ 70, 71.

¹⁰⁵ QQ 74, 80, 81.

¹⁰⁶ p 49.

¹⁰⁷ *Ibid.*

would support rules on jurisdiction relating to cross-border family law disputes.¹⁰⁸ The Society also recognised the advantages of action in succession matters, while respecting national legal traditions. But it was opposed to the proposal for a European register of wills.¹⁰⁹

62. We asked for the Government for their reaction to the Hague proposals in this area. Baroness Ashton told us that there were everyday problems in cross-border situations, for instance where people owned property in different countries subject to different laws. In such cases there was a need at least for a framework for resolving any issues that might arise.¹¹⁰ While respecting the different legal traditions of Member States, it was important that people should have the appropriate information on how to act.¹¹¹ She believed that EU action could progress without defining concepts such as family and marriage.¹¹²
63. **As mentioned above, we believe that EU action in civil law is acceptable only if it adds value and is absolutely necessary to improve the everyday life of EU residents in situations having a cross-border dimension. This is even more so in the sensitive area of family law, where action at the EU level may challenge deeply-founded legal and social principles in Member States. We are not convinced that action in family law matters is required to the extent proposed by the Hague Programme. Supplying the individuals concerned with more and better information on their rights under the laws of Member States may be a more effective way of addressing cross-border issues than EU legislation. We believe that such avenues should be explored before embarking on the very ambitious legislative agenda set out in the Hague Programme.**

Quality of EU legislation

64. The Hague Programme calls for action to ensure coherence and upgrade the quality of Community law in matters of contract law, by measures of consolidation, codification and rationalisation of legal instruments in force and by developing a common frame of reference. We have examined these proposals in detail in the context of our current inquiry into European Contract Law. In the context of the Hague Programme we asked Baroness Ashton what action was envisaged in this area, but did not receive a clear-cut answer. The Minister told us that any such measures would support the drive for better regulation and promote better problem-solving and better understanding of the issues involved. But she added: “I do not yet have any straightforward ‘this is what we mean, this is what we are going to do’”.¹¹³
- Improving the quality of EU legislation is always welcome but the development of a common frame of reference for contract law raises a**

¹⁰⁸ *Ibid.*

¹⁰⁹ pp 49-50.

¹¹⁰ Q 80.

¹¹¹ Q 82.

¹¹² Q 85.

¹¹³ Q 195 of the Minister’s evidence to Sub-Committee E for its inquiry into European Contract Law. The evidence session took place immediately after the Minister’s evidence session on the Hague Programme. The full transcript of the Minister’s evidence on contract law will be published in that report.

number of issues. We will return to these in our Report on European Contract Law.

Relationship with international instruments

65. The Hague Programme calls on the Commission and the Council to ensure coherence between the EU and the international legal order and engage in closer relations with international organisations such as the Hague Conference on Private International Law and the Council of Europe. Accession of the Community to the Hague Conference should, according to the European Council, be concluded as soon as possible. Baroness Ashton welcomed the Commission's involvement in the Hague Conference, as it would take full account of what was happening in the Conference and ensure that EU action was not contradictory to it. The EU would act within the limits of its competence and Member States within the limits of their competence.¹¹⁴ **While recognising that Community participation in discussions in international fora may be necessary to ensure consistency and coherence between EC law and international instruments in civil law, we remain concerned about the external competence implications and the potential limitations that Community involvement may place on UNITED KINGDOM negotiations in such fora. The point has become more acute as the proportion of common law countries in the EU has decreased as a result of enlargement.**

¹¹⁴ Q 106.

CHAPTER 10: EXTERNAL RELATIONS

66. The Hague Programme closes with a section on external relations, in which the European Council identifies the development of a coherent external dimension of the EU JHA policy as a growing priority. It calls on the Commission and the Secretary General/High Representative to draw up an EU strategy covering all external aspects of all EU JHA-related policies by the end of 2005. Other parts of the Hague Programme also include references to the external dimension of EU action: there is a separate and detailed section, for example, on the external dimension of asylum and migration, stressing the need for EU partnership with third countries, and with countries and regions of origin and transit. Emphasis is also placed on return and readmission.
67. Many of our witnesses were concerned about the tone of the Hague Programme on EU co-operation with third countries. Amnesty noted that “there is a marked shift to counter ‘illegal immigration’ through engaging with third countries in ways that blur the fine line between co-operation and pressure”.¹¹⁵ JUSTICE criticised the emphasis on EU agreements with third countries on issues such as border controls and readmission, instead of developing third countries’ capacity to strengthen protection of refugees.¹¹⁶ ILPA believed that the EU focus was “unduly influenced by self-interest, i.e. the desire to ensure that refugees and asylum seekers are prevented or deterred from making their way to the territory of EU Member States”.¹¹⁷
68. **As we have commented in earlier Reports,¹¹⁸ co-operation between the EU and third countries is essential in developing an effective policy on immigration and asylum. Ways of providing protection for asylum seekers and refugees in regions of origin should be explored, but they must be a part of a general strategy of conflict prevention and resolution in regions of origin with the aim of achieving security and stability.¹¹⁹ Care must also be taken to ensure that the rights of asylum seekers, in particular protection against *refoulement*, are fully protected.**
69. Concerns have also been raised about the external dimension of EU action in the field of police co-operation and judicial co-operation in criminal matters. JUSTICE mentioned the agreements between the EC and the United States on the transmission of information on Passenger Name Records (PNR) and the agreement between Europol and the United States. It argued that these agreements did not sufficiently acknowledge EU standards of protection.¹²⁰ JUSTICE noted that “if EU co-operation with the US is to be further consolidated under the next five-year programme, greater attention needs to be paid to the inclusion of appropriate safeguards and remedies for those affected by the agreements”.¹²¹

¹¹⁵ p 23.

¹¹⁶ pp 41-42.

¹¹⁷ p 32.

¹¹⁸ A *Common Policy on Illegal Immigration*; and *New Approaches to the Asylum Process*.

¹¹⁹ See *New Approaches to the Asylum Process*, paragraph 95.

¹²⁰ pp 44-45.

¹²¹ p 45.

70. **We recognise that concerted action is essential to address global problems, such as international crime and terrorism but this must not be at the expense of fundamental rights, including data protection. As part of our regular scrutiny work, we have closely examined agreements aimed at forging a transatlantic partnership in criminal matters and have repeatedly raised concerns regarding the lowering of EU standards in order to ensure co-operation with the United States.¹²² In this context, EU-US co-operation, but also global co-operation, is crucial. So is co-operation of Member States with global organisations like Interpol.¹²³ We urge the Commission and the Secretary General/High Representative to give full weight to, and promote the protection of, fundamental rights when preparing the EU external action strategy for JHA.**

¹²² In particular in respect of the Agreement on the exchange of personal data between Europol and the US (*Correspondence with Ministers*, 49th Report, Session 2002-03, HL Paper 196, pp 191-201); and the Agreement on Passenger Name Records (PNR) between the Community and the US (*Correspondence with Ministers*, 25th Report, Session 2003-04, HL Paper 140, pp 128-135). We also expressed concern about the EU-US Agreements on extradition and mutual legal assistance (38th Report, Session 2002-03, HL Paper 153).

¹²³ We examined the EU's relationship with Interpol in some detail in our report *After Madrid: the EU's response to terrorism*, paragraphs 68-75.

CHAPTER 11: CONCLUSIONS AND RECOMMENDATIONS

Scrutiny

71. We regret that the Government saw fit to withhold from scrutiny the drafts of the Hague Programme prior to its adoption by the European Council. It is unacceptable that Parliament was denied the opportunity to examine and comment on proposals of such importance until it was too late to influence their content (*paragraph 4*).
72. We make our recommendations in this Report so that they can be taken into account in the negotiations and drafting of the Commission's five-year Action Plan (*paragraph 4*).

General principles

73. We welcome the emphasis that the Hague Programme places on respect for the principles of subsidiarity and proportionality and for the legal traditions of Member States in developing legislation in Justice and Home Affairs. We expect the Government to be vigilant in ensuring full respect for these principles (*paragraph 9*).

Freedom and security

74. Criticism of the Hague Programme for placing undue emphasis on security considerations at the expense of respect for fundamental right is justified. This emphasis on security may be explicable in the light of recent events, but it is important that measures to protect citizens' rights are not sidelined in the implementation of the Programme. We urge the Commission and Member States to give full weight to the need to protect fundamental rights when developing and implementing the five-year Action Plan for JHA (*paragraph 11*).

The Fundamental Rights Agency

75. The establishment of a Fundamental Rights Agency could be beneficial for the respect and promotion of human rights by the EU institutions and by Member States when applying EU law. Careful consideration must be given, however, to the role and powers of the Fundamental Rights Agency, in order to avoid wasteful duplication of work between the EU and the Council of Europe (*paragraph 15*).

Asylum—minimum standards

76. We fully share our witnesses' concerns regarding some of the standards adopted in the first stage of EU asylum measures. The Committee has repeatedly highlighted the danger of Member States reaching agreement on the basis of the lowest common denominator, which would not provide an adequate level of protection for asylum seekers and could jeopardise existing levels of protection in those Member States currently observing higher standards than those required by the EU (*paragraph 18*).
77. A detailed evaluation of the implementation of these instruments is essential to ensure that it is consistent with international human rights and refugee law standards (*paragraph 18*).

78. The concept of a Common European Asylum System, which has been a central objective of JHA policy since Tampere, remains valid to ensure consistent standards across the EU and to prevent “asylum shopping” (*paragraph 19*).
79. Proper evaluation of the first stage of the CEAS is essential before embarking on consideration of second stage measures; the deadline of 2010 is probably too ambitious. Evaluation should be carried out by an independent body of experts, whose findings should be published. It is essential that any new EU standards on asylum should ensure a high level of protection in accordance with international human rights and refugee law (*paragraph 20*).
80. Joint processing of asylum applications in the EU is not the right way forward. The key lies with improving the asylum process and decision-making in Member States. We welcome the UNHCR “Quality Initiative” and will monitor its progress during the UNITED KINGDOM Presidency of the EU (*paragraph 21*).

A European Asylum Office

81. A European Asylum Office could assist practical co-operation between national asylum authorities, through the exchange of information and best practice. In our Report on extra-territorial asylum processing, we recommended the establishment of an independent documentation centre managed on an EU basis. The European Asylum Office could take on this role in co-operation with the UNHCR (*paragraph 23*).
82. We see less value in the Office taking the role of an auditing/evaluating body. This could cause unnecessary duplication with the work of other structures specifically established to evaluate the implementation of EU measures in the JHA field. Still less should the Office develop a centralised decision-making role (*paragraph 23*).

Asylum—extraterritorial processing

83. We highlighted our concerns about extra-territorial asylum processing in our Report *Handling EU Asylum Claims: New Approaches Examined*. Studies on extra-territorial processing are a distraction from the central objective of improving asylum procedures in Member States (*paragraph 24*).

Migration

84. Effective EU action to counter irregular migration is hard to achieve without common EU policies on legal migration and the admission of third country nationals for paid employment. We welcome the invitation by the European Council to the Commission to prepare a policy paper on legal migration, and urge Member States to examine the issue as a matter of priority (*paragraph 28*).
85. We urge Member States to revisit the issue of the rights of legally resident third country nationals (*paragraph 29*).

Border security

86. When negotiating measures involving controls on third country nationals, Member States should take full account of their implications for privacy and

data protection and give public opinion, and national parliaments, enough time for meaningful scrutiny and debate of them (*paragraph 30*).

The European Border Agency

87. We remain of the view, expressed in our Report on *Proposals for a European Border Guard* that the case for a centrally managed, multi-national European Border Guard has not been made (*paragraph 34*).

Police co-operation and the role of Europol

88. It is important to improve co-ordination between Member States, and with international bodies such as Interpol, without necessarily creating yet more structures in the EU (*paragraph 37*).
89. Europol has an important role to play but is still underused by Member States. Before attempting to redefine its role, it is essential to convince Member States of the need to co-operate with Europol fully (*paragraph 37*).
90. Any proposals to enhance the exchange of information must be accompanied by high standards of data protection. There is a clear need for specific EU data protection standards for the Third Pillar (*paragraph 37*).

Criminal law – approximation and mutual recognition

91. Approximation of the criminal laws of Member States is likely to have a significant impact on Member States' legal cultures and traditions and on national sovereignty. We are pleased to see that the Hague Programme views such approximation as being necessary only if it facilitates mutual recognition. However, the more progress that is made on developing the mutual recognition programme, the greater the need will be for some sort of minimum standard across the EU of procedures in the legal processes for which mutual recognition will be claimed (*paragraph 40*).
92. Such approximation is necessary not only to facilitate mutual trust and justify mutual recognition, but, more importantly, to protect the rights of the individuals affected. However, we would urge caution in the further development of harmonisation in sensitive areas such as the admissibility of evidence. Before any further expansion of harmonisation there needs to be a full examination of the implications of such a development for Member States. This is an area where the principle of subsidiarity will come into play and due observance of it will be necessary (*paragraph 40*).

The rights of the defendant

93. We welcome the commitment towards the swift adoption of the Framework Decision on defence rights. but the need to reach agreement on its terms should not jeopardise the adoption of adequate standards of protection for suspects and defendants. Standards must not be lowered in order to obtain agreement (*paragraph 42*).
94. The Government's non-committal attitude to a forthcoming legislative initiative on bail is regrettable. Any legislative proposals on bail should be treated as a matter of priority during the UNITED KINGDOM Presidency (*paragraph 43*).

Eurojust and the European Public Prosecutor

95. We welcome the deletion of the reference to the potential establishment of a European Public Prosecutor from the final version of the Hague Programme. Eurojust has a pivotal role to play in enhancing judicial co-operation in criminal matters in the EU, and we welcome the commitment of Member States to revisit its role in order to achieve greater efficiency. In developing Eurojust's role in dealing with multilateral cases, care must be taken that the rights of the individual are not jeopardised for the sake of "prosecutorial efficiency" (*paragraph 45*).

Mutual trust and the judiciary

96. We welcome the emphasis on bringing together prosecutors and judges from Member States in order to promote understanding of the different legal systems in the EU. Better understanding should lead to enhanced trust and consequently better implementation of mutual recognition measures (*paragraph 47*).

Evaluation

97. It is very important that proper monitoring and evaluation procedures should be put in place. Evaluation must not be limited to the collection of statistical data, but must also be based on information coming from the practical experience of the individuals involved (such as suspects and defendants) and the legal profession. Assessment must be made by an independent body, reporting publicly (*paragraph 51*).
98. There are a number of issues relating to evaluation that remain unresolved. They require careful, but urgent examination by Member States in order to establish a meaningful evaluation system (*paragraph 52*).

Judicial protection in the ECJ

99. In view of the far-reaching effects that measures such as the European Arrest Warrant will in many cases have on the rights of individuals, it is essential that any disputes arising from the interpretation of these instruments are resolved as soon as possible. We welcome the commitment by the European Council to establish a mechanism to expedite proceedings in Luxembourg in JHA cases, and urge that priority be given to any relevant proposals tabled during the United Kingdom Presidency of the EU (*paragraph 54*).

Civil law – justification, competence and subsidiarity

100. Any EU action in the civil law field under Article 65 of the EC Treaty must respect the conditions set out in that Article. There must be a clearly identifiable and substantial cross-border dimension. The legislation must also be necessary to enable the proper functioning of the internal market (*paragraph 58*).
101. There are some issues where EU action in civil matters may be beneficial to EU citizens. But it is essential that the benefit that EU action may confer is fully substantiated before any proposals in civil matters are tabled. National parliaments can be expected to examine closely the subsidiarity implications of proposals aiming to harmonise civil law (*paragraph 59*).

102. EU action in civil law is acceptable only if it adds value and is absolutely necessary to improve the everyday life of EU residents in situations having a cross-border dimension (*paragraph 63*).

Family law

103. This is even more so in the sensitive area of family law, where action at the EU level may challenge deeply-founded legal and social principles in Member States. We are not convinced that action in family law matters is required to the extent proposed by the Hague Programme (*paragraph 63*).
104. Supplying the individuals concerned with more and better information on their rights under the laws of Member States may be a more effective way of addressing cross-border issues than EU legislation. We believe that such avenues should be explored before embarking on the very ambitious legislative agenda on family law set out in the Hague Programme (*paragraph 63*).

Quality of legislation in the civil law field – a common frame for contract

105. Improving the quality of EU legislation is always welcome but the development of a common frame of reference for contract raises a number of issues. We will return to these in our Report on European Contract law (*paragraph 64*).

Civil law – relationship with international instruments

106. While recognising that Community participation in discussions in international fora may be necessary to ensure consistency and coherence between EC law and international instruments in civil law, we remain concerned about the external competence implications and the potential limitations that Community involvement may place on UNITED KINGDOM negotiations in such fora. The point has become more acute as the proportion of common law countries in the EU has decreased as a result of enlargement (*paragraph 65*).

External relations – migration and asylum

107. Co-operation between the EU and third countries is essential in developing an effective policy on immigration and asylum. Ways of providing protection for asylum seekers and refugees in regions of origin should be explored, but they must be a part of a general strategy of conflict prevention and resolution in refugee producing areas with the aim of achieving security and stability. Care must also be taken to ensure that the rights of asylum seekers, in particular protection against *refoulement*, are fully protected (*paragraph 68*).

External relations – criminal law

108. Concerted action is essential to address global problems, such as international crime and terrorism but this must not be at the expense of fundamental rights, including data protection. EU-US co-operation, but also global co-operation, is crucial. So is co-operation of Member States with global organisations like Interpol. We urge the Commission and the Secretary General/High Representative to give full weight to, and promote

the protection of, fundamental rights when preparing the EU external action strategy for JHA (*paragraph 70*).

Recommendation for debate

109. In view of the important issues raised by the Hague Programme, we recommend this Report to the House as a basis for a general debate on Justice and Home Affairs issues (*paragraph 4*).

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
Baroness Bonham-Carter of Yarnbury
Earl of Caithness
Lord Corbett of Castle Vale
Lord Dubs
Baroness Gibson of Market Rasen
Earl of Listowel
Viscount Ullswater
Lord Wright of Richmond (Chairman)

APPENDIX 2: CALL FOR EVIDENCE

Sub-Committee E (Law and Institutions) and Sub-Committee F (Home Affairs) of the House of Lords Select Committee on the European Union are conducting a short joint inquiry into the Hague Programme. The Hague Programme is a five year programme in the area of justice and home affairs, which was approved by the European Council on 5 November 2004. It follows on from the five year Tampere programme, which was the first attempt to further develop the EU as an “area of freedom, security and justice”.

The Sub-Committees would welcome comments on any of the following elements of the Programme:

The general direction of the Programme

- The further development of a common European asylum system
- The scope for EU action on legal migration
- The development of policies on irregular migration and border controls (including the role of the European Border Management Agency)
- Measures to assist legally resident third country nationals
- Police co-operation: including the enhancement of data exchange between national law enforcement authorities (and related data protection issues); crime prevention; and the future role of Europol
- Judicial co-operation in criminal matters (in particular the role of Eurojust)
- Mutual trust and mutual recognition in criminal matters
- EU action in civil law (in particular proposals for future action in the fields of family and succession law)
- The external dimension of the Programme

In addition to the evidence they receive the Sub-Committees will take into account their previous work in these areas, which includes reports on asylum, immigration, police co-operation, and judicial co-operation in criminal and civil matters.

APPENDIX 3: LIST OF WITNESSES

The following witnesses submitted evidence. Those marked * also gave oral evidence:

- Amnesty International
- Association of Chief Police Officers (Scotland) (ACPOS)
- * Department for Constitutional Affairs
- European Commission, Directorate General of Justice, Freedom and Security
- Europol
- Professor Elspeth Guild
- * Home Office
- International Law Practitioners' Association (ILPA)
- JUSTICE
- Law Society
- National Criminal Intelligence Service (NCIS)
- Dr Constantin Stefanou, Fellow, Institute of Advanced Legal Studies (University of London)
- United National High Commissioner for Refugees (UNHCR)
- Dr. Helen Xanthaki, Academic Director, Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies (IALS), University of London

APPENDIX 4: GLOSSARY OF ACRONYMS

ACPO	Association of Chief Police Officers
AFSJ	Area of freedom, security and justice
CEAS	Common European Asylum System
ECHR	European Court of Human Rights
ECJ	European Court of Justice
FRA	Fundamental Rights Agency
ILPA	Immigration Law Practitioners' Association
JHA	Justice and Home Affairs
NCIS	National Criminal Intelligence Service
NGO	Non-governmental organisation
SIS	Schengen Information System
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

**APPENDIX 5: EXCHANGE OF CORRESPONDENCE BETWEEN THE
CHAIRMAN OF THE EU SELECT COMMITTEE AND CAROLINE FLINT, MP,
PARLIAMENTARY UNDER SECRETARY OF STATE, HOME OFFICE**

Letter from Lord Grenfell to Caroline Flint, MP

Communication from the Commission to the Council and the European Parliament on the area of freedom, security and justice: results of the Tampere programme and future guidelines (10249/04 COM(04) 402, 20249/04 ADD 1 SEC(04) 680 & 10249/04 ADD2 SEC (04) 693

This Communication on the follow-up to Tampere has been examined by both Sub-Committee E (Law and Institutions) and Sub-Committee F (Home Affairs) of the Select Committee on the European Union. We were grateful for your detailed explanatory memorandum.

We consider that the Communication is of pivotal significance in the debate over the direction of EU Justice and Home Affairs policy in the next five years. As you know, our Committees have examined many of the issues raised in the Communication in detail in the past, and are currently holding inquiries on aspects of mutual recognition and criminal procedural law, and police co-operation and counter-terrorism activities. This letter outlines the Committee's general view on the Commission's strategic priorities in Justice and Home Affairs.

We note that many of the Commission's proposals build on already established priorities. In many fields, these proposals seem a logical continuation of existing work, prime examples being measures on illegal immigration and returns, mutual recognition in criminal matters and the role of Eurojust (where, as will be apparent from our recent report, we welcome the central role that the Commission envisages for Eurojust). Other priorities touch on matters where, notwithstanding the Commission's efforts, little has been achieved thus far – prime examples are legal migration and the status of third-country nationals legally resident in Member States. The Committee has repeatedly highlighted the importance of these issues for the Union, and we strongly endorse the priorities identified by the Commission.

In other areas the Commission is putting forward proposals that are more radical than what has been proposed so far: a prime example here is the area of civil law, especially fields such as succession and the civil status of individuals, where no proposals have yet been tabled. The Committee has repeatedly expressed its concerns over the necessity and legitimacy of Union action in the field of civil law, especially when it is not related to the functioning of the internal market. We note that you are concerned to ensure the respect of national legal traditions in civil law and would welcome any information on what concrete steps you will take in this context.

We note that you will oppose the inclusion in the programme of the establishment of a European Corps of Border Guards. As you know from our report on a European Border Guard, we share your opposition to the creation of a Corps of

Border Guards, but it seems unlikely that the United Kingdom's views will carry much weight on this issue given its exclusion from the European Border Agency (in spite of its wish to participate in it). We would like to take the opportunity to stress again our view that the United Kingdom's piecemeal approach to border controls, immigration and asylum in the EU is inconsistent and detrimental to United Kingdom interests.

The same point applies to visa policy. In this connection we note that the Government advocates the sharing of Visa Information System data with police authorities. This would extend the dissemination of visa data very widely, and we would be grateful for more information about the Government's intentions in this field, the justification for such an extension and any legal obstacles or implications that you foresee.

Given the Government's support for the first stage of the 'asylum package', your opposition to further harmonisation seems a rather abrupt change of direction. We would welcome a clarification of the reasons behind this policy decision.

In the policing area you say that you favour a 'flexible interpretation' of the Europol Convention. What exactly does this mean? Do you support the Commission's view that Europol should assume an operational role? On police co-operation we note that the Commission envisages the reinvigoration and development of the Police Chiefs' Task Force. We would welcome your views on the Task Force and the scope for increasing its effectiveness.

As you will know from our comments on the Commission's Communication on crime prevention, we remain sceptical about the scope for effective crime prevention at EU level. We are not persuaded otherwise by the comments in paragraph 34 of the Explanatory Memorandum, which in our opinion is unrealistic and does not take sufficient account of subsidiarity.

Finally, an element underlying the Commission's Communication are the institutional and legal constraints (such as unanimity in the Council) hampering EU action in JHA. This will change when the draft Constitutional Treaty is adopted, since decision-making in most JHA matters will follow the 'Community method' (majority voting and co-decision). But in view of the fact that the Constitutional Treaty is unlikely to enter into force before the end of 2006 at the earliest, the question arises whether to take into account its provisions (and the new competences it gives the EU in the field) in the Tampere II programme (which will run from 2005 to 2009). We would welcome your views on this issue.

The Committee decided to retain the documents under scrutiny.

I am copying this letter to Jimmy Hood MP, Chairman of the Commons European Scrutiny Committee; and to Dorian Gerhold, Clerk to the Commons Committee; Michael Carpenter, Legal Adviser to the Commons Committee; Les

Saunders (Cabinet Office); and Stuart Young, Departmental Scrutiny Co-ordinator.

16 September 2004

Letter from Caroline Flint, MP, to Lord Grenfell

Communication from the Commission to the Council and the European Parliament on the area of freedom, security and justice: results of the Tampere programme and future guidelines (10249/04 COM(04) 402, 20249/04 ADD 1 SEC(04) 680 & 10249/04 ADD2 SEC (04) 693

I am writing in response to your letter of 16 September. I apologise for not responding earlier by my office did not receive your letter until 20 October.

I note that the Committee has concerns about the necessity and legitimacy of Union action in the field of civil law, especially when it is not related to the functioning of the internal market. The Committee will be aware that the same concern underpinned the Government's lobbying to secure changes in the original Convention text of the new Constitutional Treaty. It is a concern that has been heightened by attempts on the part of the Commission in a number of current civil law dossiers to have those dossiers applicable in both cross-border and purely domestic cases. With the active support of a number of other Member States, we have resisted this, arguing that there is no Treaty basis for domestic application.

We are conscious that there may be those who wish to extend the use of the internal market argument to a point where we see it coming into conflict with the principle of respecting the different legal traditions of Member States. Both in relation to the current dossiers under negotiation (European Payment Order, small claims mediation) and areas in which work is being taken forward over a longer term (including in relation to contract law) the Government will ensure that inappropriate inroads are not made into our common law system.

I note your views on the European Corps of Border Guards and the "United Kingdom's piecemeal approach to border controls, immigration and asylum in the EU". The Government does not consider that its policy on these issues is piecemeal. Stronger EU Borders and a better approach to asylum are strongly in the United Kingdom's interest. We opt in to immigration and asylum measures when it is in our interests to co-operate in these issues with our EU partners; immigration and asylum are international issues and they demand international solutions. In practice this means we have tended to opt in to measures on asylum and illegal migration, but do not tend to participate in legal migration measures.

You asked for further information about the Government's intentions for sharing Visa Information System data. As you know from earlier correspondence with the Committee, we advocate an approach that seeks to maximise the use of data stored on EU information systems, and within that we have argued that the EU

should do all it can to exchange information widely across law enforcement agencies. Enhancing our collective ability to identify and refuse entry or monitor the movements of individuals who pose a threat to national or public security at the EU's borders is an essential step in strengthening the EU external border and thereby, our ability to prevent a terrorist attack. This was recognised in the European Council Declaration on Combating Terrorism and in a number of recent EU measures, for example, the proposal to transfer data on lost and stolen passports to Interpol.

However, within the context of VIS, we are referring to EU law enforcement agencies in a broad sense, which therefore includes Member States immigration authorities. The Government does not intend, at present, to propose that VIS data be shared more widely with police authorities.

The Government is committed to working with our European partners to achieve an effective, fair and managed system of immigration and asylum. In 1999 we stated that we were interested in developing co-operation with EU partners on asylum. We recognise now, as then, that immigration and asylum are international issues and that they demand international solutions. We will continue to collaborate and co-operate on immigration and asylum issues where it is in the interests of Britain and in the interests of Europe.

At the Tampere European Council in October 1999, Member States agreed to look towards the creation of the Common European Asylum System (CEAS). We endorsed the need for the first phase of the CEAS to concentrate on establishing common minimum standards, which can help protect genuine refugees while safeguarding asylum systems from abuse. When the Asylum Procedures Directive is formally adopted, the legislation to put in place the first phase of the "Tampere Agenda" will be complete at the EU level. This is a substantial package of legislation. It is important next to implement it in each Member State and to evaluate its effects properly. The draft Hague Programme for Justice and Home Affairs co-operation recognises that second phase legal instruments will only come forward following a thorough evaluation of the current (first phase) instruments. The Procedures Directive will not be in force until 2007 at the earliest, so we will not be in a position quickly to make an informed assessment of the impact of the measures we have agreed, and to judge what further measures might be appropriate.

In the meantime, we believe that the focus of our work at the EU level should be on practical co-operation between Member States. Practical co-operation both within the EU and with third countries can help us to improve protection in regions of origin, and to persuade third countries to re-document and accept the return of their citizens where they are found not to be in need of international protection. We feel that this is where the immediate benefit of EU co-operation can be gained. Our policy has not changed; we are simply continuing to take a pragmatic approach to EU co-operation to ensure that it can deliver real benefits.

The Government supports a 'flexible interpretation' of the Europol Convention in the sense that where Europol can assist Member States through guidance, informal

support and examples of best practice Europol should be encouraged to do so, even where it is not explicitly stated in the Convention. The United Kingdom does not support the view that Europol should assume any coercive powers. Europol should provide value-added analysis of existing criminal intelligence to Member States, becoming more focused on supporting and co-ordinating targeted operations by Member States or groups of Member States that ensure tangible results in the disruption and prevention of Organised Crime. Methods to increase the effectiveness of the Police Chief's Task Force (PCTF) are currently under discussion; on the basis of whether the PCTF's main tasks are agreed to be operational or more policy focused the PCTF may either be brought closer to Europol or to Council Structures or to both. Whatever the exact outcome the PCTF should be given a firmer legal basis and will be better placed to contribute to intelligence led operations by Member States.

