"TRUST AND CO-OPERATION IN JUDICIAL, EXTRADITION, IMMIGRATION AND ASYLUM MATTERS"

PROCEEDINGS OF A CEPS – SITRA NETWORK MEETING

BY

JOANNA APAP

AND

MARCO INCERTI

CEPS, BRUSSELS
23rd of MARCH 2002

SITRA

CONTENTS

'Trust and co-operation in judicial, extradition, immigration and asylum matters'

Proceedings of a CEPS-SITRA Network Meeting
Date: 23 March 2002
Location: CEPS, Brussels
Time: 10 a.m. until 5 p.m.

Present: Joanna APAP, Ryszard CHOLEWINSKI, Jorge COSTA, Peter CULLEN, Paul DE HERT, Sofia DE SOUSA, Andrea DI NICOLA, Cyrille FIJNAUT, Bill GILMORE, Marco INCERTI, Kemal KIRISCI, Manuel MALHEIROS, Felicita MEDVED, Mijako NIERENKÖTHER, Ferruccio PASTORE, Iwona PIORKO, Olga POTEMKINA, Doris SCHMIDT, Lorenzo SEGATO, Judit TOTH, Neil WALKER.

Apologies: Monica DEN BOER, Antje HERRBERG, John MAFFETT.

ADMINISTRATIVE ISSUES

Joanna APAP opened the network meeting giving the other participants an update on the issues of:

1) **Network Publications and Copyright:** Joanna Apap informed the Network Members that for the publication of network papers with CEPS, the copyright would be in the author's name therefore these articles can be published also elsewhere. However, with regard to the publications with publishers such as Kluwer – the contractor for our collective volume - the copyright will belong to the publisher. This means that the author will have to produce a different version of the paper if he/she wants to publish it again. The title of the book to be published on behalf of the network by Kluwer will be "Police and Justice Co-operation and the new European borders: promoting trust in an enlarged European Union".
2) **Network Information sheet:** Joanna Apap presented the CEPS-SITRA Network information sheet "JHA in an enlarged Europe" to the network members, stressing that the emphasis should be on how to balance civil liberties with security. Moreover, the network needs to focus on the concept of an "enlarged Europe" rather than "Enlargement" *per se*, since the former implies an ongoing process that will not finish in 2004. The Network members were asked to circulate the Network information sheet during conferences and meetings they will attend in order to promote the work of the network.
3) **Funding:** Joanna Apap informed the network members that the European Commission has agreed to support the ELISE project. With regard to other sources of funding, SITRA was impressed with the results produced by the network. However, Apap announced that the decision as to whether to continue funding will be taken by SITRA only in June.
   Furthermore, the Network is looking for other potential sources of funding. The network members were encouraged to forward suggestions to this regard to Joanna Apap.
4) **Trier Conference July 4-6 July 2002:** Apap distributed the draft programme of the conference and asked for opinions (the revised programme can be found in annex 3).
   Please note that the conference is now scheduled to take place over two and a half days, in order to enable the participants to thoroughly discuss the various topics.

SUBSTANTIAL ISSUES

Session 1

Joanna Apap introduced the roundtable discussion by highlighting the progress made in the field of Justice and Home Affairs with regard to the Commission's scoreboard (see annex 2).

This introduction was followed up by members of the network, who delivered a briefing on the respective topics identified on the basis of their expertise.