I note that your Committee remains sceptical about the scope for effective action in crime prevention at EU level. We agree that the vast majority of activities to prevent crime are carried out at a local or national level, and that crime prevention is primarily the responsibility of individual Member States. However, there is substantial value to be gained in sharing experience and evidence-based good practice at EU level solely to support Member States' efforts, focusing on a few key priorities from which Member States would most benefit. It is also the government's view that some activities, such as work on the designing-out of crime or improving the comparability of statistics, can only be strengthened by an EU-wide approach. In terms of the United Kingdom we should be ready to exploit and influence any opportunities that would make the task of policing our streets easier or our own efforts more effective. This includes using the EU and other Member States when it is in our interests to do so. Furthermore, it is clear that specific proposals will emerge on the actions specified in the Communication. We will carefully scrutinise each of these as they appear to ensure that whatever is proposed properly falls within a third pillar legal base and satisfies the subsidiarity principle.

Where there are competencies within the existing Treaties, the Government sees no difficulty in bringing forward measures envisaged under the Constitutional Treaty. As the Hague programme runs until after expected ratification of the Constitutional Treaty, we do not oppose the programme making reference to competencies under this Treaty. However, The Hague Work Programme should not pre-empt the Constitutional Treaty by proposing contentious measures that can only be brought forward under that Treaty.

The Hague Work Programme will be agreed by Heads of State at the European Council on 5 November. I am confident that it will reflect the strenuous efforts the Government has made to ensure it accommodates United Kingdom priorities.

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

4 November 2004

Letter from Lord Grenfell to Caroline Flint, MP

*Communication from the Commission to the Council and the European Parliament on the area of freedom, security and justice: results of the Tampere Programme and future guidelines (docs 10249/04 COM (2004) 402, 10249/04 ADD 1 SEC (2004) 680 and 10249/04 ADD 2 SEC (2004) 693) The Hague Programme—
'Strengthening Freedom, Security and Justice in the EU'*

Thank you for your letter of 4 November about this Communication, which Sub-Committee F (Home Affairs) of the European Union Select Committee considered at a meeting on 1 December.

We are grateful for your detailed response to my letter of 16 September and for the helpful clarification of a number of points that we raised. I will not comment further at this stage since Sub-Committee E and Sub-Committee F are planning to undertake a short joint inquiry into the Hague Programme early in the New Year, as we were not given the opportunity to scrutinise it in advance of its adoption by the European Council. We will be inviting you to assist this inquiry by giving oral evidence to the Sub-Committees.

There is one additional point that we are likely to wish to pursue in that context—the extent to which the Government's desire that the EU should exchange information widely across law enforcement agencies extends to third countries and agencies outside the European Union, including Interpol.

We have cleared the Commission's Communication from scrutiny.

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

2 December 2004

Letter from Caroline Flint, MP to Lord Grenfell

The Hague Programme on strengthening freedom, security and justice in the European Union

I attach a copy of The Hague Programme on Strengthening Freedom, Security and Justice in the European Union that was endorsed by Heads of State, including the Prime Minister, at the European Council on 5 November. The Government

welcomes this programme, which lays down a sound basis for progress in the Justice and Home Affairs area over the next 5 years. The Government's views on the priorities for this work programme were set out in my Explanatory Memorandum of 28 June 2004 on the Commission's Communication on the Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations (10249/04 JAI 204 COM (04) 402) and in the debate on the Floor of the House of Commons on 14 October 2004.

The Government's objectives are well served by The Hague Programme. Its tone and content are consistent with the views I expressed in the Explanatory Memorandum of 28 June and the 14 October Commons debate on the subject. Especially welcome is the emphasis on a practical approach and a focus on adding real value to Member States' efforts. For example, through partnership with third countries, progress on returns and readmissions, and improvements in intelligence-led policing. We also welcome the emphasis on evaluation and implementation which will help ensure delivery of EU level initiatives bringing tangible benefits to United Kingdom citizens. In the areas that the Government considered of key importance, set out below, we are satisfied with the substance of the programme. We will seek to ensure that United Kingdom interests are equally well reflected when the European Commission sets out its Action Plan next year to put the programme into practice.

The Government is content with the sections of The Hague Programme relating to immigration and asylum. In this area, we believe that relations with third countries are particularly important and that we need to improve co-operation with source and transit countries, including developing partnerships with countries of origin. Areas of special importance for the United Kingdom include the protection of refugees, progress on returns and readmissions, and closer working with the EU's new neighbours. The Government also welcomes the incorporation of biometrics into travel documents, and minimum security standards for EU ID cards, as set out in the programme. Such developments are vital in tackling identity fraud, combating illegal immigration and serious crime and terrorism.

We welcome the importance given to practical and collaborative co-operation on asylum. As we near completion of the common minimum standards legislative package, the United Kingdom believes and the text makes clear, that any further legislative action at the EU level should be based on an evaluation of the current instruments. This principle of decision-making based on evaluation is repeated in relation to the suggestion of a European Office to co-ordinate co-operation on asylum processing. We are also pleased that the Programme acknowledges the need to look into the difficulties behind issues such as joint processing before considering whether to take them any further. Given the timetable for adoption, implementation and evaluation of the first phase asylum measures, we consider the dates attached to the second phase (2007 for evaluation, 2010 for adoption) to be premature. However, we recognised that many Member States wanted target dates to aim for and, in this context, we accepted their inclusion. We retain the ability to choose whether to opt in to future measures and will continue to do so when it is in our national interest.

We welcome the importance attached to border security in this programme and the recognition that the 'control and surveillance of external borders fall within the sphere of national border authorities.' We support the establishment of the European Borders Agency and the support being offered to Member States in vulnerable positions, including the establishment of teams of national experts to provide technical and operational assistance to Member States. The United Kingdom is not alone in its opposition to a European Border Guard, and the establishment of one could only be considered by the EU after an evaluation of the teams of national experts and a further feasibility study. Co-operation with our EU counterparts on border management issues is essential, but there are ways that we can work together without needing a corps of border guards. The new EU Border Agency is one such example, as are the proposed study into a community fund for border management and teams of national experts—both of which were included in The Hague programme.

The Programme calls upon the Council to adopt a decision, no later than 1 April 2005, to extend Qualified Majority Voting and co-decision to all immigration measures, with the exception of legal migration. A proposal for a Council Decision is due to be adopted on 21 December. The Government's position is set out in its Explanatory Memoranda of 15 November on document 14497/04, and of 25 November on documents 15130/04 and 15130/04 COR 1 (en). We opted-in to the decision, which will have no effect on the United Kingdom's Title IV protocol negotiated at Amsterdam. The United Kingdom will continue to be able to opt in to measures that are in the United Kingdom's interest. We are keen to see such measures adopted without the delays experienced under unanimous voting in a Council of 25 Member States.

The Hague Programme takes as the basis for the exchange of information the principle of availability. The Government strongly supports the aims of sharing relevant information between Member States and reducing unnecessary barriers to data exchange. It is also important to ensure that release of information is properly controlled and adequate safeguards are in place to protect sensitive information sources and techniques being put at risk. That is why the Government is pleased that The Hague Programme adopted language that made clear that sensitive information sources and intelligence methods should be protected from unqualified disclosure, particularly where the security services are concerned. The Government also welcomes the focus on better practical co-operation between law enforcement bodies within the EU and the development of an intelligence-led approach to policing. This should encourage better sharing and analysis of criminal intelligence and a more strategic and accountable use of it.

The Government endorses The Hague Programme's support for the EU's counter-terrorism programme, including the continued implementation of the comprehensive agenda set out in the 2004 Declaration on Combating Terrorism. We welcome the recognition of the need to address the underlying factors that contribute to the radicalisation that supports terrorist activities. Although national security must remain the clear responsibility of Member States, collective security can only be achieved through cooperation between Member States, supported by the EU.

The Government strongly supports the continued emphasis on mutual recognition in The Hague Programme. It ensures that Member States' judiciaries can co-operate effectively whilst still respecting their distinct and diverse legal systems. The Hague Programme also highlights the development of confidence building and mutual trust in the EU, which the Government can support on the condition that it is based on the diversity of Member States' legal systems. We support the evaluation of the implementation of EU justice policies in order to ensure these bring improvements in EU judicial co-operation. Linked to this, the emphasis in the programme on providing Eurojust with the necessary powers to effectively aid judicial co-operation is also welcome. Although some Member States pushed for the inclusion of a reference to the establishment of a European Public Prosecutor (EPP), this was resisted by the majority of Member States and does not feature in the programme. The Government remains unconvinced of the need for an EPP and is satisfied at its exclusion from the programme.

The Government can also support the call for further work on procedural rights in criminal proceedings, taking into account Member States' legal traditions, as highlighted in the programme. We would hope to be in a position to finalise work on both the Framework Decision on the European Evidence Warrant and the Framework Decision on certain procedural rights in criminal proceedings by the end of the United Kingdom Presidency in 2005.

The Government welcomes the importance the Council attaches to the further development of judicial co-operation in civil matters and the completion of the programme of mutual recognition. This programme supports the ability of European citizens to live, work, study, buy and sell and do business across European borders with the same security and ease of access to justice as at home. The programme invites the Commission to submit proposals on maintenance, succession, matrimonial property regimes and divorce, indicating that instruments in these areas should be completed by 2011. These are areas requiring special care, in which member states have particular sensitivities; discussion on any proposals brought forward will have regard to the need to respect individual member states' traditions, and the assurance that such instruments will not be based on harmonised concepts of "family", "marriage" or other is welcome.

The Government is pleased to see an explicit reference to the mainstreaming of Justice and Home Affairs issues into the EU's external relations, especially where action at EU level can complement the actions of Member States. The JHA priorities abroad through co-operation with third countries is one of the keys to achieving domestic improvements.

I am writing in similar terms to Jimmy Hood, MP, Chairman of the European Scrutiny Committee, and copying this letter to Dorian Gerhold, Clerk to the European Scrutiny Committee, to Les Saunders (Cabinet Office), and to Stuart Young, Departmental Scrutiny Co-ordinator.

21 December 2004

Letter from Lord Wright of Richmond to Caroline Flint, MP

Inquiry into the Hague Programme

As you know, Sub-Committee F (Home Affairs) of the Select Committee on the European Union is undertaking a short inquiry jointly with Sub-Committee E (Law and Institutions) into the Hague Programme, which was approved by the European Council on 5 November. I can now send you a copy of our call for evidence.

I understand that you have kindly agreed to give evidence to a joint meeting of the two sub-committees on Wednesday 26 January at 4.45 p.m. and we look forward to that. It would be very helpful to have in advance of your oral evidence a note setting out the Government's views on the Programme. As the Programme was not deposited, no explanatory memorandum was submitted and we have not had the opportunity to scrutinise it in the normal way, although we did scrutinise the Commission's earlier Communication on the subject.

13 December 2004

Letter from Caroline Flint, MP, to Lord Wright of Richmond

Inquiry into The Hague Programme

Thank you for your letter of 13 December enclosing a copy of the call for evidence for your inquiry on The Hague Programme. I believe that your letter crossed with my letter to Lord Grenfell of 21 December, which set out the Government's views on The Hague Programme in which I covered many of the issues you raised in your call for evidence. This letter therefore concentrates on those areas that have not already been addressed. I hope you find it acceptable to accept both letters as the Government's written evidence for this inquiry.

2. The Government does not believe that The Hague Programme itself was depositable for Parliament Scrutiny, as it was an internal Council working document and was only formally published in the conclusions of the November European Council, although I appreciate that it was posted on the Council's Internet Website. However, I am happy to help your Committee with its inquiry and look forward to appearing before the joint meeting of Sub-Committees E and F on 26 January.

3. The Government remains content with the general direction of the Programme and will seek to ensure that the Action Plan implementing The Hague Programme will follow this framework. The United Kingdom Presidency in the second half of 2005 will finalise the Action Plan if necessary and begin implementing it.

4. The Government welcomes the continuing debate on immigration for employment purposes and recognises that most Member States face similar

challenges and opportunities in this area. We value the work to date to identify a broad EU based framework for migration, within which individual Member States can pursue their own national plans for migration, and we support continued work in this field. We believe the Commission has a valuable role to play in formulating the scope for action through encouraging debate and we agree that there are benefits to be gained from the exchange of ideas, knowledge and experience in this field. We shall be examining the Commission's Green Paper on managing economic migration carefully and constructively. The United Kingdom has taken a positive approach to opening its labour markets to new Member States since enlargement of the EU. Transitional arrangements for nationals of 8 of the Accession States (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia, Slovenia) which have been in place since 1 May are working well. Unlike most other EU countries, by opening up our labour market, we are ensuring that Accession nationals who were already in the United Kingdom, possibly illegally, can legitimise their status and move into the formal economy, paying tax and national insurance rather than working in the sub-economy. Nearly all applicants to the Worker Registration Scheme are in full time employment and doing jobs in sectors where there are key skills shortages and recruitment difficulties (hospitality and catering; administration, business and management, agriculture; health; construction).

5. The United Kingdom welcomes and has already gone some way to achieving the principles outlined in the November JHA Council Conclusions on the establishment of common basic principles for integration policy in the EU. The Government has already embarked on a wide community cohesion agenda. There are valuable initiatives in place at local level and the aim now is to identify and build on those initiatives to develop a great sense of "belonging" and shared values. Classes in citizenship and English are currently being piloted in selected areas by using existing provisions and building on pioneering projects already in place. The approach needs to be practical and flexible to meet the needs of the individual and the community that they are joining. For prospective new citizens, the United Kingdom has already introduced a requirement that they should meet a particular standard of English. Later in the year secondary legislation will be introduced requiring applicants to show that they know something of life in the United Kingdom, and we are exploring innovative ways of testing this. The United Kingdom will carry forward the strategies on integration started during the Netherlands Presidency.

6. The United Kingdom fully supports the aims and objectives of the European Border Agency, which will become operational in May 2005. It will more effectively co-ordinate Member States' joint action at the EU external border. The Government recognises the importance of working with its European partners. We seek to participate in joint operations and other activities wherever possible and participated in a significant number of operations led by the EU Border Management centres. Other Member States acknowledge and are keen to learn from United Kingdom expertise in many areas, for example new detection technology and document forgery detection. Despite this the United Kingdom has been excluded from the Border Agency Regulation. This is a point of legal principle which needs to be clarified; and as you know we will make an application to the ECJ against our exclusion. We have noted your request to be regularly updated on progress of the challenge and will write to you at key stages of the procedure.

The Government welcomes the call for the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls. We also welcome efforts to increase the security of EU travel and residence documents by incorporating biometric identifiers and fully support the Hague Programme's call for the development of minimum standards for national identity cards.

7. The Hague Programme takes as the basis for the exchange of information the principle of availability, which means an obligation on Member States to make available to other Member States information pertinent to investigations or proceedings in another Member State. We strongly support the aims of sharing relevant information between Member States and reducing unnecessary barriers to data exchange. It is also important to ensure that release of information is properly controlled and adequate safeguards are in place to protect sensitive information sources and techniques being put at risk. Therefore, we are pleased that The Hague Programme adopted language that made clear that sensitive information sources and intelligence methods should be protected from unqualified disclosure.

8. The Hague Programme recognises that crime prevention is an indispensable part of the work to create an area of freedom, security and justice across the EU. While crime prevention is primarily the responsibility of individual Member States, there is substantial value to be gained in sharing experience and evidence-based good practice at EU level solely to support Member States' efforts, using a more strategic, structure EU-wide approach, providing that the principles of subsidiarity and proportionality are respected.

9. The Programme also recognises the need for measures to be taken to ensure that the necessary resources are in place for effective delivery of these objectives, such as the strengthening of the EUCPN. We firmly agree that providing suitable organisational arrangements is crucial.

10. The Government believes that Europol should provide value-adding analysis of existing criminal intelligence, and support targeted operations by Member States that ensure tangible results against organised crime. We particularly welcome the agreement that Europol should produce forward looking threat assessments from 1 January 2006 onwards. This complements and supports United Kingdom thinking that Europol should be central to a more effective use of criminal intelligence and the process of intelligence-led policing than it has been in the past. The Hague Programme does not require Europol to, and it should not, develop operational powers or be responsible for terrorist threat assessments.

11. External relations was covered in the Government's letter of 21 December but we also look forward to the Commission's forthcoming proposals for pilot EU Regional Protection Programmes, as envisaged in their recent Communication (4 June 2004) on 'durable solutions'.

I am copying this to Lord Grenfell, Chairman of the European Union Committee, to Lord Scott of Foscote, Chairman, Sub-Committee E, European Union

Committee, to Jimmy Hood, MP, Chairman of the European Scrutiny Committee, to Simon Burton, Clerk to the European Union Committee, to Tony Rawsthorne, Clerk to Sub-Committee F, to Sarah Price, Clerk to Sub-Committee E, European Union Committee, to Les Saunders (Cabinet Office), and to Stuart Young, Departmental Scrutiny Co-ordinator.

21 January 2005

APPENDIX 6: OTHER RECENT REPORTS FROM THE SELECT COMMITTEE

Annual Report of the EU Select Committee 2004 (32nd Report 2003–04, HL Paper 186)

Relevant Reports prepared by Sub-Committee E

Session 2000–01

Minimum standards in asylum procedures (11th Report, HL Paper 59)

Session 2001–02

The European Arrest Warrant (6th Report, HL Paper 34 and 16th Report, HL Paper 89)

Minimum standards of reception conditions for asylum seekers (8th Report, HL Paper 49)

Defining refugee status and those in need of international protection (28th Report, HL Paper 156)

Session 2003–04

The Rome II Regulation (8th Report, HL Paper 66)

Strengthening OLAF, the European Anti-Fraud Office (24th Report, HL Paper 139)

Session 2004–05

Procedural Rights in Criminal Proceedings (1st Report, HL Paper 28)

Relevant Reports prepared by Sub-Committee F

Session 2001–02

A Common Policy on illegal immigration (37th Report, HL Paper 187)

Session 2002–03

Europol's Role in Fighting Crime (5th Report, HL Paper 43)

Proposals for a European Border Guard (29th Report, HL Paper 133)

Session 2003–04

Handling EU asylum claims: new approaches examined (11th Report, HL Paper 74)

Judicial Co-operation in the EU: the role of Eurojust (23rd Report, HL Paper 138)

Session 2004–05

After Madrid: The EU's response to terrorism (5th Report, HL Paper 53)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB COMMITTEE F)

WEDNESDAY 26 JANUARY 2005

Present:	Avebury, L	Listowel, E
	Bonham-Carter of Yarnbury, B	Mayhew of Twysden, L
	Caithness, E	Neill of Bladen, L
	Corbett of Castle Vale, L	Scott of Foscote L (Joint Chairman)
	Gibson of Market Rasen, B	Thomson of Monifieth, L
	Lester of Herne Hill, L	Ullswater, V
		Wright of Richmond, L (Joint Chairman)

Examination of Witnesses

Witnesses: CAROLINE FLINT, a Member of the House of Commons, Parliamentary Under Secretary of State, Ms SUSANNAH SIMON, Director of European Policy, IND, and MR CHRISTOPHE PRINCE, Deputy Head of Unit, European and International Unit, Home Office examined.

Q1 Lord Scott of Foscote: We are very grateful indeed to you for giving us your time, particularly as this is a joint meeting of two Sub-Committees, and neither Lord Wright nor I have any experience of this having happened before. I hope that you will not feel over-burdened by having to face questions from two Sub-Committees. We have divided the questions between us, but I do not think it matters who asks the questions. May I start by asking you about the work that has been done on the Tampere Conclusions, which set out the EU work for the 1999–2004 period? I gather there are gaps and work that has still not been properly completed so that the Hague Programme has to pick some of that up. Does the Hague Programme in your opinion satisfactorily address the lack of progress in dealing with the Tampere work programme?

Caroline Flint: First, can I thank you for your welcome to this Joint Committee. I will just introduce the two officials I have with me, Susannah Simon and Christophe Prince.

Ms Simon: I am Director of European Policy in IND.

Mr Prince: I am Deputy Head of Unit in the European and International Unit.

Q2 Lord Scott of Foscote: We are very grateful to both of you for coming to help as well.

Caroline Flint: I am very grateful for being here as well. In relation to your question about progress under Tampere and how far the Hague Programme has picked it up, one of the issues you have to consider in looking at Tampere and the Hague Programme is just how new the issues surrounding the justice and home affairs agenda are in terms of the European Union. It is fair to say that Tampere was a

building block in terms of these discussions. We felt that progress had been made in a number of areas, for example the development of the Eurodac fingerprinting exercise. I understand that that enables us to identify 200 people a month. In relation to the whole issue of people with assumed identities, it enables us to use fingerprints to catch people who try to get entry under another identity. That has been very successful. Another success is the European arrest warrant, which has enabled us to deliver in a more streamlined way those people who commit crimes and then come to the UK, and vice versa. It is also fair to say that in a number of areas more progress needs to be made. In the 18 months that I have been attending Justice and Home Affairs Councils, there has been a continuing discussion on issues around Eurojust and Europol, and how we can—not extend their remit—but make them more effective. Part of the effectiveness in all these areas is just how much Member States put into the pot to make these organisations work. In terms of the groundwork, that has been important. There have been some key successes, but the Hague Programme recognises that we have to consolidate some of those initiatives. One of the issues that was missing from Tampere, which I hope you feel the Hague Programme reflects, is the need to get better at monitoring and evaluating just what has been done. We have spent a huge amount of time, as politicians and officials across 25 Member States, discussing these issues and trying to come up with the detail. As with anything, whether it is a national policy or a European policy, it will only be as good as the implementation at the end of the day, and the Hague Programme reflects the fact that in terms of new initiatives we have to get better at

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developing systems that run along with that. Before we embark on any initiatives in the next five years, we have to consolidate, and then evaluate what has been achieved and how well the Directives are working in practice.

Q3 Lord Wright of Richmond: Minister, as Chairman of Sub-Committee F I welcome you, following Lord Scott's welcome. Thank you very much for your very clear and helpful letters in preparation for today. You referred in your letter of 21 December to Lord Grenfell to the European Commission's action plan, which, when speaking in December, you referred to as being prepared "next year", i.e., this year. Are we already in touch with the Commission about what might appear in an action plan, bearing in mind what you have just said about the initiatives and the need to consolidate?

Caroline Flint: We have had discussions with our colleagues from Luxembourg about their Presidency, and our Presidency following, and some of our areas of priority. We were doing that also with our Dutch colleagues too. We have been trying to develop, through the different presidencies, how we can forward-plan work. You are right in saying that the action plan is still being formulated. We have a meeting this weekend with the new Commissioner and the new Home Secretary, so that is in train.

Mr Prince: We have been in contact with Luxembourg and we expect Commissioner Frattini to present some of his initial ideas on the action plan this weekend. They hope to have that finalised by the end of the Luxembourg Presidency.

Caroline Flint: July.

Lord Wright of Richmond: Minister, you may know that the Luxembourg Ambassador gave evidence yesterday to the European Select Committee, which was very helpful.

Q4 Lord Scott of Foscote: Minister, you referred to evaluation, and for my part I agree with you about the importance of that. I want to come back to that later, because there is a discrete question on that which I would like to ask you in due course. You mentioned also the European arrest warrant. There has to be a balance between measures that promote the efficiency of the prosecution process—and the European arrest warrant falls into that category—and on the other hand proper protection for the rights of individuals who are subject to criminal process in countries not their own—other Member States. One of the criticisms that has been expressed about the Hague Programme is that it focuses successfully on the former and gives insufficient attention to the latter, to the protection of the rights of citizens. If one is considering mutual recognition, mutual recognition by governments of one another's criminal justice systems is one thing, but acceptance

by citizens in individual Member States of the way in which they will be treated if they are the subject of criminal proceedings in other Member States is equally important. Do you think that sufficient attention is paid in the Hague Programme to the need to protect individuals' rights when they find themselves the subject of criminal proceedings in other Member States?

Caroline Flint: I think there is, but, in relation to the emphasis in the Programme on issues around security—whether in terms of tackling crime or terrorism—it is important to recognise that in tackling those issues, it is also about people's individual and collective freedoms as well. Undoubtedly, if we do not deal with some of those measures, people's freedoms and their freedom from fear will not be addressed. It is right that alongside issues like the European arrest warrant we should look at minimum standards that we can expect in relation to court proceedings in different Member States. To that end, we have been involved in discussions around representation, translation, and a number of other areas. Without undermining individual Member States' own judicial procedures and legal systems—because that is very much reflected in the Hague Programme as well in recognising that different systems exist—that should not necessarily count against some of the positive work in those areas. You may come on later to issues such as bail. We have just received a paper that has been produced in relation to that. That is another good example where it might be appropriate for us to have discussions about how, if there was a UK system, someone who was arrested in another EU Member State could be granted bail, particularly for an offence that would not normally attract a custodial sentence. These are important issues, and we have had some of that discussion already under the previous work programme in terms of the minimum standards in criminal proceedings, and that aspect will be picked up in the Hague Programme over the coming months.

Q5 Lord Avebury: In regard to the protection of fundamental human rights, paragraphs in the Hague Programme refer also to the extent and mandate of the European Monitoring Centre for racism and xenophobia, but I wonder, Minister, whether you noticed an article in the *European Voice* which referred to the possibility of resuscitating the Framework Decision on racism and xenophobia, which was the subject of an inquiry by Sub-Committee E, and whether you feel that this should be incorporated in the Commission's programme. Has the Government yet thought about whether it would promote a Framework Directive on racism and xenophobia during the Presidency of the UK in the second part of the year?

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Caroline Flint: I have not seen that article in the *European Voice*. This is one of the areas which my colleague the noble Baroness in DCA is leading on, and I think she is due to give evidence before this Committee.

Q6 Lord Scott of Foscote: Which colleague?

Caroline Flint: Baroness Ashton. I think she will be leading on the setting up of the agency. I understand the Framework Decision will fall to us, though, as part of the JHA.

Mr Prince: We understand the Luxembourg Presidency will be seeking to re-present a Framework Decision on racism and xenophobia at the February Council. As the Committees will be aware, there were difficulties the last time it was presented, and some of those outstanding issues will still be there, and we will look at that closely.

Caroline Flint: As you can imagine, these are quite difficult issues to discuss, particularly now across 25 Member States. People have different interpretations of racism and xenophobia. I imagine there will be issues in relation to the establishment of the Human Rights Agency and how the broader aspects of equality issues will be viewed.

Q7 Lord Lester of Herne Hill: In Tampere, the fight against racism is emphasised with great priority, and obviously in Europe at the moment it must be a very high priority. I was struck by what looked like lack of ambition in the Hague Programme in tackling that. Does the Government have thoughts about beefing it up, especially in relation to the European Race Directive and the need to make quite sure that training, remedies and that whole European part of the racism/anti-racism programme are not rhetorical but translated into practical reality?

Caroline Flint: As I said before, this area has been very difficult to deal with. However, in terms of some of the other areas we have dealt with over the last year, particularly in relation to issues around security, some of the discussions we have had have been quite interesting. We have to make sure that people's concerns and fears about security do not lead to racism against different ethnic groups within countries. It has been important to make sure that that is addressed in other areas that we have been looking at in terms of migrant groups and other issues of security. We think it should be talked about, not as a separate issue, but in the context of developing those other policies. In terms of whether we want to develop that area itself in the Hague Programme, one of the issues would be how much we feel we can secure common ground. That is not to say that it is not important, but it is a question of whether we could arrive at a policy agreement, set against all the other issues we are trying to address as part of the Hague Programme. We have been looking at how we

can tackle some of these issues and some of the community-based issues during our Presidency, so that these issues are recognised as being important. I will take some soundings from within the Department and take back your comments.

Q8 Lord Wright of Richmond: Minister, the Hague Programme calls for the establishment of a Common European Asylum System and a European Asylum Office. Can you give us your views on that? I think you have been rather cautious about the first; are you also cautious about the second, and what kind of powers do you see the asylum office having?

Caroline Flint: In terms of the Common European Asylum System, as I said earlier, we think it is important that, where we have reached some common ground, for example on the European Refugee Fund, the Eurodac Regulation, the Temporary Protection Directive, the Reception Conditions Directive, the Dublin II Regulation, the Asylum Qualifications Directive, and of course the Asylum Procedures Directive, we make sure that they are implemented. We do see areas where we can reach some common agreement. There is no doubt that an issue like "asylum-shopping" could not have been addressed without agreement across the European Union. That said, we continue to be of the opinion that to have a system whereby there is one form of processing applicable to all is not something that would work, and we are not alone in that view although some people think it will work. We are very clear where we are on that issue. In relation to the Office, we think there probably is some benefit in some pooling of information and sharing of practice across the European Union. In that sense, that would be quite helpful, and we are not averse to it. Sharing of expertise is also helpful as well. We engage with our opposite numbers in other European countries on a regular basis to see how we manage our courts and deal with interviews, and in a whole host of areas. That is not to say that we do not have anything to learn from anyone else—we may well have. However, the idea of establishing an office that would become a common point through which some sort of processing would happen would be extremely difficult not just in terms of organising it but in terms of getting common agreement. That is why, whilst it is in the Hague Programme, the wording reflects the difficulties there might be. There would have to be a feasibility study into what we want to get out of it, which is important. The study itself would not necessarily mean that we want an office that would be the central point for dealing with all the issues around asylum.

Q9 Lord Scott of Foscote: Minister, I have had the privilege of being the Chairman of Sub-Committee E for more than four years, and my predecessor, Lord

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Hope, presided over an inquiry into the Procedures Directive, which was then subject of a report from the Select Committee; so it has been around and discussed for a very long time now, and it still has not finally been agreed. One finds the Hague Programme saying that the Council should adopt unanimously this Directive as soon as possible, and the Commission is invited to conclude the evaluation of the first phase of the four legal instruments—and the Procedures Directive will be the last of the four—in 2007, and move on to the second phase before the end of 2010. The history of the Procedures Directive does not give one much confidence in those dates. Is it realistic to suppose that the implementation will have taken place in time for there to be any meaningful evaluation of first-phase instruments by 2007 and the second phase in 2010?

Caroline Flint: I agree; it is a very ambitious programme to meet those deadlines, and that is a concern we voiced, along with others, when the work programme was being finalised. We did say that we felt to implement by 2007 and evaluate in order to move to a next phase by 2010 was probably unrealistic. Some people disagreed with us, as would be the case at these events, but what is really important here is that we have agreed that there has to be evaluation of what has already been agreed before moving on to the next phase.

Q10 Lord Scott of Foscote: I am sure that is right, but you have to have something to evaluate first, do you not?

Caroline Flint: I agree, but do not forget that we are also evaluating other measures as well. In terms of the Procedures Directive, it will be 2007 at the earliest that we think it will come about.

Q11 Lord Scott of Foscote: What is the state of play on the Directive? Has everything been agreed? Is anything still being negotiated?

Caroline Flint: We are still waiting for the European Parliament to express their view as well.

Ms Simon: We are waiting for the European Parliament to express an opinion, and that is what is holding it up now.

Q12 Lord Scott of Foscote: But all the Member States have agreed.

Caroline Flint: Yes, we have all agreed.

Q13 Lord Scott of Foscote: It is only the Parliament.

Caroline Flint: Yes.

Q14 Lord Wright of Richmond: Minister, the Hague Programme talks about launching studies on the feasibility of the joint processing of asylum claims both inside and outside the EU. We have looked in past hearings of the Committee into the question of

extra-territorial asylum processing, and I think the Government withdrew some of its proposals on this last year. Are you going to resist the idea of joint asylum processing if this is proposed in the future?

Caroline Flint: We are not minded to agree with joint processing in the way it has been outlined so far. It was one of the reasons why, when we were negotiating the programme, we felt the study should look at the difficulties involved. It is one of those phrases that can be bandied around, and it is only when you get down to the nitty-gritty of what it would mean in reality and how it would affect individual countries, and how it would be processed and who would be processing it, that you can then explore just how difficult these issues are. In that sense we do not expect any movement on this until 2006 or even 2007. If we were to participate in a study, then obviously we would want to input into that in relation to what we strongly believe are real difficulties in this area. Some of the issues we have discussed over the last year are, for example, how we can better work with the United Nations, particularly in terms of looking at those regions of the world that deal with the largest number of refugees and all the associated issues and problems. Where that presents itself in the West is often in the form of people-traffickers, who exploit these people and transport them to this country and other countries. That is an area where we have had helpful discussions. In fact we have the UN representative coming to the informal meeting this weekend. The other problem about a joint asylum procedure goes back to your earlier question; it pre-supposes a common asylum policy, but I think that that is fraught with difficulties, and a consensus would be very difficult to find.

Q15 Lord Avebury: You mentioned a few minutes ago the sharing of practice between Member States. Do you think that as part of that process there could be an extension of the Quality Initiative, under which there is an audit of first-instance decision-making between the Home Office and the UNHCR? Although it is too early to say how that scheme is going to work out, because they will be reporting in February or March, it sounds like an extremely good idea, considering all the problems we have had in the past with faulty decision-making at first instance. If we have learned something from collaboration between the Home Office and the UNHCR, is that not something that could be extended, as part of sharing good practice, to the rest of the European Union?

Caroline Flint: In principle I suppose the answer to that is “yes”. We have been looking at the interviewing process and how that can be improved, and we have also been looking at the quality of decisions. You could share best practice.

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Q16 Lord Wright of Richmond: Minister, turning to migration, there has been some criticism of the Hague Programme for continuing minimal provisions on legal migration and for the lack of legislative progress in this area over the past five years. Are there ways in which the EU can move forward in this area, other than by legislation?

Caroline Flint: When we have discussed this, one of the issues has been difficulties with the different needs of different countries in terms of migration; so it is very difficult to come up with one blueprint, and the skills needed in each country will be different. That said, there are ways, such as best-practice seminars and exchange programmes for information and personnel to see how we organise our different migration schemes, and we have a number of different legal migration schemes that operate in different sectors and address different employment needs. Out of that, the European Union could provide guidance and advice taken from experience and expertise, to share with countries that may or may not have a history of dealing with these routes of migration. It would be very difficult to get agreement on a Directive, but that is not to say there should not be some discussion in this area. Important to this is recognising that people who do come through that legal route have our support as well. It is important that that is recognised, and sometimes it is not.

Q17 Lord Wright of Richmond: What about labour migration? There seems to be a lack of a coherent policy on that. Ought we to be doing more to get a policy?

Caroline Flint: It is helpful for the EU—and it has potential no doubt—to act as a forum for exchanging dialogue on labour migration and mobility between EU states. The structures that could support that are expert groups, exchange of personnel, people going to different countries to see how they operate, and reflecting best practice and expertise in those areas.

Q18 Lord Mayhew of Twysden: Professor Elspeth Guild suggested to us that there is an inherent weakness in the Hague Programme, and that is the lack of any common definition in European Union law of “illegal immigration”. She says that by concentrating as the Hague Programme does upon ills such as illegal immigration, trafficking in and smuggling of human-beings, terrorism and organised crime, the Programme fails to take account of the inherent legal complexity of these matters. There is no basic definition, and therefore there cannot be any agreement on how to cope with them. My question is this: are we making any progress in overcoming what is perceived as that inherent weakness?

Caroline Flint: I do not quite understand what the witness said. In terms of illegal immigration, people have not come through the appropriate systems

where they could come through legally into a country, or they have used the system and have not come for that purpose, or they have not come through properly. It is difficult in that sense to set a wider definition on that. I do not know if this underlies what you are saying, but in terms of those who come illegally, there are questions asked—going back to the earlier point—about labour migration. The reality is that a lot of people do come in illegally in one way or another, and they can come in many forms, but they do not want necessarily to work in the legal economy anyway. It is not always the case—I am not saying we should not have systems as individual Member States to deal with labour migration and people coming in illegally (obviously we have to do that)—that there is a legal migration route for those coming in illegally. If you think about women who are brought in and end up, many of them, as slaves in the vice trade—we are not going to have a labour migration route for women into the sex trade.

Q19 Lord Mayhew of Twysden: In fairness to her, she says: “One cannot be an illegal immigrant in a country one has never entered; thus preventing illegal migration presents insurmountable problems of legality, particularly when coupled with the lack of definition of ‘illegal migration’.”

Caroline Flint: I think I had better read that section of her evidence and get back to you on that.

Ms Simon: We do not have a definition, but we recognise that there are different forms of illegal immigration, and therefore we use different ways of tackling it; so some of the ways you tackle it is by border control, but some of it is about what you do outside of the EU. Of course, you are not an illegal immigrant into the EU until you arrive in the EU. Arguably, many of the people who find themselves somewhere like Libya, in a transit country, are already illegal immigrants into those countries. What the EU is doing is working with transit countries and third countries in order to—

Caroline Flint: Another example would be the fact that our agreements with both France and Belgium have meant that we can have British personnel working on the train services coming through those countries. If that is where she is going, yes, I suppose her point that you therefore can be identified as somebody coming in illegally before you set foot in the country is valid, because in that sense our frontier controls, with co-operation from those countries, have been extended to tackle that problem. But that was all part of the discussions with our European colleagues and the positive discussion about how they can contribute to stopping people shopping around different Member States.

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Q20 Lord Wright of Richmond: Can we turn to the rather controversial question of the European border guard. I think you know that our Committee joins the Government in arguing against formation of a European border guard, but the Hague Programme talks about the potential establishment of a European “system” for border guards. How do you interpret that; and are we actually getting a European border guard by the back door?

Caroline Flint: Our position stays the same on this issue, and I have to say that we are supported by a large number of other Member States, although one of the discussions we had when agreeing the Hague Programme was about the need for a border agency—not that that would take away from individual countries operating their own border controls. We felt that it was important to have some oversight about issues, problems and difficulties. For example, there could be support from experts from different countries if it was needed: a rapid response not in terms of guards on frontiers but expert response if a particular crisis or problem emerged. We all felt that that was useful. The term “a system” of European border guards does not necessarily mean that we will have a European border guard as a multi-national border guard agency, but rather we will look at how border guards across Europe will work and share best practice and identify problems. It is a system that undoubtedly is the responsibility of each Member State, which can share different practice. Some of the countries that come in, in our extended border, will welcome other countries’ expertise and support in this area. One of the issues we picked up on is possibly looking to what funding might be appropriate for that new external border to support those countries as well. It is one of the reasons why we support the border agency because we felt that all those issues needed to be discussed, and you did not have to have a multi-national border guard approach to still need those other requirements. The Programme says there should be a further feasibility study. That is important because we are a bigger European Union now and it is important to hear the voices of those other countries, particularly as they are part of that new border.

Q21 Lord Wright of Richmond: Do you or your colleagues know what position Poland has taken on this?

Caroline Flint: Poland was opposed to the idea, as were Hungary, Ireland, Portugal, Denmark, Slovakia, Sweden, Estonia, Finland and Austria.

Q22 Lord Wright of Richmond: I ask because my Sub-Committee visited the German/Polish border and saw a degree of quite clearly serious linguistic

problems, but a quite impressive degree of co-operation between the Polish and German border guards.

Caroline Flint: I think that should be encouraged.

Ms Simon: It may be worth adding that as a result of that co-operation the Poles are now carrying out similar forms of co-operation on the external border with the Russians and the Ukrainians.

Q23 Lord Wright of Richmond: I think I am right in saying that you helped us organised that visit. Thank you very much. Can we turn to information exchange because I think you know that Sub-Committee F are at present engaged in an inquiry into counter-terrorism, and there is a strong emphasis in all the documents we are examining on the need for more information exchange, to enhance security, and to fight illegal immigration and terrorism. There are some worries clearly about the extent to which exchange of information can damage the protection of personal data and civil liberties. How do you respond to that worry, or those criticisms?

Caroline Flint: It is a fair point. One of the issues about the exchange of data is in some areas a lack of confidence in other Member States’ data protection systems. We do have to have a better exchange of information. One of the issues around Europol, as the European centre for collecting intelligence, that will help in terms of crime, has been the disproportionate amount of information being put in by some countries and very little by others. That is one of the issues that needs to be addressed, and also in terms of sharing information; and as regards the point you make about data protection, we need to develop confidence about individual Member States’ application of data protection measures. Then we can feel confident that when we are giving information it will be dealt with appropriately and vice versa; if the information is given to us, then it is done within proper protocols and procedures. That is a very important part of building this confidence, and hopefully good information.

Q24 Lord Lester of Herne Hill: Does the Government have any proposals to put across Europe for quality controls, effective safeguards against abuse, and remedies where the information system does unnecessarily infringe personal liberty, for example because wholly inaccurate information enters the system and then adversely affects the rights of the individual? Are there safeguards envisaged, or remedies, for quality control?

Caroline Flint: I understand that the Commission is planning to put forward a paper on data protection later this year, which might pick up on some of the issues you are concerned about, and quality control as well of course, and, when that comes through the

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usual channels, we will be responding and no doubt it will be deposited.

Q25 Lord Lester of Herne Hill: It is of course a very old issue with our Committee; we have gone into this in previous reports over the years.

Caroline Flint: The Hague Programme lists the conditions under which the principle of availability should be applied, and that does include issues around data protection and individuals being protected from abuse of data. I know that is just words in a programme, but it is probably one of the reasons why the Commission now will come forward with a paper that we can put some flesh on.

Q26 Earl of Caithness: Minister, the Hague Programme, in typical European fashion, centres everything on Europe. There is a lot of emphasis in your letters to us about Europol. Can you tell us what the latest situation is with regard to the appointment of a Director of Europol, because it is a bit of concern to a lot of people that you are pushing more and more on to Europol, which depends on good leadership, but because of political wrangling and bad procedures they cannot appoint a director. The second point is that in view of the inward-looking nature of the Commission, it will alarm a lot of people if there is not a single word here about the international perspective and the need for Europol to work with other agencies around the world, so can you say a word about Interpol, please?

Caroline Flint: In terms of your first point, you are correct that there has not been a final solution to the appointment of a new Director of Europol. I would not say that it is necessarily about Europol expanding; I think it is about Europol doing the job it was given the remit to do in the first place. That is something that can be improved upon. In relation to your second point, I have visited Interpol and was very pleased to meet at that time a person from the UK who was working for Europol but who was based at Interpol. As far as I understand it, that is still the arrangement; that there is someone from Europol at Interpol. It is important that those organisations are seen to liaise and contribute to each other's body of work. I think there have been some improvements in co-operation on that front. That was 12-15 months ago. In terms of the other international side of things as well, in that area in terms of crime, that is important, but also all Member States bring their own international connections, which is also very important in terms of our relationships with different Member States making different headway in different areas, and sharing information on networks. That is something that individual Member States can bring to the pot. That in itself just cannot be done by magic by creating a body; it is often to do with long-term personal relationships and networks, and working

together, which adds to the sum worth of the European Union.

Q27 Earl of Caithness: Is it a priority for our Presidency of the Union to improve the practices and procedures of Europol and the appointment procedure, so that we do not have the current situation appearing on a regular basis; and will there be a move during our Presidency to ensure that Europol co-operates properly with other international agencies?

Caroline Flint: There are no plans to review the appointment procedures. It has not come to my attention that somehow Europol may not be co-operating properly with other agencies. You may want to have a word with me elsewhere about that, if you have particular concerns. That has not been my impression as such.

Q28 Lord Avebury: Minister, in your letter to the Chairman of the European Union Committee, Lord Grenfell, of 21 December, you said that you welcomed the recognition of the need to address the underlying factors that contribute to the radicalisation that supports terrorist activities. Do you agree that apart from the detailed information exchange that goes on at the level of Europol there ought to be a co-ordinated European programme of research and analysis of the ideological and cultural universe from which terrorism arises, and if so would you promote this as part of the Presidency of the European Union?

Caroline Flint: It is difficult for me to say "yes" or "no" to that today. One of the issues around radicalisation is individual countries addressing the ways in which they work and discuss these issues. For example, if we take the situation in Holland, the stereotype that the people involved in extremist behaviour might be new to the country was rocked by the recent murder which involved someone who was born in that country, who spoke Dutch and was very much assimilated into Dutch culture. That has raised a number of questions about how we address these issues. During the Dutch presidency we shared work and ideas between officials in relation to some of these areas. It is one of those areas that we are considering with Luxembourg what we might do. I will take your idea away, if I may, and raise that with other colleagues in the Department who deal primarily with that area.

Q29 Lord Avebury: I was thinking of more theoretical work of the type that was done, for example, by Jason Burke in his book *Al-Qaeda* and in the 9/11 Commission report for that matter, where there is quite a comprehensive discussion at the beginning of these ideological foundations of terrorism. Presumably, there is research going on in

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the United Kingdom on these matters. I am thinking that we ought to share this with the rest of the European Union to make sure that we know what is going on elsewhere, so that there is not any duplication.

Caroline Flint: In principle that sounds common sense to me. I will have a look more closely at the proposal later on.

Q30 Lord Wright of Richmond: Minister, my last question goes back to Europol. You are on the record as saying that the UK does not support the assumption by Europol of any coercive powers. We questioned the Luxembourg Ambassador about this yesterday because the Luxembourg Presidency priorities talk about examining the possibility of giving Europol operational competence. Is there a division between Luxembourg's views and ours? Are you worried about this?

Caroline Flint: I am not unduly worried by it. I think we talked particularly about questions raised by some as to whether Europol should have coercive powers, and by that I mean powers of arrest and the right to stop and question people. We are firmly against that. If we want to look at the operational competence of the agency and how it might work better based on its existing remit, that is a fair discussion to be had. I do not think we would have a problem with that. Europol has to be able to contribute properly within its existing remit of work. We feel we can play a part to help make that happen. One of those issues is discussing in more depth a better exchange of information and how they can contribute to intelligence risk assessment in different areas, which can help either operations in individual countries or joint operations where they are thought appropriate.

Q31 Lord Scott of Foscote: Minister, can I ask for your help in elucidating some parts of the Hague Programme which refer to matters of criminal law. Paragraph 3.2 of the Programme refers to the advantages being expected from creating the "progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law". All European judicial systems would accept the primacy of the rule of law and would have signed up to the ECHR and be aware of Article 6 of the Convention, which requires fair trials, an independent judiciary and so on. I have to say that I do not really know what is meant by "the development of the European Union judicial culture" unless it is just stating what I have just mentioned; nor do I understand what is meant by this being "based on diversity of the legal systems of the Member States and unity through European law". It all sounds splendid, but what does it mean?

Caroline Flint: I think in some respects your first point is right; it is on the basis of recognising there is European law, but it also comes down to the implementation. For example, we have mutual recognition in a number of areas. We always want to ensure that that is implemented to the best effect in each Member State. That is what is important about unity; that you can have, as we all know, diverse legal systems, but where we have reached common ground and mutual recognition we will seek to make sure that that is implemented in a unified way through processes across the European Union. That is how I would interpret that area.

Q32 Lord Scott of Foscote: What about the expression "European judicial culture"? I have a feeling that I ought to be part of it, but I do not know what it is!

Caroline Flint: As I say, it is the progressive development of a European judicial culture based on diversity of legal systems. I think it is recognising that in a number of areas we have been able to make progress through mutual recognition. It is very important to recognise that the Hague Programme does emphasise and re-confirm that mutual recognition should be the cornerstone of judicial co-operation; but it is flagging up again that we have made progress in a number of areas, which have allowed us to take forward certain aspects of criminal law more speedily. For example, we talked earlier about trying to look at ways in which we can protect individuals, whether it is a UK citizen tried in a Belgian court or vice versa. That is again recognising a European responsibility, whilst at the same time not having to sign up to one legal system across Europe.

Q33 Lord Scott of Foscote: I certainly agree with you about the importance of mutual recognition and the importance of measures to promote mutual justice in judicial systems of Member States by EU citizens.

Caroline Flint: I have recently looked at some of our events for the UK Presidency, and a number of those bring together prosecutors across Europe and people from other parts of the judicial system, and in terms of exchanging and networking in terms of good practice as well, so there are other benefits too. That is again about the European culture, the judicial culture.

Q34 Lord Scott of Foscote: Perhaps I was getting too excited by the use of the adjective "judicial"! The next question talks about steps for enhancing mutual recognition. The Programme refers in paragraph 3.3.1 to the adoption of measures related to the admissibility of evidence and the execution of prison sentences. Is the Government contemplating harmonisation of European law in the area of admissibility of evidence?

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Caroline Flint: No, we are not. Our initial view on this is that there are differences in rules of evidence in common and civil law, and it is unlikely that we could achieve an overall framework of mutual recognition on evidence. We do not feel that it is appropriate to go down that route, to be honest. However, there may be some specific areas such as self-incrimination or burden of proof where agreed minimum standards could be possible, and which might be beneficial, but we would need to do more work on those areas.

Q35 Lord Scott of Foscote: So some harmonisation, but not full-scale. Is that right?

Caroline Flint: With all these issues we look at them on a case-by-case basis. There are different ways in which different legal systems accept evidence and are presented, which would not allow a framework to apply to each European Union Member State to apply in that area. I think they have looked at this in terms of long-term work, but I do not think there is likely to be anything substantial on this until after the ratification of the Constitutional Treaty, if and when that happens.

Q36 Lord Scott of Foscote: I imagine the reference to execution of prison sentences is the possibility of sentences being served in the country of residence of the person being sentenced.

Caroline Flint: Yes. We fully support the principle of allowing prisoners to serve their sentences in their own country. That is appropriate for all sorts of reasons, in terms of rehabilitation and what-have-you; but we are not sure that a separate initiative in this area is necessary because we already have the Council of Europe Convention that we are signed up to, which covers these areas, so I am not sure why we would need to duplicate it.

Q37 Lord Scott of Foscote: I wondered what the Commission had in mind in including these references.

Mr Prince: They may wish to go a little bit further, and we understand that the Austrians will be presenting a proposal on mutual recognition, which takes the Council of Europe proposals a little bit further, speeds them up and perhaps changes some of the provisions on that.

Caroline Flint: We do not know the detail of where they are going with this.

Q38 Lord Scott of Foscote: It is a case of “watch this space”.

Mr Prince: Yes. It has only just come out.

Q39 Lord Scott of Foscote: Earlier, Minister, mention was made of the importance of matters such as bail. In the evidence we have had relating to minimum standards for protection of those subjected

to criminal proceedings in other Member States, bail has figured very high, but there has been no timetable and there seems to be no real priority given to this matter in the Hague Programme. Is that to be regretted?

Caroline Flint: It was an issue that came up, but I am not sure whether you are aware that the Commission has recently published a consultation paper on EU policy on bail, but we have not had a chance to have a proper look at that. We will make our views known on that. As I said, we are not averse to thinking about how this might apply because there would be some advantages, given that we obviously want to have assurances about people coming back, and for that matter people want assurances from us if we have a UK citizen who has committed an offence in another country coming back to the UK. It is at such an early stage at the moment that it is difficult to say. It did come up during discussions.

Q40 Lord Scott of Foscote: Is this a matter that the UK might give priority to during its Presidency?

Caroline Flint: It is likely the Commission will propose a legislative initiative later this year and it might be something that we will have to pick up on, but it is difficult to say at this stage until we have looked at the consultation document. The other side of it is, at the end of the day, how much common agreement there is in terms of how it would be progressed. Again, there are so many issues that you could discuss, and some of the practical application of the Hague Programme has to be deciding the priority and seeing whether there is a will not only to pass the relevant policy but implement it.

Q41 Lord Thomson of Monifieth: Can I press the Minister to consider whether the Government should not give a great deal more priority to the issue of bail in this area of international judicial policy, not only with Europe, which we are discussing here, but also internationally because it arises quite sharply in our relationships with the United States? Is it not very important that we should not get a situation where we are trying to build up, very properly, better international understanding and mutual agreements and so on, but that if you do not have a bail system then a foreigner outside his own area is put at a great disadvantage if there is no bail provision available to local citizens of a Member country, in our case, or in the United States? The thing could operate in a way that somebody could be deprived of bail for a very long time under a judicial process.

Caroline Flint: I do take on board your points.

Q42 Lord Thomson of Monifieth: It is just one of a number of quite important matters, and it seems to me to be a matter that, given the UK Presidency, it might be worthwhile giving a degree of priority to.

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Caroline Flint: We are currently addressing a large number of priorities, but we do in principle welcome the idea of seeing what the Commission paper has to say about bail because we think it is very important for the reasons you have outlined. Again, we have a number of areas that we are already considering, and it is finding the time, the slots and also seeing what areas can be resolved, and have a consensus in order to develop those. We have only just received the document and we will look at that. Obviously, we will have a discussion on that and then we will see, once the Commission gets its first soundings back from different Member States, just where we are. There are so many different issues to consider.

Q43 Lord Mayhew of Twysden: I am wondering whether one of the issues you have just alluded to might include the notion of a European Public Prosecutor. I appreciate that that is not in the text of the Programme, but the Law Society reminds us that it was in a draft text, and says that the political debate keeps moving towards this end. Do you foresee having any truck with that notion?

Caroline Flint: No, we are very much opposed to the idea of a European Public Prosecutor. That is still our position, and it is something we argue very strongly with the Commission. We do not feel it would add anything in terms of some of the areas we have discussed today. As an issue, it would have to be a unanimous decision for that to happen.

Lord Mayhew of Twysden: That is very reassuring.

Q44 Lord Scott of Foscote: Minister, you mentioned earlier the issue of evaluation, which is something that certainly my Sub-Committee regards as a matter of very, very great importance in the development of measures in this area. We have been recently looking at a proposal from the Commission for harmonising minimum standards of protection, minimum rights for defendants in criminal proceedings across the European Union, none of which adds anything at all to the obligations which all Member States have undertaken under the ECHR, but which highlights particular rights which are thought to be particularly important and necessary to have that emphasis. Everybody accepts that the proposals in this area, assuming they are agreed and implemented, will be useless in achieving anything unless there is proper evaluation and monitoring of the observance or non-observance of them after the requirements come into effect. Has the UK Government given thought to how evaluation should take place, and by whom it should take place in order to try to achieve the beneficial results of a proper evaluation and monitoring system?

Caroline Flint: First of all, I agree with you that evaluation is important because it is very easy to sit in committees, passing policies and sending them on

their way and really not keeping an eye on monitoring and evaluating them. I do not think there is necessarily one single way to carry out an evaluation; it needs therefore to be looked at on a case-by-case basis. In some cases independent evaluations by independent bodies or others might be appropriate. There may be issues where there is peer evaluation. We have just had an evaluation on us in the police and judicial area, and we are due to go and do an evaluation on another Member State in relation to one of their areas. There is a combination of different ways in which evaluation can take place. One of the other issues in the last year has been the Justice and Home Affairs Council having people from certain bodies coming to us and presenting what they are doing. The Head of Eurojust has come to the Council on two occasions. There are different ways in which this can be addressed and should be addressed. Obviously, the Human Rights Agency, which the Department of Constitutional Affairs leads on, will be important in looking individual rights and how they are protected, and whether their individual rights are being protected as part of their responsibility in terms of the European Union. I would not want to see, for example, an evaluation of the UK legal system, but you might have an evaluation about how we are implementing the European arrest warrant. It should be defined in relation to the areas where we have responsibilities and we have signed up to the Directives, and which we take responsibility to implement at the end of the day. There needs to be a tight focus and we need to work out on a case-by-case basis what sort of evaluation there should be of different policies and different organisations for that matter.

Q45 Lord Neill of Bladen: Evaluation is potentially a pretty difficult area. One form of evaluation could be to look at instances where the procedures have been brought into operation, where the criticism is that they do not work particularly well. Perhaps more difficult is to see whether the system overall is working at all. Our Committee for example has had some evidence on behalf of people who drive trucks and lorries around Europe, and the drivers occasionally get arrested because asylum-seekers have climbed on board their vehicles, and they are innocent but are put in gaol in a foreign country. To monitor or evaluate whether the procedures are protecting people in those cases is almost impossible without random examination country-by-country, from particular police stations or whatever, to see how in the real world it is working, rather than just looking at highlighted cases that have got into the newspapers. Do you follow the drift of what I am saying?

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Caroline Flint: Yes, I do follow the drift of what you are saying. I agree with you; it is a hugely complex area, but I suppose another aspect would be—and I had a constituent in that very situation—in most of the constituency cases I have had, they have had contact with our people posted overseas in those countries and the consular service. Therefore, that would be one way in which, for example, if there were issues where people's rights were not applied, I would very much hope that that was something we could gather as a Member State in terms of consular officials and others who would then take that up. How we might then pull that together is another area: you might want to say—do we set up a huge body to wander around police stations and gaols across Europe, just to check what they are doing, or are there other mechanisms so that we can get the information we want? If we do find that in a certain Member State we have evidence that we are unhappy that under mutual recognition agreements some safeguards are not being applied, we should be able to collect that evidence ourselves through our contact with our citizens and then find a way of making sure that that can go into a more central pot of information, for discussion about whether these things are working. Of course, there are mechanisms we can take up if we feel that individual Member States are not applying the rules in the way they should.

Mr Prince: In the field of the Schengen evaluation there are those mechanisms and in the case of the enlargement there was a mutual recognition—

Caroline Flint: Do you want to say a little bit more about the Schengen evaluation? That might be helpful.

Mr Prince: The Schengen evaluation mechanism is one possible model whereby peer evaluation of Member States in a field could be addressed, and of course the UK has undergone an evaluation of police and judicial matters. It could be used in a wider arena in respect of other measures. The approach taken in the Framework Decision on procedural rights is another possible approach whereby the evaluation is specifically targeted at that measure itself.

Q46 Lord Scott of Foscote: Minister, I am sure that there are various models which might be set up for a proper effective evaluation and monitoring system, but it must be right that there should be a system as opposed to just *ad hoc* evaluation from time to time, EU-wide, must it not?

Caroline Flint: Yes.

Q47 Lord Scott of Foscote: To evaluate such matters as whether there is proper observance of defendants' rights in criminal proceedings.

Caroline Flint: I think that is a fair point. There should be some sort of system. One of the things we have tried to address as part of the Hague Programme, which certainly was not part of the previous programme, is that as we develop initiatives we think about monitoring and evaluation of any policy at the same time. That should be part and parcel of our discussion, rather than discussing all the policy and at the end of it, when we have done that, moving on to something else. We would like to see that being part and parcel of any of the new initiatives we discuss under the Hague Programme.

Q48 Lord Scott of Foscote: Minister, finally can I ask you about the references in the Hague Programme to the European Court of Justice in paragraph 3.1. There is reference to the speeding up of preliminary rulings procedure in freedom, security and justice cases, and speedy and appropriate handling of requests for preliminary rulings. It is unclear to us what the Hague Programme envisages in this regard.

Caroline Flint: It is looking ahead to the entry of the Constitutional Treaty but I will ask Christophe to elaborate.

Mr Prince: The Constitutional Treaty contains provisions to ensure that the European Court of Justice speeds up cases where there is potential for individuals to be in custody, and the Hague Programme has called on the Commission to bring forward proposals, taking into account the views of the European Court of Justice, as to how we might do that. The Government's view is that there are already mechanisms in the case of ECJ to expedite particular cases, so it is not clear that it is absolutely necessary at this stage; but it has been recognised that there is a possible need to speed up the cases where somebody is in detention. We are waiting to see whether the Commission in consultation with the ECJ feels there is a need to look at its statutes with respect to cases involving freedom, security and justice.