1. "The European Arrest Warrant vis-à-vis Extradition" by Bill GILMORE

Bill Gilmore is a public international lawyer, who, given his background, believes that the Framework decision was a great theoretical exercise, albeit the initiative was more interesting from a political point of view rather than from a legal one.
Concerning the European Arrest warrant, Gilmore pointed out that there are still parliamentary reservations in various Member States. This is due to the fact that, until the Tampere Council, the warrant was not high on the European agenda, an attitude that was to be changed only in the wake of the terrorist attacks on the United States of September 11th. Indeed, at a specially convened European Council on 21 September, an action plan was drafted that gave the EU arrest warrant a higher priority. Gilmore highlighted the extent to which trust is inherent to the smooth functioning of the EU arrest warrant. Nevertheless, it is important to notice that even though it was adopted in a package of measures aimed at strengthening the fight against terrorism, the European arrest warrant is not specifically an anti-terrorist measure. The warrant is based on the principle of mutual recognition, a notion that carries with it a degree of reliance on the systems of justice and penal administration of other Member States. It also presupposes a similar level of protection of fundamental freedoms and human rights in the various states. From a technical point of view, there is a difficulty with the text of the arrest warrant; especially with regard to the English version as this was translated from French (the language originally used to draft the proposal), thus giving rise to differences in interpretation of some extracts. However, the EU arrest warrant remains a major improvement when compared with the extradition process. In particular, the purely judicial process of the warrant will make it possible to overcome the main problem of the traditional system, that is the influence of the executive branch of government in its operation.
However, what remains controversial are the criteria for refusal of execution of an arrest warrant which include among others, non-extradition of nationals, political figures in office, and barriers to extradition represented by the double criminality principle.
As far as derogations are concerned, the question remains unanswered as to which opt-outs could be permitted without undermining the whole initiative. So far, the old political offence exception has been eliminated, and progress has been recorded in relation to the surrender of nationals and double criminality - although certain forms of special treatment in these areas survive. One could also witness a slight progress in the interaction between the two. In fact, the framework decision contains a list of 32 offences (which are similar, but not exactly the same, as those that can be found in the Annex to the Europol Convention), and double Criminality remains only as an optional restriction to surrender. This loosening of the extradition procedure represents arguably the most significant advancement in the Council's agenda. Gilmore also affirmed the necessity to consider the EU arrest warrant in the light of the political asylum protocol annexed to the Amsterdam Treaty. A question that one may ask at this point is whether there are means to prevent member countries from further extraditing a surrendered person to a non-European state that does not offer sufficient guarantees. According to Gilmore, to solve this problem it will be necessary to refer back to the procedures usually applied in the state where surrender took place.

In the past, the notion of "distrust" has often proved instrumental for the development of civil liberties, but in the new global climate, the need for social security has grown stronger than the need for a double criminality test. Therefore, the question arises as to how to preserve the same degree of respect of civil liberties.

1.1 Reactions to Bill Gilmore's presentation

In the ensuing debate, the issue of mutual trust was discussed, a notion that, as mentioned above, is vital to ensure a hassle-free application of the European arrest warrant. Furthermore, the question was raised of what are the measures that constitutional lawyers may take to reinforce civil liberties. Indeed, civil liberties may in some cases be undermined to take into account security reasons. This is particularly true in cases where the latter constitute the ground for infringements of the right to privacy as, for example, telephone tapping.

2. "The impact of the September 11 attacks on Third Pillar issues, with specific regard to the US and UN policies" by Cyrille FIJNAUT.

Cyrille Fijnaut divided his presentation under three main headings:
1 the nature of Islamic threat and Al-Qaida Terrorism
2 UN and US response
3 American and European approaches

From the first point of view, the lecturer made clear that Islamic and Al-Qaida terrorism are not an ephemeral phenomenon. Quite the opposite, they are deeply rooted, being the result of a potentially lethal combination of frustration, mistrust and hate, feelings that in recent years have blossomed in many countries in response to American unilateralism and short-sighted policies. Therefore, it would be a mistake to believe that Al-Qaida is an isolated group; the reality is that it has great backing and support among layers of the population of many countries.
From an operational point of view, Al-Qaida is structured as an army, even though, at a more in-depth analysis, it is possible to notice a dual nature. On the one hand, a very overt presence, as in Afghanistan, where visible military actions and training took place; on the other hand a more subtle organisation, as in Germany, where some of the terrorists lived for a long time before leaping to action ("dormant" phenomena). This "call to arms" seems to have characterised the modus operandi of the various terrorist groups in the last period, as there is a growing belief that attacks, as deadly and gruesome as possible, represent the only way to get a result.