Q49 Lord Scott of Foscote: On page 30 under 3.2, the Programme says that the Commission is invited to prepare as soon as possible proposals aimed at creating, from existing structures—and I am not sure what those existing structures are—"an effective European training network for judicial authorities" for both civil and criminal matters, as envisaged by articles in the Constitutional Treaty. What is "an effective European training network for judicial authorities"?

Caroline Flint: It is, as it says, a network of sharing expertise and information in these areas. It is envisaged that it should be developed as part of the Constitutional Treaty, if and when it comes into force. That area is about establishing further those networks of training of expertise.

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Caroline Flint MP, Ms Susannah Simon and Mr Christophe Prince

Mr Prince: We would envisage that that would be building on bodies like the European Judicial Network. The Minister has already mentioned the exchange of expertise and knowledge between judiciaries in different Member States.

Q50 Lord Scott of Foscote: What would the judges be being trained in?

Mr Prince: Those areas where we would like to see exchange of information would be those areas of EU law where different Member States have applied existing EU law.

Lord Lester of Herne Hill: I wonder if the Minister and her advisers can look again at the transcript of the answer given in answer to Lord Scott about procedures for reducing delay in cases involving custody and personal liberty. I would be very grateful

if that could be looked at in the light of the actual record of the Strasbourg Court, which is meant to decide cases of that kind within a reasonable time. It has a vast backlog, and years and years may go by in urgent cases without an effective remedy. Can they then look at that also within the context of a crushing caseload emerging in Luxembourg and then see whether they can persuade their colleagues to put in adequate resources to make sure that what is in the Constitutional Treaty will happen in practice? I would be very grateful if that could be done.

Lord Scott of Foscote: Minister, we thank you and your colleagues very much indeed for the help you have given us this evening. We have covered a very wide area of ground. You have been very forthcoming with your answers, as you always have been on previous occasions. We are most grateful to you and your colleagues for coming to assist us.

WEDNESDAY 9 FEBRUARY 2005

Present:	Clinton-Davis, L	Neill of Bladen, L
	Denham, L	Scott of Foscote, L (Chairman)
	Lester of Herne Hill, L	Thomson of Monifieth, L
		Upholland

Memorandum by the Department of Constitutional Affairs (DCA)

“THE HAGUE PROGRAMME”

This paper sets out for the assistance of the Committee key points relating to the Hague programme on matters on which the DCA leads. It focuses primarily on family matters and the law of succession, since the Committee has indicated a particular interest in those questions.

In general terms, however, the Government welcomes the Hague programme. It includes an appropriate agenda of work concerning civil judicial co-operation, recognising that civil law concerns citizens in their everyday lives.

We also welcome the fact that the Hague programme makes clear that judicial co-operation in both civil and criminal matters is to be based on the principle of mutual recognition rather than wholesale harmonisation. It includes measures reflecting the wish for enhanced practical co-operation, notably between judges and other legal authorities in the Member States. It also provides a context for decisions that have already been made, notably the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia to a Human Rights Agency.

At a more general level, it is welcome to find in the Programme an emphasis on pragmatism, evaluation of existing EU measures, and a firm statement that action under the programme is grounded in the general principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States.

FAMILY LAW

Those general principles are particularly important in the field of family law. It follows that we especially welcome the statement (paragraph 3.4.2) that instruments in this field should not be based on harmonised concepts of “family” or “marriage”. Indeed, given that family law is governed by very different social attitudes and legal and moral traditions in each country, it is hard to see any likelihood that proposals seeking to harmonise such concepts would stand any chance of agreement, particularly given the requirement of unanimity.

It is notable that the programme goes as far as to state (paragraph 3.4.2) that the introduction of “rules of uniform substantive law” should be introduced only as an accompanying measure whenever necessary to give effect to mutual recognition or improve judicial co-operation. We can accept provisions which harmonise family law to the extent that they are genuinely necessary to support the primary purpose of a proposal aimed at promoting mutual recognition or providing rules concerning conflict of laws. We take the view that this part of the Programme makes clear that it is not the intention to adopt such rules as an end in themselves.

Maintenance

The Government could support an EU measure on maintenance so long as it added value to, and did not conflict with, any Hague Convention. Work in the Hague Conference on Private International Law aiming at a global Convention has recently begun. The Government would have preferred the adoption of an EU proposal to be delayed until the final shape of the Hague Convention is known. However the Hague Programme makes clear the intention to propose such an EU measure in 2005. Whilst we would not wish to pre-judge the content of the proposal we will expect full weight to be given to the principle set out very clearly

in paragraph 3.4.5 of the programme, to ensure coherence between the EU and the international legal order and continue to engage in closer relations and co-operation with international organisations including the Hague Conference.

Matrimonial Property Regimes

The Government will examine the proposed green paper on conflict of laws in the area of matrimonial property regimes with an open mind. This is a complex area with significant differences among the laws of the Member States and common agreement might be difficult.

Conflict of Laws in Divorce (Rome III)

Again, the Government will examine the proposed green paper on conflict of laws in divorce with interest. Early indications, following discussions at official level in 2003 are, however, that there is little Member State support for such a measure and the Government does not see it as a priority.

Law of Succession

Given the diversity of laws on succession of Member States, the elaboration of common rules of private international law on succession would be a complex and difficult process. We will assess the proposals in the Green Paper in the light of the costs and benefits that they may bring to UK citizens. We will want to consider in particular whether the evidence demonstrates that there is a genuine unmet need for legislation at European level aimed at facilitating the giving of effect to wills in cross-border situations. We would in principle be open to an appropriate proposal if the case for it can be made.

We would approach any such proposal from the standpoint that a European measure should be based on the principle of mutual recognition or the harmonisation of conflict of law rules. We see no case for the harmonisation of substantive succession law throughout the European Union. If the idea of a European certificate of inheritance is pursued it must operate in a way that is consistent with our legal traditions. Lastly, if the mechanism proposed for determining the existence of wills involves the lodgement of wills in a European register, it should be voluntary.

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Examination of Witness

Witness: BARONESS ASHTON OF UPHOLLAND, a Member of the House, Parliamentary Under Secretary of State, Department for Constitutional Affairs, examined.

Q51 Chairman: Thank you for coming to help us not simply with one set of questions but with two. We thought we would start with The Hague Programme questions. I know that you have had a copy of the questions in advance in broad outline that we are proposing to ask, but of course there may be some supplementary questions. We will take those as they come. If I may start with the Hague Programme questions, there is the proposal for the creation of a fundamental Human Rights Agency. I wondered if you could indicate to what extent the Government supports that and whether the Government takes the view that the Paris Principles, about independence of the Agency's membership and proper funding in particular, will apply to any such agency that may be created.

Baroness Ashworth of Upholland: First, may I thank you very much for inviting me to come along. I have not appeared before this committee before, and so it is a very new experience for me. We do welcome the creation of the Agency, but on the basis that its role will be to gather information and to provide advice in the context of the European Union legal framework

and not about individual Member States. In that context, the Paris Principles would apply to it, but, as I say, not on the basis that it would be either looking at the work of third parties or indeed of individual Member States.

Q52 Chairman: It would simply be information collection?

Baroness Ashworth of Upholland: It would be information collection and advice, I think, because what we do not have, where we have a gap, is that there is not any institution that advises the EU itself on what it is doing.

Q53 Chairman: Who would the Agency be advising—the EU institutions?

Baroness Ashworth of Upholland: The EU and its institutions, indeed.

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Q54 Chairman: But not the Member States?

Baroness Ashworth of Upholland: No, I think Member States need to cater for that within themselves. I think that is our view. I think there is a gap in terms of the EU *per se*.

Q55 Lord Lester of Herne Hill: I have some quite serious problems about the proposal, even though of course I am concerned about the protection of human rights across Europe. I wonder if I could share a couple of concerns with you. Some of them were raised by Kevin McNamara in the Westminster Hall debate on 2 February. You probably have not had a chance to see that when Mr Lammy was replying. Essentially, like him, I am worried about wasteful duplication and overlap as between the Council of Europe and the European Union. My particular concern is that we now have an officer called the European Human Rights Commissioner, at the moment Gil-Robles, and he has the function of advising the Council of Europe institutions on human rights protection. My worry, and I wonder whether it is the Government's concern, is not just about competence—that does not worry me—but about this problem of wasteful duplication and whether the European Convention system, the Council of Europe system, will remain paramount and why we need yet another human rights agency when we have the Council of Europe one which will perfectly well be advising the EU as well as the Council of Europe. That is certainly what Kevin McNamara was asking about and he was also asking about the complete lack of definition of functions in the proposal so far.

Baroness Ashton of Upholland: There are no doubt gaps in the proposals, and indeed, as I am sure you have, if you look at how other Member States have responded, there were a variety of views about how this might go forward. I think where we are is that we think that there could be a good, well-developed role that would fill the gap. One needs to think about how it is going to work alongside other areas, and indeed the European Court. My view is that other Member States also need to get to that point. We have seen some movement of late. I was in Luxembourg the weekend before last. We seem to be moving much more in that direction. I agree there is a lot more to do on the detail. One of our ambitions for the presidency perhaps is to look at this more fully, but in principle, on the basis that I have suggested, there is scope to have such an agency, as long as it is properly founded. I agree that we should not look for any kinds of waste or duplication; that would be pointless.

Q56 Lord Lester of Herne Hill: As a supplementary, one concrete function that occurs to me this could perform would be to have the right to intervene in

proceedings before the European Court of Justice affecting human rights as a third party intervener able to help the Luxembourg court to deal with those questions. Could the Government give consideration to that idea because it would give it a slightly sharper focus? I am not suggesting it should investigate states but simply that it should be a friend of the court able to bring submissions to the court's attention in the way that English courts now allow third parties to intervene.

Baroness Ashton of Upholland: I am very happy to look at that. The question will come around to our interpretation of the word "intervene". Having said "intervene", you then qualified what you meant, to be the friend of the court. I will have to look at that. What I would be reluctant to see is it playing any kind of intervention role when Member States and the court are interacting appropriately, because that takes us into a place that is inappropriate for it. Certainly, we could look at what its relationship would be to the court. That would be a fundamental part of this because it must not be a second court, and therefore it needs to have a proper and full relationship.

Q57 Chairman: Minister, may I now ask you a question or two about paragraph 3.2 of the Presidency conclusions of 25/26 March last year? Some of the language in this paragraph I find very difficult to get my mind around and to try and envisage what is actually being proposed. The paragraph says: "In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established." What does that mean? What is being envisaged: what sort of organisation and what sort of functions?

Baroness Ashton of Upholland: The principle behind what is in that paragraph, and I agree sometimes the language takes a while to understand, particularly if, like me, you are not a lawyer—I always think lawyers have a better shot at it than I do—and what I see as the thrust of that is looking to reinforce the principle of mutual recognition, which is the cornerstone really of our view of what we ought to be considering, but not to get us into, for example, the inspection of the judiciary or anything of that nature. In other words, what we are looking for are ways in which to ensure that the legal framework within a Member State is respected for itself, but that where you have either cross-border disputes or citizens moving, the citizen has an understanding of the legal framework that means there is a mutual recognition between those different frameworks.

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Q58 Chairman: Can you shed a little more light on the objective and impartial evaluation of the implementation of policies in the field of justice? Is this some organisation that is going to be set up with the role of carrying out some sort of objective and impartial evaluation?

Baroness Ashton of Upholland: I do not think an organisation will be, but one of the things that we are very keen on is making sure that we spend more time evaluating the success of what is happening across Europe. It will be increasingly important with 25 Member States to make sure that it is working properly. What that leads to, as I understand it, is to say that what one needs to have is a guarantee that we look across at how laws are operating, how institutions are operating, but we evaluate the effectiveness and that we do so with a view to better regulation to make sure the laws are working for the citizen at the end of the day in the best possible way that they can and to do that in an impartial and objective way. That is my interpretation of it. I do not see it as a new institution being set up; I see it as being something positive but within and reflecting mutual recognition as being the cornerstone.

Q59 Chairman: You have not any insight as to what practical steps are envisaged?

Baroness Ashton of Upholland: I think the Commission and European institutions are looking more fully at how they might do it. I do not think I have a plan that I can give you that would indicate precisely how that would be done. I think we are at the stage of understanding what needs to be done and we need to think more carefully, and of course some of the directives of European law require that as part of the way they were set up, but more generally to make sure that their laws are functioning effectively.

Q60 Lord Thomson of Monifieth: May I pursue this point a little? I am afraid I marked down at that paragraph “Whew!” I did not understand how the various contradictory considerations were to be reconciled. The paragraph begins by saying that “Judicial cooperation . . . could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law.” Is that not a classic example of Euro-speak, of which I used to have some experience and of trying to have it both ways?

Baroness Ashton of Upholland: I interpret it to be a classic example of where you try and devise words that actually mean mutual recognition; that is what you end up with. In other words, what we are looking for is an understanding of individual states’ legal systems, a respect for those, trust and a recognition of the kind of culture that goes alongside that, and European law to play its role within that. I

appreciate—and I did not write this, I hasten to add—that one is very conscious that nowadays the documents that are written are being translated I think into 19 languages. It is always, in a sense, the finesse that one would wish to put on it that might make it easier to understand. As I see it, it is about saying there is mutual recognition; we need to build trust and confidence in systems. I agree with that. We are not in any way moving beyond that.

Q61 Lord Thomson of Monifieth: To pursue this one step further to the point you were addressing, Chairman, this is reference to a system providing for objective and impartial evaluation. Now, a system providing objective and impartial evaluation is an institution, a proposal, and there must be something in place to do that. Is this not an example of *Quis custodiet ipsos custodes*?

Baroness Ashton of Upholland: One could interpret it that way certainly, but I think at the moment we see that as a real recognition that we need to evaluate impartially how effective the mechanisms and the laws are. I do not think I have seen any firm proposals on precisely how that might be done. Indeed, as you said Lord Thomson, it will be a question of how that will be done. They have indicated that it needs to be impartial, and that is important. Quite who will be guarding the guardians, I am not sure.

Q62 Lord Neill of Bladen: May I follow in the same interesting area as to what meaning we can attach to this, picking up the Lord Chairman’s question to you? Supposing there was a complaint arising in a Member State called Ruritania that they were not really implementing particular EU policies in the field of justice and in fact the record of half a dozen recent decisions in that Member State had been retrograde in the eyes of many, how does this system move into operation in an objective and impartial way while fully respecting the independence of the judiciary? Presumably the judiciary would be under attack for not upholding and applying the appropriate EU principles?

Baroness Ashton of Upholland: If the Member State has signed up to those principles and is therefore part of working across the EU to respect and uphold them, then the EU would have, you are quite right, a role in asking for explanations as to why that was not being done. I would not interpret that as being an attack on the judiciary. I think that would be a question of how the legal framework of the Member State was interacting fully with the legal framework of the EU. You raise a very important question about the impartiality of how that would be done and by whom. We will explore that with the European Union and the Commission to see what happens, but the principles behind that being done in that way I think are fine. There is a lot more and what the noble

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Lords are seeking is: what actually does that mean in practice? I do not have answers for you as yet.

Q63 Lord Neill of Bladen: It is an interesting area. It is not the judiciary in any way; it would be the Member State, Ruritania, for not implementing appropriate legislation presumably? Why could not the Commission follow that up without this new system?

Baroness Ashton of Upholland: The Commission might well follow it up. What they are describing here is that you need to ensure that when one looks at the judicial systems and how they are operating in the context of European law, that is done impartially, and it is right and proper to do so. I do not think that suggests it needs to be something outside it, but as for the way in which it is done, I think Member States have to feel that they have full confidence in it and that it is impartial, and that is what we need to be sure about.

Q64 Lord Lester of Herne Hill: Minister, I do not know whether you have a copy of the text we are talking about in front of you. I always think witnesses who are being interrogated should, in fairness, be allowed to see the text. If you look at paragraph 3.2, it seems to me, with respect to my colleagues, that they are making heavy weather of something which does not require heavy weather at all. If you look at the next paragraph, not the one where this quotation has been taken from but the next paragraph, is it not there making it quite clear that they think that an explicit effort to improve mutual understanding among judicial authorities with different systems should be done by means of networks, such as the Network of Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, and then they go on to spell it out and say: "The Commission is invited to prepare . . . a proposal aimed at creating, from the existing structures, an effective European training network . . ." Surely that is what they have had in mind. It is very vague stuff. What they are saying is they want a culture to be developed based on mutual recognition and confidence, a European judicial culture. They do not want inspectors looking at courts or interfering; they want this done by means of European training. That is how I read the whole paragraph. I do not see this as a threat to anything; it is simply rather a vague rhetorical paragraph. Am I wrong about that?

Baroness Ashton of Upholland: I do not think you are wrong. I was not suggesting it was a threat, but I do not think that Lord Neill's question is answered by a training network. I cannot go beyond that.

Q65 Lord Lester of Herne Hill: I cannot see anything here suggesting that there is going to be interference with judicial independence in any way.

Baroness Ashton of Upholland: No, I do not think anyone really was suggesting that. I think what we are searching for is how does one have an impartial approach to ensuring that these issues are catered for. You are right about the training network. I did not refer to it because I thought this was a broader discussion in terms of what one would do if the judicial systems in a sense were not working in harmony in that sense and not in a harmonisation sense, I hasten to add.

Lord Lester of Herne Hill: It is certainly not well expressed.

Q66 Chairman: Just for clarification, the final paragraph on this page to which Lord Lester has just been referring mentions in capital letters the European Judicial Training Network. It sounds like some existing institution. It is not one that I have previously come across. Is there such an institution? Do our judges go to it? What does it do?

Baroness Ashton of Upholland: It is not an institution I am familiar with either. I believe that it is what it says, which is a network. I do not think it is an institution in the same way that other institutions exist within the European Union. If I might, I will find out more about it and let you know.

Q67 Chairman: It sounds, reading it, as if it is some sort of institution for training up judges. Of course, judges need training up. European-based training comes as a bit of a surprise to me.

Baroness Ashton of Upholland: It does, and particularly when you read on and it starts to talk about European training for judicial authorities for both civil and criminal matters. What we have here is an example where what the EU is seeking to do, and the Commission is seeking to do, is recognise the need to look at how well EU law is being operated and to use existing networks where they exist but also to think beyond that. I am afraid what we are seeing is a combination of existing institutions, organisations, networks that come together, some with capital letters some without, that might be useful in looking at how one develops an impartial system. I have not seen anything as yet that describes all of this in a way that I can give you an answer that is completely coherent on it.

Q68 Chairman: Finally, winding up the questions on this section, the progressive development of the European judicial culture, in the second sentence; I would have supposed that all Member States, having signed up to the European Convention of Human Rights, would have judicial systems which were aiming at having fair trials by the judiciary who were independent and where they were free from pressure from the executive—perhaps that is saying the same thing—and where judges did not sit on cases where

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they were personally interested, and so on. This is not saying anything more than that, is it?

Baroness Ashton of Upholland: I do not think so.

Q69 Chairman: I really do wonder whether it was saying it at all; I suspect it was not.

Baroness Ashton of Upholland: The only comment I would make on that is I think when you have documents being produced at a time when we have a big expansion of the EU, perhaps the obvious is worth stating occasionally because for new countries coming in that have long traditions of a judicial system, nonetheless, it is probably worth going back to first principles simply to re-state them. What we may be seeing is a reflection of the newness of the EU and certainly attending the formal Council meetings with 25 states, potentially 50 ministers, it is a different institution in that sense. I think possibly that is what we are seeing.

Q70 Chairman: Moving on to the next question relating to mutual recognition in civil matters, the Government has said they welcome the importance being attached to development of co-operation in civil matters and the completion of the programme of mutual recognition encompassing Rome II (non-contractual obligations) as well as Rome I, a European Payment Order and instruments concerning alternative dispute resolution and small claims procedure. The proposition is that all these should be actively pursued, and then in timing the completion due regard should be given to current work in related areas. In this Committee, we have had an inquiry into Rome II. Having had that inquiry, and I do not know whether you have had an opportunity to see the report we did on it, I find it extraordinary that anyone thinks that that is something that should be given any priority at all. What is the Government's view in relation to priority being given to the matters referred to?

Baroness Ashton of Upholland: I start from the principle that what we should be looking for is to provide a better service for the citizens of Europe. That is put rather glibly. I mean that real people should get benefit from our belonging to the European Union, and they do. Therefore, we should look at civil justice in that context and see what it is that would make a difference to the lives our citizens in a European context. If one looks at the way in which people move around, the way in which they live and work, whom they marry, where their children live, to whom they leave their property, and so on and so forth, one comes up with a series of different aspects of civil law where people's lives are in a much more European context than perhaps they once were. In looking both for our own presidency but also more generally, that is where I have begun. That means that I award to different elements of the

programme that you have outlined a different weighting as a minister.

Q71 Chairman: I follow that and of course everyone agrees that if there are matters of concern to the citizens of any Member State, then it is up to the governments and legislatures of the Member States to address those concerns and see if they need some sort of ameliorating treatment in the form of legislation, but what has it got to do necessarily with the European Union? When we were looking at Rome II and trying to discover from the Commission officials who gave evidence to us why they were concerning themselves with this area, one of the answers given was that it was granted as a form of tidying up. There are obviously subsidiarity difficulties arising out of that sort of answer. That is why I was rather concerned to see here that this was still being regarded as a matter for priority. I do not think the Government regards it as a matter of priority, looking just at Rome II, but the Government seems to have signed up to the Commission proposal that these areas should be treated as deserving of some sort of priority, or is that wrong?

Baroness Ashton of Upholland: The European Parliament is involved, and I cannot say that I am seeing signs of huge consensus being arrived at on Rome II. There is always an issue when bureaucracy—and I mean that in the nicest sense of the word, not in the worst sense of the word—feels a need to look across the legislative framework across Europe to decide what needs to be done. What I was really trying to allude to is that if you take a list of all the things that happen across a government, never mind the European Union, you will see elements from your perspective that you think are unimportant, very important, of less relevance, and so on. There are always, in legislative programmes, tidying up measures. There are many representatives of government here who have been in that position and will well remember pieces of legislation that they have been involved in which are tidying up measures. It does not make them unimportant in that direct sense; it probably makes them less important in the sense of the impact they have on the citizen. What I was trying to say to you was that where we begin is that, yes, there are lots of different things going in the legislative framework and the tidying up framework as to what is important and so on, but, as we approach our presidency, as we begin to think about civil justice matters, the focus for us is very much on which of those areas that you have outlined would we say were of most relevance to people in their everyday lives as they are citizens of Europe, if I can describe them as that. That is really the only point I was making. You may well be right that Rome II is not a huge priority, but it does not mean that it is

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irrelevant. It does mean, as I have said, that there are always issues for governments in tidying up.

Q72 Chairman: I accept the sense, if I may say so, of what you have just said. The concern that I have—and I suspect it is shared by other members of this Committee—is that there is a push towards harmonisation and that the Commission regards harmonisation as good in itself. There are all sorts of ways in which the European Union can provide desirable results for citizens, but harmonisation as an object in itself does not seem to me to satisfy that sort of criterion.

Baroness Ashton of Upholland: I do not think harmonisation as a good in itself satisfies anybody's criteria. Certainly, I see no indication in the conversations I have had with colleagues across Europe of any push on harmonisation at all.

Q73 Chairman: Including in the Commission?

Baroness Ashton of Upholland: The Commission looks at all of these issues from a Commission perspective in the sense that they are looking to see how the framework works across the whole of Europe. That will inevitably give them a different viewpoint than Member States that are very clearly rooted in their own traditions, their own legal frameworks, their own legal structures. Especially again, if one thinks of the new nations who join, some of them have a kind of fledgling nature about them because they have come out of a different system at a different time and are very clear about their need to develop, yes, mutual recognition and respect, but to be very clear that that is within the context of their own frameworks. I have not seen any example of the 25 Member States yet—I have not talked to everybody, there may be some—where that really is on the agenda.

Q74 Lord Lester of Herne Hill: I thought the way you put it just before about weighting in terms of European citizens' needs and benefits struck exactly the right note, if I may say so. I was just wondering, applying that to mutual recognition and other aspects of European law-making, if you have in mind, for example, that say British citizens buying goods in French shops with credit cards and guarantees, or lack of them, need to be protected as consumers under a wider framework than English law, or that, say a Brit who owns a property in another part of Europe where there are controversies may need to have a judgment of that other part of Europe enforced here if they live here as well. I am trying to think of transactions across borders, or the rights of women, no sex discrimination in employment where workers cross frontiers and so on. Are those the kinds of examples you have in mind when you say the weight ought to be upon the

European citizen and the benefits to the citizen of this law-making programme?

Baroness Ashton of Upholland: Yes, in many respects: I am not sure about the individual examples, because I think in consumer protection law there is quite a lot of European legislation, as I understand it. I say that as a non-lawyer. I am not sure that one needs to do much more with that except make sure it is working effectively. Certainly, if you look at things like small claims and the way people buy property abroad and make sure that we have mutual recognition so that they can understand what they are doing as much as anything, there is an issue about making sure that we inform citizens effectively as more and more people move across Europe. There are also the issues like maintenance, which is an issue I am going to come on to talk about, and those are quite important, too. Trying to reflect in the work programme that we have, the priorities we have, the real lives of people is not to show any disrespect to the broader and other issues on the tidying up issues as have been described but really where I think we ought to begin when we think about where we put our priorities, so that, as we go to the presidency, where our issues are issues of course which we will come on to around contract law too, they are also issues, for example, on small claims, maintenance and so on that are specifically relevant.

Q75 Chairman: Minister, moving to the next question, The Hague Programme envisages the effectiveness of existing instruments being increased by the “standardising procedures and documents and developing minimum standards of procedural law”. There are examples given: service of judicial and extra-judicial documents, the commencement of proceedings and transparency of costs. This is involving some degree of harmonisation of procedural law and I think issues of competence are thought to arise. Article 65 of the Treaty restricts competence to “civil matters having cross-border implications”. The proposals, as described in The Hague Programme, seem to go beyond that. Is the restriction of Article 65 in relation the matters having cross-border implications necessary to the proper functioning of the internal market, the same point, still applicable in your view, in the Government's view?

Baroness Ashton of Upholland: Article 65 I think is a good foundation and it is clear that we are describing in that context cross-border issues.

Q76 Chairman: If it goes beyond cross-border issues, the Government would take the view that there is no competence?

Baroness Ashton of Upholland: I think we would. I always, when one makes a definitive statement, qualify it immediately, as a minister, to say that one would have to look at whether there was a relevance

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in the context of what I have just said, that there are issues about harmonisation with a small “h”, as I would describe it, around the procedures and processes that enable you to get better mutual recognition. Those may be in large part the bureaucracies; it might be that one tinkers around the edges in order to make sure that the legal systems enable you to have that strong mutual recognition; but, as far as we are concerned, Article 65 is very clear. Again, as I have indicated, from talking with other colleagues in other Member States, that is clearly where I think the thrust of this is.

Q77 Chairman: You mentioned maintenance just a moment ago. If we could come on to that and other like topics, in its Work Programme for 2005, the Commission has identified as a priority access to justice being reinforced, tackled by co-operation between judicial authorities, spreading the area of justice to embrace divorce settlements, maintenance obligations, successions and wills. What is the Government’s view as to the desirability and priority of work in that field?

Baroness Ashton of Upholland: Of course, we are waiting for the Green Papers, as you would expect, on many of those issues, particularly on divorce issues. In terms of maintenance, we are very clear that we are awaiting the work that is going on in The Hague Conference on Private International Law, because for us a lot of the issues around maintenance are pertinent with the USA, Australia and with Sweden interestingly which is high on the list because of the nature of the way Sweden claims from us as a government rather than the individuals, as it were, so they come up quite high. We are very keen to make sure that that links together and that we do not do something that will be contrary to that because it would not be in our interests to do so. We will wait and see what the Green Papers are. Again, in the context of the citizen, it is important to make sure that in their lives as part of Europe we make sure our judicial systems are applicable to them and work for them.

Q78 Chairman: The paper, the presidency conclusions, contains also a statement that rules of uniform substantive law, i.e. harmonisation in these areas, should only be introduced as an accompanying measure; that is to say, they may be introduced if they are simply an accompanying measure. Does mutual recognition require a substantial degree of common ground between the laws of the relevant jurisdictions and is the accompanying measure in the Government’s view a sufficiently high hurdle to forestall harmonisation of substantive law in these areas?

Baroness Ashton of Upholland: It takes us back to Article 65 again that we are very clear on what recognition is. There are many examples of where it is possible to develop mutual recognition within frameworks where individual legal frameworks are quite different. When I was thinking about how to answer that question, the example that I was looking at is laws of succession, laws around property, which are very different and yet one could develop a way in which you would have mutual recognition. Again, we are back to the principle we have which is mutual recognition. We are very pleased that the document actually puts that fairly at the forefront of everything we do, and that is where we stand.

Q79 Chairman: In the past, experience has shown that both the Council and the Commission have put forward measures relying on the Article 65 competence necessary for the proper functioning of the internal market, cross-border implications, and so on, for measures that have actually gone beyond that, and the Government itself has picked up competence issues in this field in measures that have come before us for scrutiny. The experience of this gives one a certain lack of confidence in the Commission’s adherence to their competency limits, which are obviously being imposed on by Article 65. Sometimes I think the Government has let the competence issue go because it does not really object to the substance of what is being proposed.

Baroness Ashton of Upholland: I would be very clear that we have to stick where Article 65 takes us. That is very clear. Therefore, if one were looking to go beyond that, I would be looking to see where that fitted into either the treaties or the programme in a way that made it relevant. Where we are, as I see it, is that the programme is clear that mutual recognition is what we do, that we look across to see how we support mutual recognition—and I described earlier the kind of harmonisation of the bureaucracy of the systems that need to work together—but that beyond that and beyond the competence, as you say, of the EU treaties and EU law, that would be not appropriate within the work that we are doing. I do not see any sign of that. I do not see any sign, as I say, of Member States rushing to see that happen. I await with interest to see if anything appears about which you would quite rightly say to me, “There you are, there is an example of it”.

Q80 Chairman: The Government has acknowledged that maintenance, succession, matrimonial property and divorce are areas within each Member State of sensitivity; they relate to practically every family in the state sooner or later, and that any European Union measures taken in this area must respect individual Member States’ traditions. Taking this country, the United Kingdom, as an example, are

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there particular areas of sensitivity in the Government's view that should be treated as hands-off areas for European Union measures in this family law field?

Baroness Ashton of Upholland: If you look between Scotland and England, you do have differences in terms, for example, property. In England you leave your property where you will; in Scotland you have rights as a family member. I am not sure that I accept the term "hands-off" because I think what we are looking to do is absolutely respect the laws of nations, some of which have grown up for centuries and through tradition. What we are looking for is to make sure that where there are cross-border issues, we have some framework with which to resolve the problems that can arise. One has to look across the nations. Again, if you take property as an example where people own property in different countries subject to different laws, there is a need at least to have a framework for resolving an issue that might arise where you have people living in one country owning a property in another who may be subject to different laws. I am not saying one is right or wrong; I am simply saying we need to find a way of resolving this.

Q81 Chairman: Of course the laws of each country can resolve the legal issue in relation to the assets in that country over which that country's laws have jurisdiction.

Baroness Ashton of Upholland: Indeed, and that may be the end of the matter, but I think again we are back to: do people understand and know and have the information on that? There may be occasions when, nonetheless, there are issues that can cross borders, particularly when it comes to assets.

Q82 Lord Neill of Bladen: To what extent are we talking about a practical problem? We have law labelled conflict law, which means we take account of the fact that other nations deal with legal issues in different ways. A French court might order the division of property on a death in a way that we would not. My general understanding, subject to any correction you make, is that that would be respected in English courts and recognised that a French court with competent jurisdiction has made an order which has a binding effect. What is the real worry and concern in this area we are looking at here?

Baroness Ashton of Upholland: I agree completely with what you have said and that would be the way. Again, I think in part we are back to re-stating the basic principles, but just really, in a sense, putting on the face of the document that there is an understanding that there are different traditions that exist in 25 nation states and we should not forget that. That is really all I am trying to say. When you have that, one also has to be aware that people need the

information that it will be different in different countries and to know what to do in different circumstances—that is really as far as I am trying to take it—but to respect that for what it is.

Q83 Lord Thomson of Monifieth: I suppose mutual recognition is what one is seeking and therefore one can promote, through various mechanisms, better mutual information amongst the legal professions in the member countries and that makes it easier for the ordinary citizen who is served if there is a cross-frontier family problem. Speaking for myself, I think that is wholly admirable. What did seem to me from this document is that the Commission is having very great ambitions to go further on this with a mechanism allowing precise knowledge of the existence of last wills and testaments of residents of the European Union in 2005. We do not have that within this country, do we?

Baroness Ashton of Upholland: No, we do not.

Q84 Lord Thomson of Monifieth: To do this for the Union and to do it for a Union of 25 seems to me to be big on delusions rather than beyond any sort of reality.

Baroness Ashton of Upholland: You have put better than I did the point I was trying to make when you opened, Lord Thomson. There are proposals we would have to look at. There are issues about the usefulness sometimes of the data that might be held. I have to say that I am not very clear myself yet about what value that would bring. Really, this is exactly the point you make: there is a mutual respect and understanding of the different laws and traditions that exist in nations and one does not seek to undermine those in any way, but perhaps one seeks to explore with those citizens the realities of that because it can make a difference if one is unaware. One only has to watch consumer programmes regularly on various television programmes to see how many times people are unaware of what happens across the rest of Europe and find themselves in difficulty.

Q85 Lord Lester of Herne Hill: The Hague Programme says that these measures will "not be based on harmonised concepts of family, marriage or other"—"other" I suppose refers, for example, to civil partnerships or civil unions, and so on. I understand that and I think I agree with it, but is it not the case that there are already some harmonised strands, if that is the right way of putting it, in that the European Human Rights Convention has concepts like family and marriage which do in fact radiate across Member States, but there are other areas like civil partnerships where it is left to the state itself to decide how much recognition to give to a civil partnership established in another country when a

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gay couple decides to settle here, for example. It is a combination, is it not, of the harmonising effect of the European Human Rights Convention to some extent but leaving the rest—it has nothing to do with the European Union—very much within the discretion of each Member State to decide how much recognition of, say, a gay partnership contracted in another state and registered there would have been recognised and for what purposes when the couple moves across borders to another state. My question was so long and confusing that it may have muddled you, but do you have the drift of what I am trying to say?

Baroness Ashton of Upholland: I think I understand completely what you are saying. I do not disagree with anything that you have said. The only point I would make is that there are, as I understand it, lots of examples where these terms have not been defined and yet there has been the ability to work across the European Union and indeed globally with different treaties or agreements and so on where, for good reason, it has been probably easier not to try and define them because they have different definitions within Member States. I do not know whether the way in which you describe how the Human Rights Act and the European courts work and interact with the fact that we do not need to define in other ways will, over time, have an impact. I genuinely do not know. Our view is that for some of the work that we are involved in there will not be a need to define those concepts absolutely because they will be different, for the reasons that you know very well, in different nations, particularly when you think about civil partnerships and the way that the Dutch have defined gay marriage where in other nation states that would not be something that we would seek to be doing in any way. That is all I would say to that.

Q86 Chairman: Can I bounce over questions numbers 9 and 10 because they relate more to the contract questions, which we will come to in a moment, and ask a question about paragraph 3.4.5 in

the paper, which recommends that the accession of the European Community to The Hague Conference should be concluded as soon as possible. In your view and in the Government's view, what would be the practical effect of that happening? At the moment, the United Kingdom participates fully in the discussion at the conference and the negotiations there of international conventions. Would the accession of the EU alter that?

Baroness Ashton of Upholland: No, I do not think so in any way. I think the EU approaches this conference with an understanding that it has some competence in its role, but it does not affect the role that we would play. We are quite happy that they are there. They bring a different aspect to it but, as far as we are concerned, I think, as I indicated earlier, we have a huge interest in the relationship on these issues between Australia, America and other countries and are very keen that anything that can develop in the EU takes full account of what is happening in The Hague Conference and is not in any way in contradiction with it. In a sense, it would be quite beneficial potentially for the EU to fully participate.

Q87 Chairman: We would never want to be in a position, would we, in which we in this country would have to rely on other common law countries, such as the United States or Australia, to plead the common law cause at The Hague Conference?

Baroness Ashton of Upholland: No, we would not and we are very good at the common law cause ourselves. We are the gateway to Europe on common law and I would describe it as such.

Q88 Chairman: We and Ireland.

Baroness Ashton of Upholland: Yes.

Q89 Lord Lester of Herne Hill: And Cyprus and Malta; they have one common law in both systems.

Baroness Ashton of Upholland: But it is not quite the same, is it?

Chairman: Thank you, Minister. We will move on to the other topic on which you were going to help us.

Written Evidence

Memorandum by Amnesty International

1. Amnesty International welcomes this opportunity to submit evidence to the inquiry into the Hague Programme with a critical reflection on the human rights content.
2. The first listed objective of the Hague Programme is “the improvement of the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and the access to justice . . .”. It is significant that fundamental rights now appear to be firmly placed at the heart of the EU’s ambition to strengthen freedom, security and justice. The recent pledge of the new Commission President to make civil rights and action to combat discrimination a top priority for the Commission provides further reinforcement
3. However, Amnesty International has become increasingly concerned that despite the intentions and appropriate references to fundamental rights there is too much of a vacuum in the substance of the programme as to how the stated ambition is to be realised. There is a lack of coherence when it comes to the instruments and structures needed to safeguard fundamental rights and a lack of resources to match. The fact that asylum is principally a human rights issue seems to be lost amid all the discourse surrounding migration management. With the EU’s justice and home affairs agenda driven by counter-terrorism and the fight against “illegal immigration”, there is a growing risk of a one-sided emphasis on “security” at the expense of the elements of “justice” and “freedom”.
4. Over the past five years we have seen an unwillingness on the part of the European Council in particular to acknowledge and address human rights problems within the EU’s own borders. This complacency contrasts more and more sharply with the scrutiny of the human rights performance of the candidate countries in the ongoing enlargement process. The sudden move to set up a Human Rights Agency does not prove that there is a real willingness yet to engage in self-reflection, and the Commission’s suggestion that the agency should be “a lightweight structure in terms of staff and budget” does not inspire confidence. Negotiations over procedural safeguards still lag behind the drive to intensify judicial cooperation, while the mutual recognition which is to underpin such co-operation cannot hide the lack of basic mutual trust given the significant differences in the standards of justice across the EU.
5. In the field of asylum we have witnessed the adoption of a very low common denominator of minimum standards that allow Member States to continue competing with their restrictive policies and that in some respects breach international law. At the same time there is a marked shift to counter “illegal immigration” through engaging with third countries in ways that blur the fine line between cooperation and pressure. It is remarkable that the United Nations High Commissioner for Refugees has seen the need on more than one occasion to caution the EU not to forego its refugee obligations and risk undermining the international protection system.
6. It is against this background that Amnesty International puts forward a series of observations and proposals regarding the way the human rights dimension should be strengthened in the next multiannual programme for the area of freedom, security and justice

FUNDAMENTAL RIGHTS

7. The inclusion of a reference to a proposal for the creation of “a Human Rights Agency in order to develop a human rights data collection and analysis with a view to defining Union policy in this field” is not sufficient to demonstrate that this objective will be taken seriously in practice and adds nothing to the status quo. The EU must face up to the issue that, at Council level, there is no forum to address issues relating to fundamental rights within the EU. The creation of an ad hoc mechanism to deal with the immediate question of a proposal for a Human Rights Agency does not answer the pressing question of collective responsibility at EU level for actual and potential human rights violations in Member States.

PROCEDURAL SAFEGUARDS

8. The initial orientations from the Presidency referred to the fact that “with specific regard to criminal procedure, the development of a shared set of procedural safeguards could help strike the necessary balance between the need to fight crime effectively and the need to protect individuals’ fundamental rights”. It is disappointing to see that in the final programme this balance has been abandoned in favour of “due respect for the legal traditions of Member States”, once more demonstrating that the EU is unwilling to take on board its collective responsibility for the respect of fundamental rights within its borders and instead hides behind political arguments on sovereignty.

ACCESS TO JUSTICE

9. Amnesty International is pleased to see that the Hague Programme institutes a new system “for objective and impartial evaluation of the quality of justice, whilst fully respecting the independence of the judiciary and consistent with all the existing European mechanisms”. However, there is reason to be concerned about the effectiveness of such an evaluation without a mechanism to address any shortcomings that are found. The absence of consideration in the Hague Programme for EU resources for funding of practical aspects of access to justice such as, for example legal aid or free interpreting also calls into question the practical value of the programme in terms of improving access to justice across the EU.

THE IMPLIED LINK BETWEEN “TERRORISM” AND MIGRATION

10. Amnesty International is particularly concerned about the perceived link between migration control and “terrorism” or other forms of serious and organised crime. The Hague Programme places a high priority on combating racism and xenophobia yet the creation of a link between migrants and terrorism risks exacerbating this very problem and is unjustified—there is no reason to differentiate between EU nationals and third country nationals in the context of counter-terrorism.

COMMON EUROPEAN ASYLUM SYSTEM

11. EU Member States have now formally adopted or agreed the building blocks that were required by the Amsterdam Treaty to achieve a first phase of establishment of a common European asylum system. These instruments set out minimum standards and leave a wide margin of discretion. Amnesty International holds that Member States should go beyond the lowest common denominator and ensure that national legislation is in full compliance with standards of international human rights and refugee law. In the same vein, while welcoming the commitment to a single asylum procedure Amnesty International is concerned that the common asylum system is to be based on the low standards agreed so far and urges Member States to amend the directive on asylum procedures in order to ensure that basic guarantees are fully available in fast track, admissibility and border procedures.

12. While the Hague Programme makes suggestions to facilitate practical cooperation, the framework for such cooperation remains essentially inter-governmental. It is defined in very vague terms as to the specific means and resources, and leaves remaining protection and solidarity gaps notably in the context of enlargement unaddressed.

THE EXTERNAL DIMENSION OF ASYLUM AND MIGRATION

13. The Hague Programme marks a decisive shift in the EU’s ambition to take the fight against “illegal immigration” into the domain of external relations. “Partnership” with third countries has become a principal focus in efforts to stop people from entering the EU. However, as we have seen in the recent discussions over “reception facilities” in neighbouring countries, there is a mass of questions to be answered in regard to the stated ambitions to control immigration, provide humanitarian assistance and support capacity building if protection obligations are to be fully respected. It is significant to note that the conditions on third countries for such cooperation have been watered down from “fulfilling the obligations under the Geneva Convention” to “demonstrating a genuine commitment to fulfil the obligations”.

The external dimension of asylum and immigration opens up a highly complex area in which it will be extremely important:

- to ensure strict adherence to standards of international human rights and refugee law and in particular to the principle of non-refoulement;

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- to safeguard the possibility for those in need of protection to access safety and have their claims properly processed; and
 - to prevent “solutions” in the sphere of reception in regions of origin and more generally migration management prejudicing the right to seek asylum spontaneously and having the effect of undermining the international protection system.

Jan Shaw

Refugee Programme Director
Amnesty International UK

January 2005

Memorandum by the Association of Chief Police Officers (Scotland) (ACPO(S))

I refer to your correspondence dated 10 December 2004 in relation to the above subject, which has been considered by members of the Crime Business Area and can now offer the following by way of comment.

The fight against illegal immigration and terrorism is identified as the main priority for the new Justice and Home Affairs Agenda within the Hague Programme. This will build upon the advances achieved in the field of criminal co-operation during the implementation of the Tampere Agenda during the last five years.

The EU can add significant value in the fight against Serious Organised Crime by sponsoring an intelligence led and multi-disciplinary approach. Improvement in the co-ordination of law enforcement agencies within the EU and the removal of barriers to the exchange of intelligence between member states will without doubt become increasingly important in the investigation of Serious Organised Crime in the years to come.

The Scottish Drug Enforcement Agency (SDEA) has actively engaged in this process and has achieved significant success in operations involving drug trafficking, people trafficking and money laundering activity within the EU. Replicating and increasing this type of activity by removing barriers to co-operation will demonstrate the real value of the Hague Programme over the next five years.

The cross border exchange of information is fundamental in combating Serious Organised Crime within the EU and, in that regard, the principle of availability articulated within the Hague Programme, subject to key conditions that protect the integrity of any information/intelligence supplied, will reinforce this exchange. Indeed, the exchange of information dovetails closely with the commitment of Scottish forces to the National Intelligence Model and the Scottish Tasking and Co-ordination process.

The objective of the Hague Programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and the access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to further realise the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications.

There are, therefore, issues within the programme, that may directly impact upon policing in Scotland and while the Association's initial response with regard to combating Serious Organised Crime is that of support for the direction of the programme, a detailed discussion by members of the Crime Business Area would allow for a comprehensive deliberation of the programme by Scottish forces and full consideration of the future impact of the pertinent issues from a Scottish perspective. Accordingly, the Hague Programme will be included for discussion at the next Crime Business Area meeting, scheduled to take place on 15 April 2005 and any further issues will be raised following this.

In addition, as the new European Strategy on Drugs 2005–12 was adopted by the European Council in December 2004, for inclusion in the Hague Programme, this has been included as an item for discussion at the next meeting of the Association's Drug Sub-Committee on 25 January 2005.

William Rae

Chief Constable
(Hon. Secretary ACPO(S))

20 January 2005

Memorandum by the European Commission

I welcome the inquiry you are conducting into the Hague Programme and I look forward to receiving and examining your conclusions.

As you pointed out, the European Council of 4–5 November 2004 endorsed the Hague Multi-annual Programme for strengthening the area of freedom, security and justice in its Conclusions. This programme sets out the priorities for the next five years and is the successor to the Tampere programme which came to an end in May 2004.

The Hague programme is based on the principle that the current treaties will have to be fully exploited insofar as the new Constitutional treaty has not yet entered into force.

The new programme deals with all aspects of policies relating to the area of freedom, security and justice including their external dimension, notably fundamental rights and citizenship, asylum and migration, border management, integration, the fight against terrorism and organised crime, criminal justice and police cooperation, and civil justice. In addition, a drugs strategy has been added since December 2004.¹

The Commission welcomes The Hague Programme which reconciles the various priorities of the Member States while focusing on the tools for ensuring better control over the practical implementation of measures, and allowing for improved coherence and coordination. Furthermore, it increases efficacy, notably by requesting that certain Title IV measures should be dealt with under the co-decision procedure and qualified majority voting.

As requested by the European Council, an Action Plan building on the Hague Programme will be presented by the Commission in June 2005 with proposals for concrete actions and a timetable for their adoption and implementation. In addition, the Commission will be also responsible for producing annually a report (Scoreboard) for the Council regarding the implementation of Union measures.

Jonathan Faull
Director General,
DG Justice, Freedom and Security

13 January 2005

Memorandum by Europol

I would like to express my thankfulness for giving Europol the opportunity to submit its ideas to the House of Lords' inquiry into "The Hague Programme" as concluded by the European Council of 4–5 November 2005 (Council Secretariat documentation n 16054–04 JAI 559, 13 December 2004). Based on the questions given in the call of evidence on this matter, Europol would like to sum up its position as outlined below.

Please be informed that this statement is founded on the perspective of Europol's area of activities as the central EU law enforcement authority. Europol therefore focuses its contribution on the general direction of "The Hague Programme", aspects pertaining to police co-operation (especially the future role of Europol) and the relationship with Eurojust in general (indents 1, 6 and 7 of the House of Lords' inquiry into "The Hague Programme"—call for evidence).

With regard to the general direction of "The Hague Programme", Europol is of the opinion that this new multi-annual programme which outlines new strategic guidelines in the area of Justice and Home Affairs Matters for the next five years is of key importance to prepare the European Union for the start of the envisaged constitutional phase on 1 November 2006.

Europol has therefore identified and incorporated the implications of the political orientations contained within the "The Hague Programme" into its strategic business planning. As required by the concerned provisions of the Europol Convention, the strategic business planning of Europol in relation to the future activities of the organisation is documented in the "Europol Five Year Business Plan 2006–2010" and—on a yearly basis—in the "Europol Work Programme 2006".

The Europol Convention furthermore stipulates that Europol's position with regard to corporate governance issues, such as the above mentioned business plans, has to be defined by the EU Member States in the format of the Europol Management Board as the competent policy decision-making body. The "Europol Five Year Business Plan 2006–2010" and the "Europol Work Programme 2006" will therefore be discussed by EU

¹ The European Strategy on Drugs 2005–2012 has been added to the programme after its endorsement by the European Council on 17 December 2004.

Member States at the forthcoming Europol Management Board Meeting to take place in The Hague on 2–3 February 2005. The Council structures will subsequently be informed about the outcome of this discussion in compliance with Article 28 of the Europol Convention. After final consideration at Council level, presumably to take place in July 2005, the Europol business planning is made available to the public.

I would kindly ask your understanding that for the above outlined procedure Europol is currently not in the position to give you detailed insight into the business planning instruments.

To give the Select Committee on the EU—Sub-Committee F (Home Affairs) of the House of Lords however a general assessment of Europol in relation to “The Hague Programme” I would like to inform you that Europol considers the following elements to be crucial for the further development of an area of freedom, justice and security in the EU:

- The development of the Organised Crime Threat Assessment (OCTA) by Europol (the forthcoming EU Presidency of the United Kingdom has agreed to support Europol with this task assigned by the European Council during the Presidency term in the second half of 2005)
- Concerted actions both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards including institutions like the EU Joint Situation Centre (SitCen) and Eurojust (so far, Europol has established close contacts especially with Eurojust)
- The development of a coherent approach of the Information Systems relevant in the Justice and Home Affairs domain including the Europol Information System
- The transition of the legal framework of the Europol Convention into European law under the European Constitution.

With regard to indents two and three of the above given list, I would like to refer also to the statement provided by Europol to the House of Lords in relation to the recent “Inquiry into EU Counter Terrorism Activities” (Europol documentation reference file number 3710—181 /101475v3).

Kevin O’Connell

Deputy Director of Europol

1 February 2005

**Memorandum by Professor Elspeth Guild, Radboud University, Nijmegen Netherlands,
and partner Kingsley Napley, London**

INTRODUCTION

This Inquiry, undertaken jointly by two Sub-Committees of the House of Lords, addresses one of the most important policy fields under construction in the European Union. Since the entry into force of the Amsterdam Treaty on 1 May 1999, the establishment of an area of freedom, security and justice has been among the most ambitious and controversial of the new policy areas of the Union. The field includes sensitive areas of law and policy: criminal law, immigration and asylum law. The legal framework created in 1999 was accompanied by a five year work programme adopted at the highest level in the EU for the realisation of the project, the Tampere Conclusions. This work programme ended this year. The Hague Programme sets out the EU’s ambitions for the next five years of an area of freedom security and justice.

Two important events have changed the nature of the project—first the enlargement of the EU to include 10 new members; secondly, political agreement on the text for an EU Constitution. The first change creates a substantial challenge for the EU in seeking to achieve convergence of approach, comprehension and acceptance of law and policy in criminal judicial co-operation, immigration and asylum not only among 15 Member States which have been working together in the EU for at least 12 years but among 25, with very different histories, expectations and capacities. The second, the draft EU Constitution, evidences the objective of the Member States that the legal framework of the area of freedom, security and justice be transformed (once again) into a single coherent system firmly anchored in the Rule of Law. The ambition of the Hague Programme dramatically to advance the legislative and operational agenda of the area must be understood in the light of these two events, the importance of which must be accepted as far superior to the Programme itself. The integrity of the EU depends on the success of the 2004 enlargement. The consolidation of the EU depends on the successful ratification of the draft Constitution.

THE GENERAL DIRECTION OF THE PROGRAMME

A change of emphasis can be discerned in the Hague Programme in comparison with its predecessor, the Tampere Programme. Disturbingly, the rule of law is no longer the core value. Rather more ambiguously, the area responds “to a central concern of the peoples of the States brought together in the Union.” It goes on to specify that the citizens of Europe expect the Union “while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof. Notably, in the field of security, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue.”

This assessment of the key concern of the peoples of Europe is not entirely consistent with that contained in the draft Constitution. The Constitution states in the first line of the preamble: “conscious that Europe is a continent that has brought forth civilisation; that its inhabitants, arriving in successive waves from earliest times, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason; drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law.” The core concern here is the safeguarding and respect for the rule of law and fundamental freedoms. Security of the inviolable and inalienable rights through the respect for law is perhaps a better formulation of the idea rather than security as an end in itself. The EU’s area of freedom, security and justice should not juxtapose fundamental rights and freedoms as distinct from operational measures in border controls, policing and external relations. They are rather an integral part of the legitimacy of operational measures.

THE EXTERNAL DIMENSION OF THE PROGRAMME

The Hague Programme calls for a linking internal and external dimensions in the field of freedom, security and justice. This appears to be a code for seeking to export what are seen as problems elsewhere. In the field of asylum, this approach is evidenced in the proposals to move asylum seekers and refugees to poor countries outside the borders of the EU, which countries are even less able to care for them than EU Member States. Instead of caring for refugees and asylum seekers within the Union, the linking of the internal and external dimension results in the stigmatisation of countries on the EU’s borders for failure effectively to police the EU’s border from the outside against refugees and asylum seekers. Unfortunately, the result of these policies may well be to destabilise countries on the EU’s borders by requiring them to take back third country nationals or to prevent from leaving both their own nationals and nationals of other countries who have passed through their state. As regards the nationals of the EU’s neighbouring states, such measures taken against them by their own authorities may have the effect of further de-legitimising those same national authorities, which in too many cases, are already weak and lacking in popular support. As regards the nationals of other countries who pass through the EU neighbour’s territories, the EU expulsion measures and border control obligations places the neighbouring countries in conflict with other countries in their region as regards the treatment of nationals of their countries. Thus the knock-on effects are potentially substantial and capable of frustrating the objective of the EU’s external policy objectives of fostering stability, rule of law and human rights protection in the regions around the EU.²

In the field of policing, this linking of the EU internal and external outside the EU has already given rise to some rather sinister suggestions. The UK’s Court of Appeal held in August 2004 that the UK authorities were entitled to take into account information which may have been tainted by torture, so long as the torture was not carried out by the UK authorities or its agents.³ The fear, expressed most eloquently by lawyers on behalf of Amnesty International intervening in the appeal against this decision before the House of Lords, is that police authorities outside the EU may be covertly encouraged by UK police authorities to torture individuals so that police authorities in the UK may obtain information which they can then lawfully act upon. International standards in police and criminal justice are only in their infancy. Indeed, at the EU level, among the most complex issues are the standards of criminal justice applicable within the area of freedom security and justice (see for instance the debate around the proposed framework decision on rights of accused and defendants). Linking these issues with extra EU cooperation must be carried out with great caution and respect for the principles of transparency and rule of law which are central to the EU.

² The Neighbourhood Policy, see E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, E Guild, Kluwer Law International, The Hague, 2004 chapter 10.

³ While the House of Lords reversed the Court of Appeal’s decision on 16 December 2004 their Lordships did not address the issue of evidence tainted by torture [2004] UKHL 56.

THE DEVELOPMENT OF POLICIES ON IRREGULAR MIGRATION AND BORDER CONTROLS

Central to the Hague Programme is the combat against illegal immigration, trafficking in and smuggling of human beings, terrorism and organised crime. But the listing of these ills against which action should be taken fails to take into account the complexity of their categorisation. For instance, a number of basic definition problems have hampered any action around illegal migration and smuggling of human beings. As yet, there is still no common EU law definition of illegal immigration nor indeed of an irregular migrant. So long as the effective approach demanded by the Hague Programme is against a phantom ill—for instance illegal immigration—there is clearly no legal measure which can be taken against it. This failing is then compounded by placing it temporally in the future—the prevention of illegal immigration. Before an individual can be an illegal immigrant he or she must find himself within a state which has laws which define his or her presence as illegal. One cannot be an illegal immigrant in a country one has never entered. Thus preventing illegal migration presents insurmountable problems of legality particularly when coupled with a lack of definition of illegal migration.

Another example of the inherent weakness of the Hague Programme's approach comes from the field of anti-terrorism measures. The BBC reported that the EU foreign policy representative, Xavier Solana, had contacts with an organisation which has been designated "terrorist" in the EU common list. The purpose of the contact appears to have been in order to determine the parameters of issues and claims to enable an understanding of the use of political violence by the organisation. The need for dialogue towards the regulation of violent conflict in many cases may outweigh the political value of the allocation of the etiquette "terrorist" to an individual or organisation. Emotive definitions are not necessarily helpful to dialogue. The EU's area of freedom, security and justice should not be constructed against phantom transgressors nor designed in such a way as to hamper dialogue towards the regulation of political violence.

CONCLUSIONS

The Hague Programme sets out the new orientation of the area of freedom, security and justice. In my view, however, it lacks sufficient articulation with the two foundational events of the EU—enlargement and the draft Constitution. Regarding enlargement, the relationship of the EU's internal and external policies has been transformed. The intention expressed in the Hague Programme to shift outwards to third countries responsibilities which it considers onerous, viz refugees, asylum seekers, illegal immigrants, terrorists, fails to take into account the new borders of the EU and the relations between the new Member States and countries on their external borders. The inevitable conflict which any attempt to displace these 'burdens' will cause between border states creates unwarranted risks of destabilisation on the EU's new frontiers. Among the new neighbours which enlargement has brought the EU are a very powerful state which has in the past dominated the region and some very unstable states. Policies in the area of freedom, security and justice must not be the tail which wags the EU dog into undesirable and unnecessary conflict with incalculable consequences.

Regarding the Constitution, the central thrust of the draft Constitution in the area of freedom, security and justice is to ensure that all policies are firmly based in the Rule of Law. The Hague Programme unfortunately indicates a contrary trend down playing the importance of the Rule of Law and proposing rather nebulous operational cooperation as an apparent alternative to solid legal bases for action and activities. The core value of the EU is the Rule of Law. The Hague Programme must be interpreted and implemented, notwithstanding contrary indications, in such a way as to reinforce the Rule of Law in the EU and not to undermine it.

January 2005

Memorandum by Immigration Law Practitioners' Association (ILPA)

1 INTRODUCTION

The establishment of a truly European system of immigration and asylum law and policy which fulfils the EU's obligations regarding human rights must not only set out a fair and equitable system but also ensure justice for the individual. For the individual there is no justice, no matter how good the legal texts, if there is no access to justice in the form of a right of appeal under fair circumstances and time limits. Where the life or liberty of the individual is at risk, a right of appeal must carry suspensive effect. This most important feature of any system of justice is insufficiently safeguarded in the current and proposed EU immigration and asylum system. A declaration to be attached to the Hague Programme stating in clear and unambiguous terms the commitment of the EU and its Member States to full and suspensive appeal rights in this field is urgently required.

At the outset, it is important to point out that two fundamental issues have been left out of the Hague Programme altogether. First, there is no reference to the importance of legal aid to ensure effective access to administrative and court proceedings for immigration and asylum cases, including relevant data protection disputes, or to sufficient funding for data protection authorities. Secondly, extensive harmonisation of national law and the creation of multiple interoperable data systems at EU level must be accompanied by an EU budget contribution towards legal aid in the Member States and further support for data protection authorities, in order to ensure that individual rights are protected effectively against disproportionate measures concerned with security and control.