Moving to the second topic, Mr. Fijnaut stated that the United Nations have always played a major role in the fight against terrorism. However, up to September the 11th the United Nations'-mandate, as well as the scope of the measures they were allowed to take, was limited. Even the resolution adopted on 12th September did not spell a significant improvement, as it contained no explicit definition of terrorism. Thus, the major change resulted from the decision taken by the Security Council to no longer consider "terrorism" as a military issue. Such a decision amounted to giving the United States carte blanche to strike against terrorism without having to wait for a resolution of the Security Council. Furthermore, this technical change was accompanied by a modification in the way terrorism is perceived. While traditionally it was regarded as a criminal problem that had to be dealt with by the police alone, now it was analysed against the wider social background, taking into account issues of poverty and lack of well being, as well as factors of humiliation and frustration. As a consequence, the Federal Bureau of Investigation was substantially strengthened (e.g. on money-laundering, immigration) and charged with the disruption of the greatest possible number of terrorist attacks, rather than with the prosecution of suspected terrorists. The other

corollary of the new stance of the United States was an end of the tolerance that had until then characterised its policy vis-à-vis foreigners.
From a prevention point of view, the main concern of US authorities became the use of weapons of mass destruction by terrorist groups. These concerns are aggravated by the fact that the US Congress has so far failed to reach consensus as to who is to be considered a potential target of terrorist attacks (what is the real goal of terrorist groups?). In addition, one can observe that, over the last three years, the lack of a coherent policy and of effective measures to fight terrorism has resulted in a general mistrust on the part of the public opinion. However, it is important to stress that the development of new policies would not necessarily redress the situation, as in itself it is not a guarantee of more efficiency when tackling a given problem.

Finally, as regards the comparison between the American and European approach, the starting point was the recognition of the notion that, in the area of Justice and Home Affairs, as well as in that of Common Foreign and Security Policy, the EU position is still very much based on intergovernmentalism. In these sectors, sovereignty rests with local governments, as Member States try to hold on to their national policies. In such a context, the Framework decision has been the most innovative response. In fact, the exchange of intelligence did not represent a novelty and it still has many shortcomings, so the debate on that subject was more an exercise of "window dressing" on the part of the Member States. On the contrary, the common threat assessment meant a very significant step forward, particularly important because for the first time it saw the formal participation of US officials. Another crucial development is the closer co-operation between magistrates and police and security officials that took place respectively through Eurojust and Europol.
However, there are still significant differences between the EU and US perspectives when it comes to the definition of terrorism. First of all, the US believes that the EU has a tame approach to terrorism. But perhaps more important is the divergence in the field of foreign policies, where there is no agreement on how closely to co-operate with third states.

2.1 Reactions to Cyrille Fijnaut's presentation

A notion that emerged quite clearly from the debate is that, as far as the balance of powers between the United States and Europe is concerned, the former have taken a clear lead in the UN Security Council.

During the discussion it was stressed that the United States did not react promptly to the warnings that had been issued before the 11th of September by both Germany and France. Possibly, the reason was that the United States were ill equipped to handle a problem of that magnitude, they had no infrastructure to respond effectively to the alarming signals they were getting. With regard to the reaction on the part of the European Union, reference was made to the increased number of meetings of the European Council in the aftermath of the terrorist attacks. More importance was attached to decisions taken within the framework of the first pillar than ever before, thus making the whole EU structure shift towards security policy, and giving rise to an asymmetric fortress (a more defensive one). Even though comprehensive actions were taken by individual Member States rather than by the EU as a whole, and albeit at the supranational level there was an abundance of rhetoric statements, it was submitted that the EU and its Member States were all too happy to use terrorism as a pretext to tighten their laws and practices. Altogether, the conclusion was that anti-terrorism measures were not limited to an oratorical exercise.

Session 2

Panel 1 "Measures to combat human trafficking: Is illegal migration the 'missing link' to a comprehensive immigration and asylum policy?" With contributions by Kemal Kirisci, Olga Potemkina and Felicita Medved.

1.1 Kemal KIRISCI began by drawing a distinction between the trafficking of human beings and the smuggling of human beings. The policy developments regarding the former have been the subject of a broader consensus in comparison with the controversial developments in the latter.