2. A COMMON EUROPEAN ASYLUM SYSTEM

(a) Adoption of Asylum Procedures Directive

Notwithstanding concerns raised during the process of negotiation of the directive, and warnings from UNHCR and NGOs concerned in this field (even calling at one stage for the withdrawal of the Directive entirely), the call in the Hague Programme for adoption of this instrument has been promptly followed up at the Justice and Home Affairs meeting on 19 November 2004. No heed has been paid to UNCHR's concerns, reiterated in their comments on the new multi-annual programme, that there is a genuine risk that the Directive, in practice, may lead to breaches of international law.⁴ It is also ILPA's view, as set out in our legal analysis of the Directive, that many of the Directive's provisions will lead to fundamental rights violations in their implementation. The volume of litigation this will bring forth can only be avoided by the annulment of the Directive in its entirety and there is every likelihood, given the precedent of legal action brought in respect of the Family Reunification Directive, that the European Parliament will think it right to bring a challenge before the Court of Justice in respect of this instrument too.

ILPA was further concerned to learn that the directive has been adopted without the list of so-called "safe countries of origin" in its annex. We understand that this was due to lack of unanimous agreement on the supposed "safety" of the 10 countries listed (Benin, Botswana, Cap Verde, Ghana, Senegal, Mali, Mauritius, Costa Rica, Chile and Uruguay) and that a vote on it is due to take place at a later stage by qualified majority. Given that EU member states were divided on the proposed list on account of serious human rights concerns in the relevant countries, it is highly questionable that this list should be adopted at all, let alone pushed through by QMV to overcome a lack of agreement on issues of such a fundamental nature.

Aside from the clear human rights concerns and the issue of procedural propriety in agreeing the common list by QMV, ILPA has serious reservations about the legality of a common EU list of safe countries of origin. As highlighted in our legal analysis of the directive, some Member States do not currently operate safe country of origin systems. Accordingly, this is the first time that EU Member States will be required to dilute their standards of protection by a measure of Community law. This raises serious competence concerns, as the EU is only entitled to establish "minimum standards" in this area. We believe that there is no power to adopt the common list under Title IV of the EC Treaty and any further efforts to do so should be abandoned.

(b) Implementation of first-phase instruments

ILPA welcomes the Programme's call to the Commission to conclude the evaluation of the first-phase instruments in 2007. An extensive assessment of the Community legislation adopted to date is necessary to determine where legal and practical gaps exist and may require further legislation or amendment. The European Commission has also a legal responsibility to monitor transposition and implementation of the directives into national law. Given the low standard of the safeguards contained in some of the instruments adopted in the first phase, strong monitoring of transposition of Community instruments into national law, taking into account the obligation to apply this legislation in accordance with the Geneva Convention and human rights principles and treaties, will be crucial in ensuring that member states maintain or adopt legislation and policies that are in line with international law.

⁴ UNHCR, *The European Union, Asylum and the International Refugee Protection Regime: UNHCR's recommendation for the new multi-annual programme in the area of freedom, security and justice*, September 2004.

(c) New instruments

Subject to evaluation of first-phase instruments and to making the required amendments in those areas that fall short of international standards, ILPA supports Member States' objective of supplementing and developing further the legal instruments in the common European asylum system, in accordance with the 1951 Refugee Convention and other relevant international law, provided that the EU's objective is to establish common high standards, rather than common low standards.⁵

A fully harmonised system will also need to address the position of individuals receiving subsidiary protection status in Member States, a status that remains largely unregulated under Community law. Particularly, we would welcome the adoption of a directive on a harmonised family policy which would grant immediate family reunion rights for those with subsidiary status, as well as the extension of EC "long-term resident" status for refugees and persons with subsidiary protection.

(d) Studies on joint processing of asylum applications

The idea of joint processing within and outside EU territory is highly ambiguous and is not further elaborated upon in the document. ILPA has particular concerns with the issue of joint processing of asylum applications outside EU territory. Is this the revamped concept of off-shore processing, ie camps outside EU borders? The idea of joint processing outside the EU has been around for some time now—it is a highly objectionable objective to pursue and there have been a plethora of studies and analysis, including by the Commission, which question its feasibility, practicality and legality. We don't see the need for pursuing this idea further, and indeed no justification for it is being provided. The European Parliament has also made it clear that any approach implying the establishment of holding camps for the assessment of either protection or immigration status would amount to "off-shore" the EU's own responsibilities for those seeking sanctuary and could not be accepted.

(e) The European Asylum Office

ILPA welcomes co-ordination between Member States' asylum authorities provided that the objective is to ensure effective application of EC legislation in conformity with international law, human rights obligations and high standards of protection. This co-operation provides an opportunity to establish a system of audit and evaluation (carried out not by national authorities' peers in other national authorities, but by independent observers), which *inter alia* can examine asylum policies which have failed in some Member States (such as vouchers, dispersal and cut-off of benefits for "late" applications) as an example of "bad practice" to be avoided by others.

There could be a connection between effective implementation of EC law and funding from the European Refugee Fund, and the Commission needs to devote sufficient energy and resources into ensuring effective implementation by Member States.

Current and future co-ordination measures (including the Commission's Committee on immigration and asylum and the EURASIL committee) should be fully transparent, providing full information on their activities to the public, civil society and national parliaments, and engaging in open dialogue with and ensuring effective participation by NGOs and the UNHCR.

3. THE EXTERNAL DIMENSION OF ASYLUM

Calling upon non-EU states to ratify and adhere to the Geneva Convention is certainly not enough to strengthen national protection capacities in third countries and should not become a justification for making expulsions of asylum seekers to the states concerned easier.

The external dimension of asylum opens up a highly complex area in which it will be extremely important:

- to ensure strict adherence to standards of international human rights and refugee law and in particular to the principle of *non-refoulement*;
- to safeguard the possibility for those in need of protection to access safety and have their claims properly processed;
- to prevent solutions in the sphere of reception in regions of origin and more generally migration management which prejudice the right to seek asylum spontaneously and have the effect of undermining the international protection system.

⁵ On these points see the prior comments of ILPA and other NGOs on various EC law proposals and developments in this field.

ILPA welcomes in principle the recent emphasis on strengthening protection in the region and finding durable solutions. However, the EU's input to help resolve international protection challenges beyond EU borders would be better spent in addressing the causes and consequences of flight, such as poverty, conflict resolution, good governance and human rights. We note in this respect that there has been no effective follow up to the 2002 Commission Communication on the question of root causes.

ILPA believes that the EU's recent focus on protection and solutions in regions of origin is unduly influenced by self-interest, ie the desire to ensure that refugees and asylum seekers are prevented or deterred from making their way to the territory of EU Member States. It constitutes a form of burden-shifting. The UK experience of "migration partnership" so far has shown that engagement with third countries is more a means to enhance their border controls with the intent of preventing people moving on. This is equivalent to abdicating protection responsibilities.

EC legislation should more clearly prohibit *refoulement* at the border (whether at a maritime or other border) or *refoulement* by means of interception on the high seas. Under no circumstances should EC law or policy encourage interception on the high seas with a view to *refoulement*, rather than ensuring the safety of the persons concerned.

4. IRREGULAR MIGRATION

(a) Terminology

The European Council persists in using the term "illegal immigration", in accordance with the developing EU law and policy in the field of irregular migration and the measures adopted to date, in contrast to the more neutral terminology now used by the other major actors working on migration questions, such as the ILO, the IOM and the Council of Europe. The use of the term "irregular migration" avoids the negative connotations implicitly associated with the terms "illegal immigration" and "illegal migrant", which render such migrants as effectively without rights and closely related to criminal elements. In a similar vein, the European Council continues to use military language referring on a number of occasions in its Conclusions to the "fight against illegal immigration".

(b) The "fight against illegal immigration" and Fundamental Rights

The "fight against illegal immigration" is referred to in two important contexts in the Hague Programme. Firstly, under the heading "legal migration and the fight against illegal employment", the Programme notes that "the informal economy and illegal employment can act as a pull factor for illegal immigration and can lead to exploitation", and urges Member States to meet the targets for reducing the informal economy in line with the European employment strategy. While the recognition of this connection between exploitation in the informal economy and irregular migration is welcome, it is unfortunate that there is no explicit recognition in the Programme that one of the ways of reducing the informal economy is to devote more efforts to protect the employment rights of all those persons engaged in it, including both national and irregular migrant workers, and to increase resources to conduct labour inspections in those sectors where exploitation is prevalent. The Hague Programme refers in several places to the protection of fundamental rights as an important objective and also underlines in the section on "General orientations" the need "to ensure that in all . . . areas of [EU] activity, fundamental rights are not only respected but also promoted". These are welcome exhortations, but it must be remembered that fundamental rights are not the exclusive entitlement of EU citizens and such principles must apply to all persons within EU territory, including those deemed by national authorities to be in an irregular situation. Similarly, the Programme's declared commitment to oppose racism, anti-Semitism and xenophobia cannot possibly be implemented effectively if a large section of the population of irregular migrants, a significant proportion of which is also of a different racial or ethnic origin, remains marginalised and stigmatised in host societies.

(c) Legal Labour Migration and the Link to Irregular Migration

Moreover, the continuing scepticism about Member States' ability to develop a coherent and positive strategy for increasing legal labour migration routes into the EU is hardly conducive to achieving successfully an overall reduction in irregular migration. The draft Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities⁶ has been abandoned and the European Council, referring to the forthcoming Commission Green Paper on labour migration and best practices in Member States, merely invites the Commission "to present a policy plan on

⁶ COM (2001) 386, 11 July 2001.

legal migration including admission procedures capable of responding to fluctuating demands for migrant labour in the labour market before the end of 2005” (see further the “legal migration” section below). It would seem therefore that there is little political will among Member States to tackle the question of admission of third-country nationals to their labour market in any binding legal instrument, a position supported by the reiteration of the reference in the Constitutional Treaty that the determination of volumes of admission of third-country nationals coming from outside the EU for the purpose of seeking employment or self-employment is a competence of the Member States⁷ and by the fact that the Hague Programme’s call to the Council to apply qualified majority voting to asylum and immigration measures does not encompass legal migration. Consequently, “the fight against illegal immigration” is once more to be conducted without any concerted EU efforts to address the lawful admission of third country nationals for employment. Indeed, the only positive suggestion on legal migration in the Hague Programme is the reference to the use of Community funds to assist third countries to inform on legal channels of migration.

(d) *Return and Readmission*

The Hague Programme reflects the current lack of a balanced approach in the current EU law and policy on irregular migration by its overemphasis on return measures. While the reference to the establishment of an effective removal and repatriation policy based on “full respect for [migrants’] human rights and dignity” is welcome, the adoption of minimum standards in this important area (where a proposal for a Directive is planned by the Commission) is insufficient. The need to agree principles which meet the highest standards of human rights protection is particularly pressing given that the measures adopted to date have all focused on enhancing cooperation between Member States’ officials in the return process and are based on the assumption that human rights are already respected in this area, which is clearly not the case as seen in European Court of Human Rights judgments against certain Member States.⁸

Any emphasis on encouraging voluntary return appears to have now been abandoned in favour of forced or compulsory return. In this respect the reference that migrants who do not or no longer have a right to stay legally in the EU “must return on a voluntary basis” is somewhat of a *misnomer*. Moreover, the position of such migrants cannot in practice be viewed as a *fait accompli* given that many such persons are indeed permitted to stay and work in a number of Member States on the basis of regularisation programmes. The failure in the Hague Programme to give any recognition to this common “response” to irregular migration practiced in Member States reflects a disturbing blissful ignorance of at least some Member States to this valid approach.

The idea of a “Special Representative” for readmission policy shows a shallow and negative attitude to this issue. Why not appoint a Special Representative for ensuring the protection of asylum-seekers?

5. BORDERS AND VISAS

(a) *Borders*

ILPA welcomes the call in the Hague Programme for a swift abolition of internal border controls. We note that this has been a legal requirement of the Member States since 31 December 1992, the end of the transitional period under the Single European Act. We would suggest that securing the abolition of intra-Member State border controls also requires a modification of article 2(2) Schengen Implementing Agreement which was incorporated into the EC Treaty by the Amsterdam Treaty. We would also remind the Council that the abolition of internal border controls, as initially described in 1987, is not essentially connected to “the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union.” The insertion of the Schengen Implementing Agreement into EU law by way of a protocol does not change the fundamental obligation of the Member States contained in Article 14 EC to abolish intra-Member State controls on the movement of persons.⁹ It is quite an inversion of the hierarchy of law in the EU to make such an implicit suggestion.

The linking of freedom of movement within the Union with repressive border measures at the external frontier is not a necessary or natural correlation. The Member States’ external border law and practice is the result of more than a century of national law. Why should this be considered inadequate simply because internal border controls are removed? Further, the EU’s Neighbourhood policy¹⁰ is based on the sound principle that the

⁷ Article III-267(5) of the Treaty Establishing a Constitution for Europe, OJ 2004 C 310.

⁸ Eg *Conka v Belgium*, Eur Ct HR, judgment of 5 February 2002, (2002) 34 EHRR 1298.

⁹ The judgement of the Court of Justice in Case C-378/97 *Wijsenbeek* came some 12 years later, and obviously was influenced by national interior ministries’ subsequent take-over of the frontier abolition project by way of the Schengen Implementing Convention.

¹⁰ COM (2003) 104 final.

security of the European Union depends on its neighbours enjoying stability, the rule of law and respect for human rights. The EU's security requires that its neighbours are also secure. Part of this normalcy is that practices at the border recognise that the movement of goods, persons, services and capital across borders is a way of assuring stability and economic development. The objective of the neighbourhood policy is the gradual relaxation of restrictions on border controls with the EU's neighbouring states with a view to an extension of the whole of the internal market, including free movement of persons to them. This has already been done in respect of Norway, Iceland and Switzerland with positive consequences for the EU's security. The strengthening of controls at the external frontier runs directly counter to this policy and in ILPA's view is counterproductive as regards securing both the short and long term security and stability of the Union for the reasons which the Commission itself has most cogently expressed. For example, there is a contradiction between supporting democracy in Ukraine as an essential part of the Neighbourhood Policy, and visa and border control rules that severely disrupt the personal and economic contacts between Ukrainians and EU citizens in neighbouring EU Member States.

The establishment of a European Agency for the Management of Operational Cooperation at the External Borders is an ambitious task. We understand the Council's wish to highlight the need and added value of such an agency in respect of which substantial time and money has already been expended. However, we would stress here that the Agency's orientation must be to carry out the policy of the European Union not only as understood within the framework of security but also as part of the internal market and external relations, and in accordance with the non-refoulement principle. The external border of the EU should not be approached as if it were the site of invasion, crime or cultural warfare. It must be understood both in law and practice as that which it is: the marker of normal economic, social and cultural relations between neighbouring states. Movement of persons across borders must not be presented as something to be feared as a danger and a threat but as a normal part of the modern world and part of a beneficial definition of globalisation.

The use in the Hague Programme of the discourse of "exceptional migratory pressures" is in our view very unhelpful. The image which is conjured up is one of invasion and submersion rather than normal border activity. The use of this type of image demands the interpretation of particular events as consistent with it. It is important to remember that every day, millions of people, both citizens of the Union and third country nationals, cross the external borders of the EU. This is part of the strength of the EU's market and the means towards the future prosperity and security of the Union. When the image of exceptional migratory pressure is used, it counters the normalcy of these movements of persons. Thus the arrival of a small group of third country nationals, say a few hundred individuals from North Africa, instead of being interpreted as part of the normal every day movement of third country nationals into and out of the EU, is transformed by this discourse first into a potential "exceptional migratory pressure" then almost immediately into an actual one. The arbitrariness of the allocation of this title to one group of persons arriving in one place as opposed to another group of third country nationals arriving in another is palpable. The negative impact of describing the nationals of our neighbours as an "exceptional migratory pressure" is also substantial. We would not accept our nationals being so stigmatised, we should be very slow to so stigmatise the nationals of our neighbours if we want stability and security on our borders.

Moreover, it seems from early drafts of the Hague Programme and more recent Council conclusions that these provisions of the Programme aim to provide the basis for joint EU-level measures to intercept persons travelling on the high seas, potentially with a view to violating the principle of non-refoulement. This is unacceptable for the reasons set out above (asylum section).

Furthermore, in accordance with recent practice, the European Council affirms that operational measures at the border are to play a pivotal role in preventing irregular migration, such as "the firm establishment of immigration liaison networks in relevant third countries", which was recently also provided with a legal framework by the Council Regulation on the establishment of a network of immigration liaison officers.¹¹ With regard to operational measures, the following sentence is worth noting in particular: "[T]he European Council welcomes initiatives by Member States for co-operation at sea, on a voluntary basis, notably for rescue operations, in accordance with national and international law, possibly including future co-operation with third countries". Given that Member States have co-operated in joint operations at sea, with the use of military vessels and aircraft, to apprehend irregular migrants in unseaworthy boats, actions that have allegedly contributed to the death of migrants at sea, there is supreme irony in the reference to "rescue operations" notwithstanding the subsequent reference to compliance with national and international law. Moreover, the fact that the European Council envisages possible future co-operation with third countries should be treated with particular caution given the establishment of recent co-operation between Italy and Libya to prevent irregular migration by sea, in light of the human rights record of Libya (on both points, see further the asylum section above).

¹¹ Council Regulation 2004/377/EC of 19 February 2004 on the creation of an immigration liaison officers network, OJ 2004 L 64/1.

ILPA very much welcomes the establishment of an evaluation and supervisory mechanism within the structures of the EU's External Borders Agency. Among the problems which we consider the most pressing is the uneven application of EU law in this field. Even as regards nationals of the Member States and their third country national family members (particularly as regards citizens of the Union of the newer Member States) there is a questionable application of the right of free movement of persons in many of the older Member States. These problems are particularly common when the individuals are arriving from outside the European Union. We trust that the proper application of EU law in the field (including free movement law, asylum law and the EU's association agreements) and its correct implementation at the external frontier will be a matter of substantial concern for the Agency.

(b) *Visa Policy*

The European Council calls for a further development of the common visa policy, through greater harmonisation of national legislation and a more uniform handling of visa applications at the local consular level. In this regard, the establishment of common visa offices in the long term can only be supported once the rules on issuing visas are transparent and equitable and meet certain guarantees (see below). While "tackling illegal immigration" is identified as one purpose of such measures, another is "facilitating legitimate travel" and this reference to a positive aspect of the common visa policy is welcome. However, it is unfortunate that the European Council has not advanced these proposals on visa policy in a human rights and rule of law framework by requiring the anticipated improvements in the harmonised and uniform visa-issuing procedures to conform to robust procedural guarantees and to include clear effective remedies in the event of refusal.

We support strongly the proposals which the Standing committee of experts on international immigration, refugee and criminal law made to the chairman of the European Parliament LIBE Committee on the draft Regulation establishing a Community code on the rules governing the movement of persons across borders (COM (2004) 391, 26 May 2004) dated 24 November 2004.¹² We would highlight the following recommendations of the Standing Committee on the issue as follows:

"Considering the consequences of the EU wide application of national criteria applied to persons to be refused entry and the fact that Member States apply very different criteria to record a person into SIS, the Standing Committee advises to provide in this Community Code, or in another binding legal instrument, certain minimum standards with regard to the grounds being used to refuse third country nationals entry to the EU territory. The provision of clear, specific criteria, on the basis of which individuals may be refused entry, should prevent arbitrary and unpredictable use of relatively 'light' criteria by national authorities.

These minimum standards should be based on the principle that decisions on the basis of which individuals are refused entry or visa, must be justified by overriding reasons of public interest: they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary to attain that objective.

Therefore, the Standing Committee advocates to amend Article 5 (1) in: 'For stays not exceeding 90 days, third country nationals shall be granted entry into the territory of Member States if they fulfil the following conditions. . . .', and;

The condition of Article 5 (1) sub e should be amended in: 'the personal conduct of the persons concerned, does not indicate a specific risk of an actual and serious prejudice to the requirements of public policy or national security of one or more Member States'.

The Standing Committee proposes to incorporate in this draft Regulation an explicit regulation of the right of every individual within the jurisdiction of the European Union, to an effective legal remedy. We refer to the provision, Article 6, of our draft Directive on Border Control and Movement of Persons, mentioned above:

Article 6 of the draft Directive of the Standing Committee on minimum guarantees:

Everyone within the jurisdiction of a Member State or the European Community [European Union] has the right to an effective legal remedy before a court against any decision as referred to in Article 1.

This remedy shall be easily and promptly accessible and offer adversarial proceedings before an independent and impartial court competent to review on the merits of the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The court will decide within a reasonable time. The court will decide speedily when detention is at issue or when personal liberty and integrity are affected in any other way.

¹² See also the Standing Committee of Experts in International Immigration, Refugee and Criminal Law (Meijers' Committee) draft Directive on effective legal remedies in matters of migration and border control, presented to the European Parliament on 24 February 2004.

Proceedings shall offer the individual concerned the opportunity to be heard either in person or by representative. The principle of equality of arms must be abided.

The court shall have the power to order effective suspension of the execution of measures whose effects are potentially irreversible for the period of the proceedings.

The court shall have the power to annul a decision when it finds the decision arbitrary, disproportionate or unlawful.

The courts shall be competent to order any appropriate measure against the responsible authority of any Member State repairing or compensating damages caused by such decisions.

According to the Standing Committee these rights should be explicitly included in the draft regulation on border crossing. Article 11 (3) of the Community Code provides that the authorities should make a 'substantiated decision' which shall state the available remedies. This provision should be completed by adding that the decision refusing an individual a visa or entry, should be written and in a language which is comprehensible for the individual concerned or providing an English summary of the decision. The decision should indicate the legal provisions or provisions underlying the decision and all relevant reasons. The decision should state the competent court, and its address.

With regard to third country nationals who are refused entry on the basis of a SIS entry, the decision should also state which Member State has entered the entry into SIS, and on which grounds the person is entered into SIS.

The obligation of Member States to report to the EU institutions should also have to apply to the emergency procedures as regulated in Article 22. The Standing Committee proposes to amend Article 24 (2) in "These checks may only be reintroduced for a limited period of no more than 30 days. If the serious threat to public policy, internal security or public health has not ceased to exist, this period may only be extended by another period of 30 days on the basis of a proposal by the Commission."

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The Standing Committee proposes to add to Article 28 a paragraph which limits the possibility of confidentiality, conforming to Article 4 of Regulation 1049–2001: 'Information on the reintroduction and prolongation of checks may only be kept confidential if disclosure of this information would undermine overriding interests of public security, defence and military matters, and international relations.'

The emphasis on the establishment of the European Visa Information System (VIS) and the need to implement it quickly reasserts an undue faith in new technology. The European Council also invites the Council and the Commission to examine whether short-stay visas can be facilitated to third-country nationals, on a case-by-case basis and on the basis of reciprocity, in the context of EC readmission policy. This appears to suggest that the "carrot" for agreeing to the "stick" of readmission agreements would be facilitated by travel to the EU for the nationals of compliant third countries, a proposal with resonances in the Italian practice of setting aside labour migration quotas for nationals of those third countries prepared to agree to readmission agreements with Italy. Such an approach is particularly problematic given that the European Commission has already expressed concerns in its June 2004 Study on the links between legal and illegal migration¹³ that while offering preferential labour quotas to target third countries may improve co-operation with those countries in the short term, the discriminatory effect of such quotas on third countries which have not entered into readmission agreements is likely to frustrate co-operation with the EU in the long term.

6. BIOMETRICS, BORDERS AND VISA POLICY

Border checks, visa policy and controlling "illegal" immigration are all linked to the issue of biometrics and information systems. The Hague Programme places considerable faith in security measures in the form of the development of a coherent EU approach to biometric identifiers and information systems as a way of managing migration flows. In keeping with the security context of this subject, the European Council observes that "such measures are also of importance for the prevention and the control of crime, in particular terrorism". Once again, the association of irregular migration with crime and terrorism is unsubstantiated. We are less convinced than the Council of the benefits of biometrics in the management of migration flows. The express "security continuum" seems to us to be rather devoid of meaning. We fail to understand what the meaning of security is in this sense nor what the concept of "continuum" is supposed to add. Further, we

¹³ COM (2004) 410, 4 June 2004, p 9.

remain sceptical that border control measures on persons contribute in any substantial way to the prevention or control of crime or terrorism. The experience across the EU in respect of terrorism and border controls has been that the Member States have consistently rejected a correlation of efficiency (let alone legitimacy). The examples of Northern Ireland and the Basque country are only the most striking in this regard. If the Council wishes to justify the securitisation of the external border through the use of biometrics we would suggest that more cogent reasons will need to be presented to justify the expenditure. The effectiveness of expensive mass databases in combating terrorism and other serious crime, as compared to spending that money to ensure more accurate and effective intelligence on these crimes, is highly doubtful.

The European Council requests the Council to examine how to maximise the effectiveness of the interoperability of EU information systems, such as SIS II, EURODAC and the future VIS, in order to tackle irregular migration on the basis of a forthcoming Commission communication on this question. While the reference to the “need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals” is welcome, this faith in new technology as a “simple fix” to the problem of irregular migration is unwarranted and disproportionate in the absence of efforts to adopt other more traditional and less costly measures, such as increasing lawful avenues for third-country nationals to take up employment opportunities in Member States considered above. No particular reason is given for this mixing of personal data collected for very different reasons and over which the data subject’s rights are differently configured. Tackling “illegal” immigration requires, as a very minimum a common definition of what it is. Without this, no measure taken to tackle it will be satisfactory. So long as the underlying criteria and reasons for the issue or refusal of a visa or entry into the EU remain in practice defined and applied at the national level there can be no common definition of irregular immigration. Thus the tackling of the phenomenon becomes a struggle with a phantom opponent which is quite ridiculous. Rather than demonising the data subject by making references to illegality and terrorism, the EU would do well to strengthen security by putting in place proper controls to safeguard the rights of the data subject.

Everyone is concerned about misuse of their personal data and about the threat of identity theft. It is not just citizens of the Union who are concerned about these risks. Because of the risks posed by governments’ population registers and interoperable data bases on different aspects of our lives, at the national level there are substantial controls which protect us from any sort of heavy handed approach to data collection and use. ILPA is even less enthusiastic about the possibility that foreign governments hold this sort of information about us in data bases which they can use as they wish.¹⁴ Why then, does the Council wish to antagonise our EU neighbours by seeking to use information about their nationals in a way which we would consider unacceptable if it were applied to ourselves? Surely this is not a sensible or rational approach to friendly relations with third countries. Particularly in light of the lack of any evidence of the benefit which such an approach would provide in terms of policing or otherwise, it seems particularly ill founded and likely to result in tensions and poor relations with third countries and their nationals.

7. LEGAL MIGRATION

There are important reasons for standards to be laid down at the European Union level in relation to legal migration. This is an area where it is desirable to counteract the tendency of Member States to seek to arrange legal migration on terms which exclusively reflect their own interests, and those of employers, while ignoring the interests of migrants themselves. There are moreover significant fundamental rights in play in this field, including the right to respect for family life (Article 7 of Fundamental Rights of the European Union of the Charter), rights to work and to pursue an occupation (Article 15 of the Charter) and the right not to be discriminated against (Article 21 of the Charter).

Against that background, we are concerned by the very low priority given to measures on legal migration within the Hague Programme. That is reflected in the fact that legal migration is the only aspect of asylum and immigration policy to which it is not proposed to extend the co-decision procedure (see point 1.1.2 of Chapter III of the Hague Programme and the draft Council Decision of 12 November 2004). It is not clear why this area alone has been excluded, not least given that it will become subject to co-decision if and when the proposed Constitution for Europe comes into force.

The low priority given to legal migration is reflected too in the absence of any proposal to review the main existing measures in this area. This is especially problematic because of the very low standards contained in the existing measures. The guarantees contained in Directive 2003/86 on family reunification clearly fall below those required under Article 8 ECHR in several respects. For that reason, the European Parliament has applied for the annulment of this Directive in Case C-540/03. Directive 2003/109 on long-term residents

¹⁴ See for instance the European Parliament’s challenge to the Commission’s and Council’s acceptance of the US data protection laws as sufficient to justify the exchange of passenger data (PNR).

meanwhile provides only very limited rights for third country nationals who have long-term resident status in one Member State to move to another. We have a particular concern about the exclusion of refugees and those with subsidiary protection from the scope of Directive 2003/109. The absence of a right for these groups to move between Member States is a serious omission from the legislative initiatives taken to date under Title IV. The adequacy and implementation of Directive 2003/86 and Directive 2003/109 should be examined within the framework of the Hague Programme, including questions of the scope of both Directives (extension of Directive 2003/109 to both refugees and persons with subsidiary protection, and extension of Directive 2003/86 to persons with subsidiary protection: see the asylum section above), along with the family reunion rights of EU citizens who have not exercised free movement rights.

The one concrete proposal in the Hague Programme in this area is that the Commission should present a proposal on legal migration “including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market.” ILPA welcomes the apparent intention to exercise EC competence over economic migration. We are concerned however that the focus is on a flexible admissions system, and therefore exclusively on the interests of employers and Member States. It is also necessary to recognise the rights of migrants concerning admission for employment purposes, and their right to fair and equal treatment after admission. It is unfortunate that the Hague Programme makes no mention in this regard of relevant treaties concluded within the framework of the International Labour Organisation (which a number of Member States have accepted), of the UN Convention on the Rights of Migrant Workers, of the General Agreement on Trade in Services or of the overall need to develop a fair international framework on this subject.

In this regard, we are concerned too by the concession in the Hague Programme to the effect that “volumes of admission of labour migrants is a competence of Member States”. Member State control over the numbers of persons admitted to the labour market is not something which is expressly set out in the EC Treaty at present. It is true, as noted above, that Article III-267(5) of the proposed Constitutional Treaty protects “the right of Member States to determine volumes of admission of third-country nationals coming . . . to their territory in order to seek work”. On close examination, however, even this appears to recognise the right of Member States only in relation to those looking for work, as distinct from those seeking admission in order to take up employment. Also, it should not be forgotten that the Constitutional Treaty only reserves competence to the Member States to set economic migration quotas on persons coming from outside the EU; the EU will have competence (as it does now) to remove or limit the use of quotas restricting the movement of third-country nationals between Member States.

CONCLUSIONS

In comparison with the fanfare which surrounded the Tampere Conclusions launching the first five year period of an area of freedom, security and justice in the EU, the unveiling of the Hague Programme was a decidedly muted event. The sense that the first five years have been something of a qualified success is no doubt part of the reason for the relative quiet around the start of the second five year programme. However, of more concern to this Association, the second five year plan for the area appears to have lurched into a securitarian understanding of the movement of persons. This manifests itself in a number of ways.

- First, the commitment to the principle of *non-refoulement* as regards the protection of asylum seekers is increasingly tenuous. While statements regarding the importance of the protection of refugees abound, the application of the principle of non-refoulement on which these statements are founded is increasingly lacking. Instead the vision of asylum seekers as floods and a menace is increasingly at the fore.
- Second, all of the measures regarding border controls highlight the need for more and more security at the borders. The movement of persons across borders is constructed as a threat rather than the source of our prosperity as it is in the EU, even an EU of 25 Member States. It is both incoherent and inconsistent to treat the nationals of our neighbours as threats one day, but to transform them into citizens of the Union the next day and welcome their movement as central to our economic security.
- Third, the dominance of biometrics as a solution to movement of persons is clearly absurd. The insistence of some ministries and private sector actors that identifying everyone is the way to secure security is clearly faulty. Finding criminals is about targeted intelligence rather than tagging the whole population. Masses of irrelevant information are not valuable in crime control. But it is all too easy for the temptation to use the mass of information to ends other than those for which they were designed and contrary to the interests of the population and the individual.

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- Fourth, the focus on irregular migration as “illegal” migration fails to take into account that individuals who move from one country to the next normally wish to do so within the law. It is the establishment of specific laws which render their presence irregular or “illegal”. As is very clear in many parts of Europe third country nationals fall into and out of regularity as a result of events in their lives, a failed year at university, the failure of family to send sufficient money to support their studies, divorce, etc. To found a large section of EU policy in the field of freedom, security and justice on harassing and criminalising this small section of the community rather than seeking to find ways to adapt laws to ensure that they remain in a regular status is ridiculous.
 - Finally, the failure of the Hague Programme to address the pressing need for measures on legal migration to the EU is unacceptable. Without a common system of legal migration, the concept of irregular migrant is meaningless. Until there is a common system whereby people can regulate their lives when coming to the EU to work the whole system of immigration and asylum is incoherent.

January 2005

Memorandum by JUSTICE

1. JUSTICE is an independent all party law reform and human rights organisation whose purpose is to advance justice, human rights and the rule of law through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. JUSTICE’s work on European justice and home affairs is two pronged and focuses on judicial co-operation in criminal matters and immigration and asylum. Its work in these fields is complemented by its information project on the EU Charter. The scope of this submission will reflect these areas of specialisation.
3. JUSTICE welcomes the House of Lords Select Committee’s inquiry and the further opportunity it provides to comment on the Hague Programme. Although the Hague Programme was approved by the European Council on 5 November 2004 and is no longer open to amendment, it is hoped that this inquiry will assist scrutiny of the detailed Plan of Action due to be presented by the European Commission later this year.
4. JUSTICE urges the UK to seize the opportunity provided by its Presidency of the EU in the latter half of this year to take the lead in developing high standards of individual rights protection in the legislation and policy elaborated under the Hague Programme. In so doing, it will further the Union’s commitment, expressed in the new Constitution, to the respect and promotion of fundamental rights, access to justice and the rule of law.

SUMMARY

A Common European Asylum System

Adapting voting rules and ECJ jurisdiction: The move to QMV and co-decision in most areas of asylum and immigration should be accompanied by the full jurisdiction of the ECJ over these matters. The decision by the Council to adapt the rules relating to the ECJ should not be delayed any further.

Asylum Procedures Directive: JUSTICE has serious concerns about this instrument and believes that its implementation by Member States may lead to fundamental rights violations. The Directive should be challenged by the European Parliament before the ECJ.

Evaluation and monitoring of first phase instruments: JUSTICE welcomes the Hague Programme’s commitment to undertake an evaluation of the first phase instruments by 2007. Close monitoring of their implementation should also inform the next phase of development of a common European asylum system. Human rights compliance should be a central part of this monitoring process.

Second phase instruments: the Hague Programme’s objective of developing further legal instruments in the common European asylum system should be aimed at establishing high standards of protection, rather than common low standards. Improvements to existing structures of co-operation in asylum and immigration should particularly address the lack of transparency and open up to international and non-governmental organisations.

The external dimension of asylum and immigration: partnership and co-operation initiatives with third and transit countries and with countries and regions of origin of asylum seekers are largely driven by migration management priorities despite their purported aim of strengthening capacity for the protection of refugees in the regions and countries concerned. EU institutions and member states must develop mechanisms to monitor and ensure coherence in their external actions which respect international refugee protection principles.

Judicial Co-operation in Criminal Matters

Approximation of procedural criminal law: The introduction of a deadline for the adoption of the Commission proposal on procedural safeguards is welcome if long overdue given the number of coercive mutual recognition instruments already in operation. As a matter of priority, it should be accompanied by the adoption of instruments that respond to the needs of suspects and defendants facing investigation or prosecution abroad or who are otherwise affected by EU mutual recognition instruments.

Mutual trust: Critical to the success of the mutual recognition programme, greater efforts must be made to build mutual trust between all actors in the criminal justice process. This can be achieved through developing high minimum standards of criminal justice across the Union, through independent monitoring and evaluation of those standards in practice and wide public dissemination of the results. These aspects of developing mutual trust do not receive ample attention in the Hague Programme. JUSTICE welcomes the Hague Programme's other important initiatives to enhance trust amongst European judicial authorities through training, exchanges and support for networks of judicial organisations.

EU counter-terrorism: The Hague Programme does not address the criticisms levelled at its counter-terrorism policy by the Network of Independent Experts and others, notably with regard to its unacceptable interference with fundamental rights. The violations of the rights of those listed by the EU as "terrorists" to an effective remedy before a judge, to the presumption of innocence and to the preservation of their reputations must be addressed as a matter of urgency under the Hague Programme.

Exchange of information: There must be greater clarification of "the principle of availability" to ensure that important disparities in the protection of individual rights across the EU, notably in relation to data protection and defence rights, are not overlooked in an attempt to achieve security through greater information exchange, at the expense of freedom and justice.

5. EU-US co-operation: Existing and future co-operation agreements with the US must incorporate appropriate safeguards and remedies and the limits of co-operation defined by a risk of breaching EU human rights standards.

A COMMON EUROPEAN ASYLUM SYSTEM

Adapting Voting Rules and ECJ Jurisdiction

6. With the exception of legal migration, the Hague Programme contains a clear commitment to change asylum and immigration decision-making rules to qualified majority voting (QMV) in the Council and co-decision with Parliament at the latest by 1 April 2005, in accordance with Article 67 of the Treaty establishing the European Community. This has been promptly followed by a draft decision of the Council, which JUSTICE is aware the Committee has welcomed. Regrettably, the Hague Programme does not also instruct the Council to act to adapt the rules relating to the European Court of Justice (ECJ), despite a legal obligation to do so under Article 67.

7. A review of the limitation of the ECJ's jurisdiction was to take place five years after entry into force of the Amsterdam Treaty (ie 1 May 2004). The Council appears to believe that the circumstances do not allow such a change at the moment but it has not explained its reasoning. Thus, in the field of asylum and immigration the normal rules of the ECJ jurisdiction continue to apply, subject to the limitation that the referring court must be a court or tribunal "against whose decisions there is no judicial remedy under national law".

8. JUSTICE believes that the normalisation of this area and full jurisdiction of the ECJ over matters of fundamental rights must be a priority and should not be delayed until the coming into force of the Constitutional Treaty. A clear and full interpretation of EU asylum and immigration law by the ECJ is vital for the consistent application of the asylum and immigration measures across an EU of 25 Member States and for ensuring compliance with international obligations.

The Asylum Procedures Directive

9. The Hague Programme's call for adoption of the Asylum Procedures Directive was promptly acted upon at the Justice and Home Affairs meeting on 19 November 2004. UNCHR and human rights organisations, including JUSTICE, have serious concerns about certain aspects of this instrument. A number of provisions fall short of recognised international standards, providing scope for a drift towards the lowest common denominator of existing national practice, and even for possible beaches of international law. During negotiations in the Council, nothing was done to bring the Directive into line with international standards, despite repeated warnings by UNHCR. If anything, standards dropped even lower. There is a considerable risk that the implementation of many of the Directive's provisions will lead to fundamental rights violations, and action should be taken by the European Parliament to refer the matter to the ECJ. An opinion of the European Parliament on this instrument is due shortly, although the Council will not be bound by it.

10. Further concerns are raised by the decision to adopt the Directive in the absence of an agreement on the list of safe countries of origin in its annex. The adoption of the list has been postponed until a later stage when a decision will be taken under QMV. Lack of agreement was partly due to widely differing opinions regarding the safety of certain countries listed. Quite apart from confirming our strong reservations on such a list, it is unacceptable that, on a matter that concerns fundamental rights, the Council now seeks to overcome opposition by subjecting the measure to QMV. Manifest difficulties of procedure, and with the notion of safe countries of origin, should dissuade the Council from adopting such a list altogether.

Evaluation and monitoring of implementation of first phase instruments

11. It is clear from the Hague Programme that evaluations of first phase legal instruments will be undertaken as part of the next phase. JUSTICE welcomes this. As part of this process, it will be critical to engage, in a well-informed rights-based assessment of the measures that have been introduced thus far and ensure close monitoring of their implementation in Member States' legal systems as well as formal transposition. Human rights compliance should be a central part of this monitoring process. Any additional moves in the development of a common asylum procedure must be premised firmly on respect for international refugee and human rights standards.

Second Phase Instruments

12. JUSTICE welcomes the Hague Programme's renewal of commitment, as expressed at Tampere and in the Constitutional Treaty, that the second phase will see the establishment of a common asylum procedure and a uniform status throughout the Union for those who are recognised as refugees or granted subsidiary protection. While stressing again that further legislative measures will have to be subject to evaluation of the first phase instruments, to be completed according to the Hague Programme in 2007, notably absent in the Programme is a commitment that any further legislative action should be aimed at establishing a truly common asylum system based on high standards of protection.

13. JUSTICE is not persuaded by the call for studies on joint processing, both within and outside the EU. This proposal is not elaborated further in the Programme nor is any justification for its inclusion being offered and we hope that the Commission will provide further details in its 2005 Action Plan.

14. JUSTICE welcomes the call for appropriate structures involving the national asylum services of the Member States with a view to facilitate practical and collaborative co-operation. Practical efforts to develop common tools and approaches should be encouraged, not least in the shared interpretation of conditions in countries of origin and their implications for the determination of asylum claims. We note that such efforts are already taking place with EURASIL (the EU Network for Asylum Practitioners). Rather than setting up new structures, therefore, the existing framework could be improved. Particularly, any reforms should address the lack of transparency of existing structures and provide a real opportunity to share information between EU policy makers, international and non-governmental organisations.

The External Dimension of Asylum and Immigration

15. The Hague Programme takes justice and home affairs policies further into the realm of the EU external relations by calling 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. In the past two years, EU member states and institutions have increased their focus, both collectively and bilaterally, on partnership and co-operation with third and transit countries and with countries and regions of origin of asylum seekers. While having, amongst others, the stated aim of enhancing protection capacities in those regions and countries, such initiatives are largely driven by "migration management" priorities: they aim to enhance third countries'

border controls through the provision of training and technical assistance, and to conclude readmission agreements.

16. Under the Hague Programme, new measures are to be initiated, for example, within the framework of the European Neighbourhood Policy (ENP). The stated goal of ENP is to share the benefits of the EU's 2004 enlargement with neighbouring countries in North Africa and Eastern Europe building on mutual commitment to common values, including respect for the rule of law and human rights.¹⁵ However, Commission documents on ENP suggest that border management is likely to be a priority in most Action Plans to be agreed with partner countries.¹⁶ Joint measures to strengthen the refugee protection capacity of the countries in question are not dealt with in any detail.

17. This imbalance is also reflected in the UK government migration partnership initiative. According to the government, this initiative is "seeking to assist countries in regions of origin to develop their own abilities to host refugee populations and provide asylum".¹⁷ The current initiative with Tanzania, however, has so far focused on training Tanzanian immigration officers in detecting fraudulent documents and in supplying forgery detection equipment.

18. At EU level, the UK initiative is mirrored by the Regional Protection Programmes (RPPs) initiative, first advanced by the Commission in its communication on improving access to durable solutions.¹⁸ The Hague Programme encourages the Commission to develop RPPs, with a pilot programme to be launched in 2005. RPPs are supposedly aimed at strengthening protection for refugees in the regions of origin. However, they include action on migration management and there is every reason to believe that they may be focused primarily on enhancement of border controls. We understand that RPPs are a priority for the UK, under whose Presidency the Commission is expected to submit its first project plan. JUSTICE calls for careful scrutiny of these plans in order to ensure that these are truly measures that focus on protection issues rather than being directed primarily at preventing secondary movements to EU countries.

19. On the issue of return and readmission, the Hague Programme insists on the conclusion of readmission agreements (to be assisted by the appointment of a Special Representative for a common readmission policy). If properly formulated and selectively agreed with countries which have demonstrated good compliance with international refugee and human rights law, such agreements could provide an additional safety net to ensure that nobody is sent back to a place where his or her life or freedom may be in danger. However, this has not been the case to date: readmission agreements are prioritised in countries where abuse of human rights has aroused concerns within the EU and notoriously lack safeguards against refoulement of rejected asylum seekers, therefore hugely increasing the risk that they may be sent back to countries where they are not safe.

JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

Approximation of Criminal Procedural Law

20. Both the Constitutional Treaty and the Hague Programme confirm the principle of mutual recognition as the basis of further developments in judicial co-operation in criminal matters. JUSTICE has long held that the approximation of certain aspects of criminal procedural law is necessary both to legitimise and facilitate the EU's mutual recognition programme.

21. JUSTICE welcomed the introduction in the Constitutional Treaty of specific legal bases for the adoption of minimum rules concerning (a) mutual admissibility of evidence; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; and (d) other specific aspects of criminal procedure identified by a unanimous decision of the Council of Ministers¹⁹. This explicit acknowledgement of the need for such common rules echoes previous commitments made in the Tampere Programme. To date, however, although some work has commenced—notably on a Commission proposal for certain procedural rights in criminal proceedings²⁰ and a green paper on pre-trial non-custodial supervision measures²¹—it continues to lag far

¹⁵ In December 2004, the Commission approved agreements with Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia and Ukraine. Armenia, Azerbaijan and Georgia are also to be offered the prospect of joining the initiative. In addition, joint plans with Egypt, Lebanon, and Algeria are expected to follow shortly.

¹⁶ See Commission Communication, *Wider Europe—Neighbourhood: A new framework for relations with our Eastern and Southern Neighbours*, COM(2003)104 final, 11 March 2003; Commission Communication, *European Neighbourhood Policy: Strategy Paper*, COM(2004)373final, 12 May 2004.

¹⁷ Home Office's Response to the House of Lords Select Committee of the European Union 11th Report: Handling EU Asylum Claims: *New approaches examined*, para 145.

¹⁸ COM(2004)410 final, 4 June 2004.

¹⁹ Article III-171.

²⁰ COM (2004) 328 final.

²¹ COM (2004) 562 final and Staff Working Paper SEC (2004) 1046.

behind the progress made on mutual recognition agreements that facilitate cross-border prosecutions and investigations.²²

22. The Hague programme affirms that the objectives of the programme—which include improving the ability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards, access to justice and the success of the mutual recognition programme—can only be achieved through the approximation of laws in combination with other measures. The Council’s commitment to developing such safeguards, and ensuring they are respected in practice, must now be realised as a matter of priority.

23. The Programme belatedly introduces a welcome deadline for adoption of the Commission proposal on certain procedural rights in criminal proceedings across the Union (end of 2005). However, that proposal does not meet many of the pressing needs of suspects and defendants facing investigation or prosecution in a Member State other than their own, or otherwise affected by European mutual recognition instruments.

24. The Programme mentions the need for work to be done on Member States’ rules governing the gathering and admissibility of evidence, conflicts of jurisdiction and double jeopardy, but no deadlines are incorporated for the completion of this work. Nor is there any reference at all to the wider work of the Commission on measures to strengthen the rights of individuals in criminal procedure, including its green paper on pre-trial non-custodial supervision measures, and its work on respect for the presumption of innocence. The adoption of common rules in these areas is critical at this stage of EU co-operation and should be an explicit priority of the Hague Programme.

25. Vague, inconsistent and non-committal allusions to the need to develop and guarantee respect for minimum procedural safeguards will only accentuate the difficulties in building mutual trust. JUSTICE hopes that the lack of clarity in the Hague Programme’s sections on judicial co-operation in criminal matters does not belie a lack of commitment to the work on these crucial issues that must underpin the prosecution-driven proposals.

Mutual Trust

26. The principle of mutual recognition is premised on the existence of mutual trust in the quality of the criminal justice systems of all EU Member States. The success of the mutual recognition programme therefore depends on this trust being real and demonstrable to all actors in the criminal justice process, especially in an enlarged Union of 25 states. In tandem with the development of high standards of criminal justice across the Union, this must be established through greater mutual knowledge, improved access to justice, and the respect of human rights in practice.

27. Particular emphasis should be placed on building trust amongst the judiciary. Mutual recognition instruments increasingly remove the role of the executive and devolve absolute responsibility to the judiciary to recognise the decisions and judgments of foreign judicial authorities. This is one of the main changes to extradition practice within the EU introduced by the European arrest warrant, for example. If insufficient efforts are made to build genuine trust between Member States’ judiciaries, not only are attempts to expedite co-operation likely to fail, but there will be increasing tension between the executive and the legislature on one hand and the judges who are at the sharp end of enforcing foreign judgments and decisions on the other.

28. The importance of developing greater understanding and trust, in particular between judicial authorities, is acknowledged in the Hague Programme. Reference is made to the value of (i) supporting networks of judicial organisations; and (ii) the introduction of a European component in judicial training. These are important initiatives that will help to ensure a high quality of judges, common shared values and, consequently, greater understanding and trust between judicial authorities across the Union.

29. The Programme also notes the importance of “providing objective and impartial evaluation of the implementation of EU policies in the field of justice”. JUSTICE urges the Select Committee to ensure that independent monitoring and evaluation of measures proposed and adopted under the Hague Programme specifically assess compliance with the EU Charter and other international human rights conventions to which Member States are signatories and do not focus exclusively on improvements in efficiency.

²² For example, the Framework Decision on the European arrest warrant (OJ L 190, 18 July 2002); the Commission Proposal for a Framework Decision on the European evidence warrant (COM (2003) 688, 14 November 2003); the Framework Decision on combating terrorism (OJ L 164, 22 June 2002); the Framework Decision on the freezing of assets and evidence (OJ L 196, 2 August 2003); the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ L 182, 5.7.2001); the Danish Initiative for a Framework Decision on the enforcement of confiscation orders in the Union (OJ C 184, 2 August 2002).

EU COUNTER-TERRORISM

30. There have been serious concerns about the counter-terrorism laws and practices adopted by the Union and its Member States during the course of the Tampere Programme. These were substantial enough to merit a special report on the balance between freedom and security within the EU by the EU Network of Independent Experts, supplementing its 2002 Annual Report.²³ That report highlighted the grave violations of human rights that resulted directly from counter-terrorism legislation introduced by the EU and in the Member States since 11 September 2001.

31. For example, the EU Network of Fundamental Rights concluded in their 2002 Report that the EU terrorist lists violate the rights of those included in the lists to an effective remedy before a judge, to the presumption of innocence and to the preservation of their reputations.²⁴ They declared this situation unsatisfactory then and it remains unchanged today. This kind of infringement of individual rights and lack of legal certainty must not continue into the next five-year programme.

32. The Programme does not respond to the criticisms levelled at its counter-terrorism legislation and practice by the Network of Experts and others. It does not address the need to ground its counter-terrorism response in respect for fundamental rights and the principle of proportionality, nor are assurances given that mechanisms will be incorporated that guarantee independent review of EU legislation, where the routes of judicial accountability are often obscured by the “third pillar” context.

33. The Union’s declared commitment to protecting fundamental rights in the existing treaties, and most recently in the new Constitutional Treaty as well as amongst the objectives of the Hague Programme, will be tested by its response to the terrorist threat. The unequivocal House of Lords judgment on Part IV of the UK’s Anti-terrorism Crime and Security Act²⁵ in December 2003 should provide the UK with the insight and impetus not only to reshape its own laws, but also to take the lead in developing a better EU counter-terrorism response under the Hague Programme.

EXCHANGE OF INFORMATION

34. The Hague Programme envisages improved exchange of information between law enforcement officers through implementation of “the principle of availability”. This means “throughout the Union, a law enforcement officer in one Member State which needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.” JUSTICE is concerned that Member States may attempt to attain the end goal—declared to be that “the mere fact that information crosses borders should no longer be relevant”—by overlooking important disparities in the protection of individual rights, notably with regard to data protection standards and defence rights, between Member States and prioritising security over freedom and justice in order to facilitate information exchange.

35. For example, the exchange of criminal records is undoubtedly foreseen by this exchange of information yet no mention is made of how different rules on information about previous convictions can be used in trials. Nor is there even common agreement as to who is included within the term “law enforcement officer”. These are crucial concerns that cannot be satisfactorily dealt with by “mutual recognition” of each others’ rules at the expense of guaranteeing high standards of fundamental rights protection.

EU/US Co-OPERATION

36. The Hague Programme does not make specific proposals in relation to co-operation with the US, with which two important judicial co-operation agreements were made under the Tampere Programme, as well as a Europol/US treaty on the exchange of personal data and an agreement on passenger name records.²⁶ These stem from the JHA Council held in the aftermath of 11 September but have not been restricted in scope to terrorism. While these agreements represent an important political step towards the common goal of

²³ EU Network of Independent Experts in Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, Thematic Comment 1: the balance between freedom and security in the response by the European Union and its Member States to the terrorist threat.

²⁴ See EU Network of Independent Experts in Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, Thematic Comment 1: the balance between freedom and security in the response by the European Union and its Member States to the terrorist threat, VII General Conclusions.

²⁵ [2004] UKHL 56.

²⁶ Council Decision of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters [2003] OJ L181/25; Europol/US treaty on the exchange of personal data, 15231/02 LIMITE EUROPOL 104; EU/US agreement on passenger name records (PNR).

eradicating terror, they do not sufficiently acknowledge that the protection provided in the European Union by the ECHR, the EU Charter and specific EU legislation, for instance the EU Mutual Assistance Convention, is not binding on the United States.

37. JUSTICE regrets the absence of an assurance in the Hague Programme to the effect that the risk of fundamental rights being violated as a result of police or judicial co-operation, including flagrant denials of justice, will define the limits of police and judicial co-operation with the US. If EU co-operation with the US is to be further consolidated under the next five-year programme, greater attention needs to be paid to the inclusion of appropriate safeguards and remedies for those affected by the agreements.

January 2005

Memorandum by The Law Society

SUMMARY

- We consider that the Hague Programme will provide for concrete developments in the area of freedom, security and justice. We are concerned however that an effective mutual recognition regime does not result in harmonisation “through the back door”.
- We note the intention to take a comprehensive approach to migration management and welcome the reference to solidarity and responsibility sharing. We reiterate that a European asylum system must be based on respect for the fundamental rights of the individual and executed in strict accordance with international human rights obligations.
- We support the mutual recognition programme in the criminal justice field. We consider it the most effective mechanism by which to facilitate judicial co-operation. We accept that certain minimum common standards in criminal procedure might be necessary to facilitate mutual recognition. We welcome the explicit reference to the need to “guarantee fundamental rights, minimum procedural safeguards and access to justice”.
- We strongly support the completion of the mutual recognition programme in the civil justice area. An effective cross-border civil litigation regime should go a long way to eliminate the problems inherent in cross-border litigation.
- We do not accept that approximation of substantive law in the family law field is the way forward. We believe that action must be focused instead on the core areas of mutual recognition and enforcement, determination of jurisdiction, judicial co-operation and awareness raising and information sharing.
- We recognise that there would be some advantages in EU level action in relation to succession matters, particularly as regards conflict rules.

1. The Law Society welcomes the opportunity to give comment on the Hague Programme. The Society’s EU Committee is active in the area of justice and home affairs policy. In addition to reacting to specific legislative proposals the Committee submitted a response to the European Commission’s Communication on the Assessment of the Tampere Programme and Future Orientations.²⁷ This response was formulated through discussions with domestic law reform committees, principally the Society’s specialist committees on Civil Litigation, Criminal Law, Family Law, Immigration Law and the International Succession Issues Working Party.

GENERAL DIRECTION OF THE PROGRAMME

2. The Law Society welcomes the Hague Programme and the legislative measures identified therein. In the response to the assessment of the Tampere Conclusions the Society endorsed much of the action already taken at European level to facilitate co-operation and access to justice across European borders and tackle the phenomena of organised crime and terrorism. We consider that it will provide for concrete developments in the area of freedom, security and justice. We recognise that the European Union has a vital role to play in remedying the problems of cross-border litigation, facilitating access to justice and promoting judicial co-operation. Only then will the opportunities and rights in the European Treaties become a reality.

²⁷ <http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=207634>.

3. We do however feel that where there is no clear mandate for EU level action then the limits of competence must be respected. We argue that any proposals for the development of minimum standards for aspects of procedural law should be measures that are designed to facilitate mutual recognition rather than those that are designed to harmonise or approximate rules across the board.

4. We believe that justice and home affairs policy should be based upon principles of due process, rule of law and access to justice. We consider that policy making in the European Union should be based on subsidiarity and proportionality and that transparency and accountability should be of paramount concern. We hope that these issues will be dealt with satisfactorily under the Hague Programme.

5. We also argue that the different legal systems, including the Common Law system should be promoted in EU level legislative developments—the UK itself being an example of the co-existence of different legal systems. We welcome the reference therefore to respect for the different legal systems and traditions of the Member States and insist that this principle must be paramount.

6. The Society believes that there should be a stronger focus on “better law making” so as to improve the quality of legislation and mainstream best lawmaking practice in all fields of EU law. We believe that references in the Hague Programme to better implementation and a more systematic scrutiny of the quality and coherence of all European law instruments are important developments in this regard. We therefore echo the position that “effective evaluation of the implementation as well as of the effects of all measures” is essential to the effectiveness of EU action. We consider that this is particularly important where forthcoming legislative proposals are designed to be a second phase of action such as that relating to the establishment of a Common European Asylum system.

FURTHER DEVELOPMENT OF A COMMON EUROPEAN ASYLUM SYSTEM

7. We note the reference to a “comprehensive and co-ordinated approach” to migration at all stages. We welcome the reference to solidarity and responsibility sharing. We accept that there is a need for an integrated approach involving efficient administrative decision-making procedures on returns, reintegration schemes and entry procedures that deter unfounded requests and combat networks of people traffickers. We agree that this approach is all the more important as the victims of abuses of the system are often genuine refugees. Indeed we recognise that it is the management of this delicate balance that will be the biggest challenge for the legislators and policy makers during the next phase of action in this area.

8. We underline that the principles of effective access to justice and the operation of due process must be protected in the practice and operation of immigration and asylum law. We consider that the following principles should underpin all policy regarding immigration and asylum issues: transparency and integrity of all procedures; adequate and appropriate appeal mechanisms; access to justice and good quality legal advice throughout the whole process; and availability of public funding for those who cannot afford legal costs.

9. We recognise the need to tackle illegal immigration and understand a key component of an effective European asylum and immigration policy is an effective, fair return procedure. We reinforce however that any policy on returns should be fully compliant with the ECHR and that forced return is a very significant encroachment on the freedom and wishes of individuals. We urge that this is recognised when the Council begins their discussion on minimum standards for return procedures, scheduled for “early” 2005. The stated need to safeguard public order and security should not be used as means to undermine fundamental rights or fair decision making procedures.

10. The development of partnerships and co-operation with third countries of origin and of transit is of course of great importance in the management of a EU migration regime, particularly as regards technical assistance and capacity building. However we maintain that partnership and co-operation with third countries of origin and of transit should not lead to a shift in responsibilities with regard to the decision-making process nor allow Member States to renege on their international obligations.

11. As regards co-operation with third countries and discussions concerning the joint processing of asylum applications outside EU territory (such as transit processing centres or regional protection areas) we have several concerns. Not least that the processing of claims outside the UK and the EU will lead to a failure to comply with the UK’s international human rights obligations. Moreover we are concerned that asylum camps may be situated outside the EU, in developing parts of the world, which are poor and likely to lack the systems and infrastructure necessary to support such camps.

12. Despite reference in the Hague Programme to the need for “compliance with relevant international standards” when taking action in this area, we believe any such system will threaten the global safety net provided by the 1951 Refugee Convention rather than remedying the perceived weaknesses of the current system. We believe it will instead create multi-layered systems for the determination of asylum applications and appeals that will be expensive and difficult to administer.

13. Access to legal advice, representation and appeal processes are vital safeguards for asylum seekers, wherever their claim is processed, but we are unclear how these will be provided in external processing centres. It is unclear which country’s legal systems would apply. We are also unclear how issues such as the need to obtain medical and expert reports and the quality of the decision-making process would be dealt with in processing centres. We reiterate that in framing EU asylum policy, respect for the fundamental rights of the individual must be paramount and strictly in accordance with international human rights obligations.

14. We query the effectiveness of a uniform asylum status to be developed under the Hague Programme. We believe that different categories of protection with differing levels of protection should be maintained throughout Europe. However as we understand that a proposal is imminent we believe that, prior to any publication of a proposal for a single status that a full and comprehensive evaluation of the current and pending EU asylum legislation and their impact and effect upon implementation must be undertaken.

JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

15. The Society supports the Mutual Recognition programme in the criminal justice field and therefore welcomes the continuing work in this area as set out under the Hague Programme. We consider that this is the most effective mechanism by which to facilitate judicial co-operation and create a genuine area of justice. We accept that certain minimum common standards in criminal procedure might be necessary to facilitate mutual recognition. We do however maintain that mutual recognition must not be used as a means by which to introduce the harmonisation of substantive law and procedure “through the back door”.

16. We note the explicit reference in the Hague Programme to the need to “guarantee fundamental rights, minimum procedural safeguards and access to justice”. We have long been concerned that guarantees relating to the rights of the defence and respect for fundamental rights are currently lacking at European Union level.

17. We welcome the emphasis in the Hague Programme to confidence building and mutual trust. We are keen to see effective monitoring and reporting practices in place to ensure mutual trust between national judicial authorities principally covering the definition of fundamental guarantees and the adherence to high standards in the administration of justice. We believe that this can be done without compromising the principle of the independence of the judiciary. Mutual trust and a belief in the value of mutual recognition can only develop on the basis that practitioners can rely on the concrete application of these standards in the daily legal life of every Member State. We note the end date for adoption of the draft framework decision on safeguards. We are concerned however that little will be left of this proposal for it to have any impact.

18. As regards proposals to enhance the exchange of information from national records and the development of a mutual recognition regime on previous convictions for recidivism purposes, we can see the merits in a sentencing judge in one Member State having information on previous convictions in another. Particularly in cases such as child pornography or sexual exploitation or indeed in disqualification cases. We are, however, concerned about the use of such information once a judge in a different Member State has seen it, as it could be prejudicial in the determination of guilt. The sentencing and penal sanctions’ structures in each Member State are so different that it would be too crude to assume that a higher penalty should be automatically imposed on the grounds of a repeat offence, where the original offence was committed in another Member State. Deciding on whether an offence is a repeat offence is certainly very difficult given the vast differences in definitions of offences in different Member States, not only are the definitions difficult to determine but the relative seriousness of offences are as well.

19. As regards the development in prosecution and investigation we accept that there is a stronger role for Eurojust in the future and that it should be given the competence to fulfil this role. We would like to reiterate however that we do not support the creation of a European Public Prosecutor. Whilst not explicitly mentioned in the Hague Programme itself, it featured in the draft text and the political debate keeps moving towards this end.

20. The Law Society has previously expressed very negative views on the creation of a European Public Prosecutor (EPP). We are still opposed to the creation of such a post because we do not think that, as currently proposed, the argument for such a position has been made. We do not see the need to create a special prosecutor for a limited range of “euro crimes” such as fraud against the EU budget. There is no reason why

these could not be treated as crimes in every Member State and prosecuted by the relevant national authorities on the basis of an enhanced co-operation with OLAF, the European Union's Anti-Fraud unit and Eurojust.

21. In our view, issues such as responsibility in multi-jurisdictional cases should be dealt with by Eurojust according to pre-agreed criteria, such as the "centre of gravity" of any multi-jurisdictional crime. We await with interest for the Commission's forthcoming Communication in this area and consider that the work on conflicts of jurisdiction should be a priority.

22. As regards police co-operation and "strengthening of security" we consider that whilst effective co-operation amongst authorities and swift exchange of information are vital there must be an accompanying effective data protection regime. The current EU regime, where the EU Directives of 1995 and 1997 offer protection in the economic sphere but protection as regards processing of data in the context of criminal law and security is based on an inter-governmental Council of Europe Convention from 1981, is insupportable.

23. As regards the fight against terrorism we recognise that it is the collective responsibility of all Member States throughout the European Union. The fight against terrorism must be conducted with due respect for justice, fundamental rights and the rule of law.

EU ACTION IN CIVIL LAW (INCLUDING FAMILY LAW AND SUCCESSION MATTERS)

24. The Society strongly supports the continued development of judicial co-operation in civil matters. Whilst we recognise the significant progress that has been achieved, we believe that there are further measures that can be taken to eliminate obstacles to the proper functioning of the Internal Market and that the European Union is best placed to deliver these measures.

25. We believe that the completion of the mutual recognition programme and the development of an effective cross-border litigation regime should go a long way to eliminate the problems inherent in cross-border litigation—principally high costs and lengthy and complex procedures. Mutual recognition and enforcement will significantly enhance the rights of litigants.

26. However we would reiterate that the legal basis for these proposals referring to judicial co-operation in civil matters having cross-border implication should be respected. (Articles 61 and 65(c) of the Treaty establishing the European Community). Any proposals for the development of minimum standards for aspects of procedural law or "standardisation" should be measures that are designed to facilitate mutual recognition rather than those that are designed to harmonise or approximate rules across the board. Transparency of costs in cross-border cases is an important principle but should not be seen as a precursor to standardised procedure.

27. The proposal for a European Payment Order, the draft Directive on mediation and the future proposal for a small claims regime are all proposals that the Society supports and has previously made representation on. In addition to the recently adopted European Enforcement Order and further work in this area, we believe that these instruments will offer important practical improvements.

28. We underline however that mutual recognition can only work in an environment of mutual trust and confidence in each other's legal systems. We are concerned that instruments designed to facilitate access to justice for a claimant and speed up the recovery of a debt may actually prejudice the debtor's rights. Any procedure that allows a claimant a speedy route to judgment needs to be carefully policed in order to protect the rights of the defendant. We therefore believe that there may be a need to develop mechanisms to ensure equal rights for claimants and debtors in cross-border cases.

29. We support the development of a common frame of reference in relation to contract law. We recognise that there is a clear need to improve the consistency of the *acquis communautaire* in this area. We accept that it is therefore necessary to reach agreement on common terminology and basic principles for use throughout the European Union.

30. We believe sufficient priority should be given to establish effective procedures as regards conflict rules in the civil and commercial field. There is a clear need to establish effective procedures to enable swift identification of the competent jurisdiction and clear designation of the applicable law in civil and commercial matters. We agree that work on the instruments relating to Rome I (applicable law relating to contractual obligations) and Rome II (non-contractual obligations) should be actively pursued and note that they are a priority for the Luxembourg and UK Presidencies.

Family Law

31. The Society considers that differences in law and procedure between Member States are significant, rooted as they are in national views of family life and local socio-economic and cultural traditions. In light of these differences we strongly believe that it is premature to consider any approximation of substantive law measures in terms of family law. Approximation of applicable law is the most controversial aspect of the debate on EU level action in the area of family law. The confusion and uncertainty that any attempt to harmonise or approximate substantive law between 25 Member States would elicit would, we argue, actually undermine the very objective of simplification and efficiency that underpins judicial co-operation in this field.

32. Indeed, we welcome the assurances given in the Hague Programme that instruments in the family law and succession field cover matters of private international law and should not be based on harmonised concepts of “family” or indeed “marriage”. We have concerns however in relation to the statement that “rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary, to effect mutual recognition of decisions or to improve judicial cooperation in civil matters”. It appears to us that a broad interpretation of “necessary to improve judicial co-operation in civil matters” would lead to proposals that impact significantly on the domestic systems of Member States, without necessarily being related to a cross-border issue.

33. We believe that action must be focused instead on the core areas of mutual recognition and enforcement, determination of jurisdiction, judicial co-operation and awareness raising and information sharing.

34. We encourage enhanced co-operation on the enforcement of decisions. We advocate a simple, speedy and effective system of enforcement at EU level in relation to judgments/orders in the family law field. Therefore we support the removal of the *exequatur* procedure where it is still in place. Indeed, any limitations on executing enforcement proceedings must be very narrowly defined and stand as exceptions. We await the proposal for a Regulation on maintenance claims with interest. We consider that a EU wide system of mutual recognition coupled with a practical method of ensuring that enforcement is carried out would result in a speedier and more cost-effective process for the client.

35. We recognise the existence of “forum shopping” in the family law field and understand the Commission’s ambition to limit this. There is indeed a need to solve the issue of competing jurisdictions and the inequalities that may ensue for one of the parties. Rules on jurisdiction relating to “cross-border” family law disputes would have the advantage of providing legal certainty and universality. However we foresee a long and complex debate as to the content and substances of those rules.

Wills and Succession Matters

36. The ambitions as regards proposals relating to wills and succession matters will be one of the major developments under the Hague Programme. This is a highly complex and technical matter with significant consequences for different legal traditions and for the European citizen and must not be taken lightly.

37. Whilst we acknowledge that “testamentary tourism” does occasionally occur, we would be interested to see however any statistical evidence available to assess the level of movement of individuals within the EU and the level of acquisition of property in a jurisdiction other than the jurisdiction of origin. In our experience, the problems caused by “cross-border” aspects of succession matters and devolution of estates are principally problems that relate to domicile and taxation, rather than generating heirship disputes.

38. We recognise however that there would be some advantages in approximating systems across the EU in this field, particularly as regards conflict rules in order to deal with the cross-border issues that arise. An instrument, or series of instruments, dealing with jurisdiction, applicable law, recognition and enforcement, could offer significant improvements over the current situation.

39. By limiting the *lex succession* to only one jurisdiction and the *lex forum* also to one jurisdiction this may well reduce cost and time in resolving issues. A clear designation of jurisdiction would resolve the current situation where conflicts are absolute and irreconcilable. Furthermore if EU citizens had an additional choice of laws, whether that of their habitual residence or of their nationality, the availability of such choice would be welcomed. Mechanisms determined at EU level relating to mutual recognition and enforcement would also be significant developments. Mutual recognition of probate documents from other Member States can only speed up the administration of estates generally.

40. We reiterate however, that such action must not trespass on the legal traditions of Member States. While we agree that it is sensible to attempt to regulate around the conflict rules, so that cross-jurisdictional anomalies can be resolved more quickly and easily, we have a general concern that the underlying intention or direction of this process is moving towards standardisation of not only conflict rules, but ultimately towards standardisation of the laws within each jurisdiction.

41. The Law Society believes that a European Register of Wills could create problems. The UK has signed the Basel Treaty, although it has never ratified it by bringing sections 23-25 of the Administration of Justice Act 1982 into force. In most countries that have ratified, a two-tier system exists requiring notarial wills to be registered but allowing the registration of holographic wills to be voluntary. If will registration was compulsory, then unregistered and death-bed wills would be invalid, and this itself could create many problems. Furthermore, under the current system the making of a will is a private matter. A compulsory register would change the fundamental nature of the will making process and might indirectly influence the testator's feeling of freedom to distribute his/her estate as he/she wishes.

Julia Bateman, Justice and Home Affairs Policy Officer
Law Society's Brussels Office

Richard Woodward, Parliamentary Assistant

January 2005

Memorandum by the National Criminal Intelligence Service (NCIS)

1. Thank you for giving me the opportunity to contribute to the Inquiry into The Hague Programme. We are pleased to say that, through co-operation with the Home Office, we have exercised an influential role in the development of aspects of the programme from the start. We found the process valuable and hope our input has assisted the Government's handling of the issue.

2. In the areas of the programme that concern my organisation the most—police co-operation, information exchange, and the further development of Europol—I welcome the proposals. I offer the following comments.

POLICE CO-OPERATION

3. In conceptual terms the programme calls for a series of measures that will lead to EU law enforcement co-operation and the adoption of the principles of intelligence-led policing. This is explicitly recognised in section 2.3. This represents a significant success for UK lobbying during the construction of the programme, and has the potential to deliver improvements in EU law enforcement co-operation of the type and scale the UK has pursued for many years. We have enjoyed considerable success in using these principles to direct more effective law enforcement activity at a national level under the terms of the National Intelligence Model. In the last two years the National Criminal Intelligence Service has led UK attempts to translate that experience into something similar in Europe. In particular we have developed proposals for a new European Criminal Intelligence Model, at the heart of which are plans to increase the effectiveness of Europol and a requirement to produce a "yearly threat assessment" of the type called for in section 2.3. The relevant chapters of the Hague Programme provide an extremely helpful boost to the development of our proposals and reflect our success in winning broad support for these plans so far. The implementation of such a model will be a priority feature in the UK's Presidency of the EU later this year. The production of a new-style threat assessment is a particularly important element, given its function in informing strategy and the setting of priorities.

4. Other proposals in section 2.3 are also welcome, in particular those regarding co-operation between Europol and Eurojust, and joint investigation teams (JITs). As regards Europol and Eurojust we recognise that some shortcomings exist currently in the nature and levels of co-operation, with the former relying too steadfastly on the terms of a formal agreement between the two bodies. In the interests of supporting UK investigations we have promoted a better level of co-operation with, for example, the UK liaison offices in both organisations maintaining regular contact and routinely exchanging information about case work. It has been a successful experience, the model for which has been promoted for use by Europol in other Member States.

5. The procedure for initiating joint investigation teams represents a new co-operation capability in the EU, which we and our UK partners are keen to exploit. The first case, involving collaboration with the Netherlands, is currently being developed. We endorse the calls in the Hague Programme for greater use to be made of this new capability.

EXCHANGE OF INFORMATION

6. The Hague Programme suggests that a better exchange of information between Member States could be facilitated by the use of a “principle of availability”. We endorse the general approach, although it offers little that is different from current practice. Member States already accept the need to exchange information as much as requirements and conditions allow and are already encouraged to do so through a range of other initiatives that have preceded the Hague Programme. Part of the underlying problem is that there exists insufficient clarity about what information should be exchanged. In terms of addressing Europol’s need for information and the poor information flow it still suffers, this could be overcome through the institution of a formal intelligence requirement, which Member States would respond to directly. This is included in our plans for a new European Criminal Intelligence Model.

OTHER ASPECTS OF THE PROGRAMME

7. We regard as a positive development the proposals on judicial co-operation and mutual trust. The Serious Organised Crime Agency (SOCA) should be in a position to exploit them, particularly in regard to the greater use of Eurojust in facilitating cross-border operations across different jurisdictions and relatively incompatible legal systems.

8. NCIS does not have a significant remit in regard to countering terrorism so I will limit my contribution in this area to the general point that, as the Hague Programme does, we see Europol playing an important support role but not going beyond that. We think Europol has a good opportunity, in particular, of identifying links between organised crime and international terrorism and of providing analysis support in some cross-border cases. In regard to the specific proposals on SitCen, through our involvement in the Europol Management Board we have promoted senior exchanges between Europol and SitCen, in order that appropriate arrangements are put in place between the two bodies for cooperation in the production of EU terrorist threat assessments.

9. I hope you will find this contribution helpful.

Peter Hampson
Director General

21 January 2005

**Memorandum by Dr Constantin Stefanou, Fellow, Institute of Advanced Legal Studies
University of London)**

Traditionally seen as one of the two intergovernmental Pillars of the EU, Justice and Home Affairs, despite its characterisation as “intergovernmental”, has proved to be an area of rapid harmonisation, if not Europeanisation. Just five years after the Tampere European Council, which changed the nature and content of the Third Pillar, the EU is once again on the move and the Commission has produced a new agenda (the Hague Programme) reflecting the ambitions included in the European Constitutional Treaty. The Commission’s new multiannual agenda, as outlined in the Hague Programme, has been welcomed by the European Council²⁸ and the European Parliament²⁹ and already a detailed outline of the programme³⁰ (now in its third draft) has been published by the Commission. Indeed The European Council itself met on 4/5 November 2004 to adopt the new five year programme for the development of the EU’s area of freedom, security and justice.

Strictly speaking the Hague Programme aims to improve the ability of the EU and the Member States to guarantee:

1. Fundamental rights.
2. Minimum procedural safeguards.
3. Access to justice.
4. Protection in accordance with the Geneva Convention on Refugees.
5. Other international treaties [protecting] persons in need.
6. Regulation of migration flows.
7. Control of the external borders of the Union.
8. to Fight organised cross border crime.

²⁸ COM (2004) 401 final.

²⁹ P6—TA-PROV (2004) 0022 A6-0010/2004.

³⁰ See Council of the European Union, “Draft Multinational Programme: The Hague Programme; strengthening freedom, security and justice in the European Union”, 13302/2/04, REV 2, JAI 370, 22 October 2004.

9. to Repress the threat of terrorism.
10. to Realise the potential of Europol and Eurojust.
11. to Carry further the mutual recognition of judicial decisions and certificates both in civil and criminal matters.
12. to Eliminate legal and judicial obstacles in litigation in civil and family matters with cross border implications.

An extension of the process inaugurated by the Treaty of Amsterdam (as elaborated by the Commission and accepted by the Member States at Tampere) the Hague Programme concludes the transfer of areas covered by the Third Pillar to the First Pillar. The Commission, *en passant*, refers to this process as the “passage to qualified majority voting and co-decision as foreseen by Article 67(2) TEC”.³¹ In institutional terms this means that the relationship between national sovereignty and EU competence enters a new era through the extensive use (by 1 April 2005 at the latest) of qualified majority voting (QMV) in the Council and co-decision with the European Parliament in policy areas such as immigration, asylum and policing which had traditionally been the exclusive preserve of the nation state. The Programme covers the 2005–10 period. Given that the European Constitutional Treaty will enter into force on 1 November 2006, if ratified by all member states, it is clear that one of the purposes of the 5 year Hague Programme is to prepare the way and smooth the transition to QMV.

There are, of course, many issues that this new 5 year Programme brings to the fore. The most obvious issue concerns the gradual and continuous loss of national sovereignty to a supranational entity (the EU). This point has been extensively described, analysed and debated elsewhere so I do not intend to raise it again. Suffice it to say that this is an issue that all Member States had taken into account and accepted when they signed their accession Treaties.

Normally, when examining such large Programmes EU experts tend to concentrate on the less obvious issues because in such long and complex EU proposals usually “the devil is in the detail”. The aim is to determine if new programmes introduce ideas that merit careful examination because they depart from normal EU practices. For example, starting with the core value of the Hague Programme the Challenge Liberty & Security pressure group³² claims that “the rule of law is no longer the core value”. While I do not agree with their conclusion I too think that the emphasis is shifting again from the individual to the State. It took 40 years for the EU to start addressing issues concerning the individual³³ and it is interesting to see that this process is being held back with this Programme.

Yet, when looking at the specific proposals in each of these 12 fields the general impression is one of a Programme that aims to consolidate the institutional aspects of the exercise, in other words the switch to QMV, rather than introduce brand new concepts in the field. Very few of the proposed courses of action in the 12 fields departs from usual EU practices—which is actually quite normal as Member States tend to agree on proposals which formalise existing practices rather than radical proposals that introduce novelties. For example, even in the area of mutual recognition of judicial decisions or mutual legal assistance the proposals are quite compatible with the work that the Commission has been doing in the last 2-3 years, so again there are no major departures from informal practices. Despite the rhetoric the Hague Programme has one overall agenda: the transfer of the Third Pillar into the First Pillar. The specific policy proposals on the 12 areas included in the Programme were priorities for the Member States so action would have been taken anyway. The Commission has used the old tried and tested method, first introduced by the Single European Act, of “packaging” together various proposals in order to minimise possible objections on “specifics”.

As is well known, the UK has an opt-out on immigration issues (which is not the same as a “veto”³⁴). What this means is that the UK can at best not get involved in immigration issues. It cannot stop the move towards QMV and by continuing to exercise its opt-out the UK is actively supporting the transfer of the Third Pillar into the First Pillar.

In view of the forthcoming vote on the European Constitutional Treaty and the possible referendum on the Euro this positive attitude towards European integration should be applauded. It will assist the progress towards the Europeanisation of the Third Pillar and hopefully change the perception within the EU of the UK as a Eurosceptic *bête noire*.

20 January 2005.

³¹ Ibid, p 3.

³² See Challenge Liberty & Security, “A Response to the Hague Programme: Protecting the Rule of Law and Fundamental Rights in the Next Five Years of an EU Area of Freedom, Security and Justice?”, <http://www.libertysecurity.org/IMG/pdf/CHALLENGEHagueProgramme.pdf>.

³³ See Stefanou, C. and Xanthaki, H. (2000), *A Legal and Political Interpretation of Article 215(2) [new Article 288(2)] of the Treaty of Rome: The Individual Strikes Back*, Ashgate, Aldershot.

³⁴ Anthony Browne, “Britain faces pressure over asylum policy for Europe”, 24/10/2004, <http://www.timesonline.co.uk/article/0,,13509-1329457,00.html>.

Memorandum by the United Nations High Commissioner for Refugees (UNHCR)

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) attaches great importance to the further development of European refugee and asylum policy, and welcomes this opportunity to provide input into the Lords Select Committee inquiry into the Hague Programme.
2. UNHCR's suggestions in relation to the Hague Programme are contained in the attached "UNHCR's recommendations for the European Union's new multiannual programme in the area of freedom, security and justice".³⁵
3. UNHCR looks forward to working with the EU and EU Member States on both the internal and external dimensions of asylum and international protection, as outlined in these recommendations.
4. With respect to the external dimension, UNHCR is also pleased to attach the "UNHCR Observations on the European Commission Communication 'On the Managed Entry in the EU of Persons in Need of International Protection and Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions', (COM(2004) 410 final, 4 June 2004)".
5. As outlined in the said recommendations to the Hague Programme, UNHCR has noted that the harmonisation of the asylum system necessitates more than the adoption of common rules. It requires the introduction of measures to improve the quality of asylum decision-making across the 25 Member States in accordance with high standards to ensure the long-term credibility of EU asylum policy and its compliance with international norms.
6. In this regard, UNHCR wishes to draw the Committee's attention to the Quality Initiative, a joint project it currently undertakes with the Home Office, focusing on improving the quality of initial asylum decision making in the UK. While the project is still in its pilot stage, the encouraging results obtained from the project to date has led UNHCR to recommend that the UK consider promoting this model, during its upcoming Presidency of the European Union, as an example of standard-setting which could be expanded to improve asylum decision making throughout EU member countries in line with the objectives outlined in the Hague Programme. Further details of the model are below.

THE QUALITY INITIATIVE

7. In UNHCR's experience, asylum-seekers as well as States benefit from high quality first instance decisions.
8. The Quality Initiative project aims to review and improve the quality of first instance decision-making. The project aims at assisting the Home Office in the refugee determination process, through the monitoring of both the procedures and the application of the refugee criteria. It is based on the supervisory role of UNHCR under its Statute and the 1951 Refugee Convention.
9. During the initial implementation phase of the Quality Initiative in March/April 2004, a needs assessment was conducted where UNHCR reviewed the Home Office's first instance decision making systems, including, *inter alia*, training programmes, the interpretation and application of the Convention, staff recruitment and promotion, interview practices, and the use of interpreters.
10. Since the launch of the audit segment of the Quality Initiative in August 2004, UNHCR has sampled some 50 first instance decisions per month (which amounts to about 2 per cent of all asylum decisions made by the Home Office). As of early 2005, the audit will be extended to cover interviews conducted by caseworkers.
11. On the basis of the findings of the audit, detailed written and oral feedback is provided to Home Office caseworkers and their superiors each month. The findings are also used to identify gaps in the asylum procedures. It is anticipated that on a biannual basis, UNHCR will summarise the findings of its audit for circulation in the public domain. The initial report of the Quality Initiative will be issued late February/early March 2005. UNHCR would be happy to feed this back into the Inquiry should the Select Committee deem this of interest.

UNHCR

January 2005

³⁵ The European Union, Asylum and the International Refugee Protection Regime: UNHCR's recommendations for the new multiannual programme in the area of freedom, security and justice. UNHCR September 2004 (attached).

Memorandum by Dr. Helen Xanthaki, Academic Director, Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies (IALS), University of London

Thank you very much for your invitation to submit evidence to the Select Committee. I am grateful for the opportunity to express my thoughts on the Hague programme. I base my comments on my extensive research in EU criminal law mostly funded by the European Commission under the Falcone, Grotius, Agis and Grotius Civil programmes and on my experience as the expert of the Ministry of Justice of the Hellenic Republic to the Council Working Group on Judicial Co-operation in Criminal Matters. My comments are made strictly in my personal capacity and do not necessarily reflect the view of the Institute of Advanced Legal Studies or the Ministry of Justice of the Hellenic Republic.

GENERAL DIRECTION OF THE HAGUE PROGRAMME

The aim of the Hague Programme is to set a policy framework within which the Commission may propose new legislative measures in the area of JHA. It is notable that the Programme already adopts the shift from the rule of law as a core concept in the JHA policy to a demand from the states of Europe for the realisation of an area of freedom, security and justice. This is a clear indication of the reallocation of the basis of legitimacy for the JHA policy from legitimacy on the basis of an abstract general principle of law common to the laws of the member states to legitimacy deriving directly by the European peoples expressed within the framework of the Treaty for the European Constitution (TEC). Unfortunately, this does not resolve the issue of lack of a legal basis for JHA which will hopefully find a final solution once TEC comes into force. Until a clear legal basis is introduced expressly, JHA will continue to be plagued by a fragmented approach consisting of scattered proposals in specific issues where agreement of the member states can be secured. This lack of a coordinated principled legislative programme is evident in the approach chosen by the European Council's Hague Programme and the Commission's White Paper in the area of police co-operation already presented to the Council.³⁶ The effect of fragmentation and speckled legislation in JHA will probably become tangible if the Council's innovative and enlightened proposal for monitoring of the implementation of JHA introduced in the Hague Programme is finally acted upon by the Commission.

POLICE CO-OPERATION

The principle of availability of data does not suffice to guarantee effective police co-operation in criminal matters. There is little doubt that even the current systems of bilateral, multilateral and EU instruments suffer from severe deficiencies as a result of the lack of common structures with respect to data availability and recording, access, usage either as soft evidence or evidence admissible before a court of law, erasure periods, data format and procedures for releasing the data to foreign authorities. Although the Hague Programme identifies adequately the minimum standards required in any legislative proposal in this area, it fails to determine specific measures which will facilitate data availability. This seems to be a result of the inability of member states to agree on the exact format for data availability especially in the area of data for convictions. The draft Council Decision on the exchange of information extracted from the criminal record³⁷ introducing a registry of offenders as the first initiative in a two-stage approach on this issue has been fought by France, Germany and Spain within the Council and agreement seems doubtful especially after the informal meeting of Ministers of Justice on 28 and 29 January 2005.

However, a clearer vision is needed in the area of police co-operation if the draft measures in this area are to ever become legislation. In its White Paper the Commission seems to favour the networking of national databases for convictions in the model of SIS or Eurodac. Belgium is pressing for a database for paedophiles. Studies at the IALS demonstrate support for a need for a database of legal entities infiltrated by terrorism and organised crime. There is also a need and initial support for a database on investigations and prosecutions. It is unfortunate that a format for such databases could not be included in the Hague Programme: perhaps the difficulty in achieving agreement in the Council on this issue plagued also the drafters of the Hague Programme. One point of common agreement seems to be the delimitation of the territoriality of all such databases to EU countries only, as these share minimum standards for data protection. Participation of the Schengen non-EU countries will inevitably be discussed on an *ad hoc* basis, although recent decisions at CATS seem to indicate that these countries will be invited to participate in these initiatives after the relevant legislation has been passed.

³⁶ See White paper on exchanges of information on conviction and the effect of such convictions on the European Union, COM (2005) 10 final, 25.1.2005.

³⁷ COM (2004) 664 final.

In contrast to the vagueness of the Programme with regard to the exchange of data, there is precision in its vision on Europol. Europol has been hindered by the lack of implementation of its operational instruments by the member states as a result of inherent inefficiencies of the third pillar instruments (soon to be abolished along with the pillars) and of the fragmented application and implementation of JHA by the member states. The Programme identifies the main threads of the future role and tasks awarded to Europol by TEC successfully thus reaffirming the Council's view that it should play an operational active role in the combat of transnational organised crime under stricter data protection requirements.

JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

The Programme constitutes a vote of confidence for TEC: it pre-empts its ratification by the member states and it calls upon the Commission as the initiator of legislation to prepare the structures for the effective implementation of the TEC provisions in this field. The Programme introduces a parallel dual approach: tidying up existing but non-implemented provisions; and proceeding with the new structures introduced by TEC. Again there is a lack of reference to precise initiatives, such as the harmonisation of sentencing systems; of prosecutions with specific focus on the discretion of national prosecuting authorities to prosecute; of criminal and administrative liability for legal persons; of systems of sentencing; of categories of offences; of mediation procedures, status of mediators and training of mediators in criminal proceedings.

MUTUAL TRUST AND MUTUAL RECOGNITION IN CRIMINAL MATTERS

The lack of specific guidelines for the realisation of the principle of mutual recognition is another indication of a lack of clear vision for JHA. One wonders if the current draft Framework Decisions already presented by the Commission could have been endorsed in the Hague Programme: an example is the Draft Framework Decision on the European Evidence Warrant. Known initiatives in this area could also have been endorsed in the Programme: the Austrian initiative for the transfer of prisoners, or the Commission's initiatives for mutual recognition of sanctions, alternative sanctions and disqualifications and the mutual recognition of foreign criminal judgments for the establishment of recidivism in the member states.

CONCLUSIONS

The Hague Programme seems to be focused in the asylum and immigration part of JHA, an area which inevitably attracts public interest. In general, the Hague Programme establishes a shift from the rule of law as the legal basis for instruments in JHA to the wishes of the states, rather than the peoples, of Europe. The Programme identifies the need for further legislation in, amongst others, police co-operation and data exchange, judicial co-operation and mutual recognition in criminal matters. However, it fails to propose specific areas where legislation would be welcome. This indicates a lack of general consensus on specific legislative proposals, even those currently before the Council, and reflects a lack of a clear vision for the immediate future in these fields. Nevertheless, the future of Europol is well defined and is viewed as the European police office with an active supervisory and operational role. Similarly, the role of Eurojust as detailed in TEC is reaffirmed as the European prosecutor's office with the task of facilitating cross-border prosecutions and investigations.

Dr. Helen Xanthaki

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