In fact, smuggling is a more complicated issue as, since the mid-eighties it has been closely intertwined with political asylum. In that period, sanctions against carriers became heftier and, as a consequence, asylum seekers had to resort to organisations of human smugglers to try to enter safe countries. Therefore, human smuggling has been considered as the provision of a service, a crime against the state rather than against the person and maybe perceived as a less serious offence. But in this way, two rights have been undermined: the right to seek asylum under International Law, and the right to be granted asylum should the conditions be met. The strengthening of controls leads to more attempts to enter a country illegally, and increases the risk of dealing with irregular migrants and asylum seekers in the same way (usually, by means of deportation).

The criteria for accession put a strong pressure on the candidate countries, and there is a danger of erecting a "wall", with borders drawn between countries whose citizens enjoy at the moment an "unofficial" freedom of movement. This in turn would be an anachronism in the foreign relations process, which was initiated at the end of the cold war, particularly between candidate countries and their neighbours. The problem of illegal migration is worsened by the common assumption that it is a matter that affects only the North European countries. Therefore, the challenge becomes one of convincing the southern European countries that migration constitutes a global issue, and that an equitable reshaping of the burden-sharing system is necessary for everyone to be a winner in the process.

1.2 Olga POTEMKINA illustrated the difficulty in defining the difference between the trafficking of people who try to migrate voluntarily and forced trafficking by drawing an example from her first hand experience in the Russian town of Libbitsk.

During her work on the field, Olga Potemkina followed a case which involved young Russian women who voluntarily signed up contracts, allegedly to begin a career as dancers in western European clubs. However, they were aware of the fact that the real purpose of their employment might actually have been prostitution. The problem with this kind of female employment is that exploitation is organised as a business, and as such, it relies on an extensive network. For this reason, the only way to counteract it successfully would be through co-operation of police forces in different countries, something that local authorities do not seem prepared to do.

Continuing with her example, Olga Potemkina elucidated the nature of the loophole in the system. In fact, these young women are usually brought into western European countries in a legal way: they sign regular contracts (e.g. as dancers), and they even travel to their destinations using public transport. Technically, these activities do not amount to trafficking, so the question arises as to how one can prosecute the perpetrators. At the moment, the only offence which criminal organisations could be sued for is breach of contract, but, paradoxically, the same claim could be brought against the women themselves, who would end up in court for violation of the employee's obligations. The Russian police do not seem to be concerned with this situation, possibly also because the officials in charge are on the pay roll of the traffickers. The only suggestion they managed to come up with was to involve Non-Governmental Organisations in helping the prostitutes. Nevertheless, Olga. Potemkina regards the proposal as a ludicrous one, it simply is not the correct approach. In her opinion, Non Governmental Organisations should not deal with criminal issues, which are a matter for

professionally trained police alone. The aim should rather be the punishing of the whole chain of smuggling/trafficking.

1.2.1 Reactions to Olga Potemkina's opinions:

The result of this field study shows the dilemma of the prosecution of crime. It also illustrates once again that immigration can lead to an economic exploitation. One issue in this debate is that the attainment of work permits enables this "black" economy to function.
For an example of successful approach to prosecution, one can look at Italy, where the "best practice" was introduced: by the public prosecutor of Trieste who built a database of telephone numbers of people suspected to be involved in illegal immigration. Given that illegal immigration is very much a question of demand and supply, in Italy emphasis was placed on the co-operation with the victims. In particular, a law was passed by which third-country nationals can legally enter the country provided they have at least the promise of a job (it is not necessary to have a legally binding contract). In addition, the Italian government introduced a type of short-term working permit (if guarantee is given by a national sponsor), e.g. for domestic work.

1.3 Felicita MEDVED explained that, even though accurate statistical evidence is hard to get, available figures suggest that, over the last years, there has been a decrease of regular immigration, whereas the number of illegal immigrants has steadily risen in the same period. Most of all trafficking becomes an urgent human rights issue, it is no longer just a matter of fighting transnational crime. Medved again stressed the importance that when contemplating the possibility of effective countermeasures to human trafficking, it is vital to determine the difference between human trafficking and illegal immigration. As a matter of fact, where illegal migration begins and ends is a matter for each sovereign state to define. The spectrum is very wide. Illegal migrants either entered a country in violation of that country's laws or have violated a condition for legal stay (e.g. by overstaying a tourist visa, or by not leaving upon the rejection of an asylum application). The illegal border crossing can happen independently or can be facilitated by others: this support is increasingly organised, to the extent that smuggling of migrants becomes a remunerative activity for in/direct financial gain. In cases where coercive, abusive or exploitative elements are included migrants often become victims of traffickers. The definitions of trafficking and smuggling have been clarified within the framework of the United Nations Convention against Transnational Organised Crime and its two accompanying protocols. Trafficking may occur within the country. Thereby it is important to establish which is a human rights issue and which is a migration one. It is also important to notice that the boundaries between volunteer/non-volunteer migrations are becoming blurred. Medved further emphasised that migration itself is not a crime.

These findings suggest that the times are ripe for a comprehensive approach to the regulation of migrations, an approach that should be based not only on legal regulations, but also on practical instruments for the management of the flows. Following earlier proposals on asylum and legal immigration, the Commission's ideas on common policy on illegal immigration were announced just before the Leaken summit.[1] Taking into account the 'European' pluri-annual guidelines on immigration and asylum, which are the key element of the open co-ordination method,[2] the Communication on common policy on illegal migration outlines what the fight against illegal immigration at EU level should comprise:
1. *An understanding of the Phenomenon* of illegal immigration, in particular, there is the need for instruments and structures for in-depth analysis of different categories and patterns of illegal immigration

[1] Communication from the Commission to the Council and the European Parliament On a common policy on illegal immigration 15.11.2001, COM(2001) 672 final.
[2] See Communication From the Commission to the Council and the Parliament On an open method of coordination for the Community Immigration policy COM(2001) 387 final.

2. *The compliance with International Obligations and Human Rights* in order to conduct the fight against illegal immigration in a sensible way and to strike a balance between

(i) The right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those in need of international protection. In particular, obligations to protect arising from the Geneva Convention on Refugees (Articles 33 and 31), and the European Convention on Human Rights (Art. 3).
(ii) A degree of refugee protection compatible with a system of efficient countermeasures against irregular migratory flows.
(iii) Finally, whatever the measures designed to fight illegal immigration, the necessity to respect the specific needs of potentially vulnerable groups like minors and women.

In this respect, according to the Commission, the possibilities of offering rapid access to protection should be explored. These could include, for instance, a wider use of Member States discretion in allowing asylum applications to be lodged from abroad. Otherwise, the procedure could be quickened by processing the requests of protection in the region of origin, facilitating at the same time the arrival of refugees on the territory of the Member States by resettlement schemes.[3]

3. *An actor-in-the-Chain Approach* as an element of an efficient management of migration flows in order to monitor and influence irregular movements from the countries and regions of origins via the transit countries to the destination countries, as well as within the external borders of the EU. Therefore, the fight against illegal immigration requires the mobilisation of a number of external policy aspects, designed for all actors in the chain, as well as continuing participation in other international forums, such as UNHCR or IOM (see below)

4. *The prevention of Illegal Immigration* is another crucial element of a common policy on illegal immigration. From this point of view, the best model to balance repression and prevention seems to be the multidisciplinary approach put forward by the Commission in May 2001 at The European Forum on prevention of organised crime. In the latter, attention to the prevention has been devoted to the specific field of trafficking in human beings.

One issue that is usually overlooked is the necessity to improve the dissemination of information regarding legal migration. For example when a revision of the quotas of legal immigrants takes place, e.g. for demographic reasons, or because the relevant country needs to recruit highly skilled workers who are not available within its territory, this information would have to be widely publicised. The information system could be based on an open co-ordinating method with plural-annual guidelines issued.

5. *The Enforcement of Existing Rules under the Maastricht regime and Schengen and their monitoring* (see below)

6. *Adequate Sanctions for Criminal Activities*, which are connected with irregular migration flows, especially trafficking and smuggling in human beings. The UN Convention against Transnational Organised Crime and its two accompanying protocols on trafficking in persons and smuggling of migrants[4] should be ratified and their provisions implemented in a co-ordinated manner at EU level. In September 2001 the JHA Council reached political agreement on a Framework Decision on combating trafficking in human beings, [5] this should contribute to the facilitation of law enforcement and judicial co-operation in criminal matters. It also provides for common sanctions starting with a term of not less than eight years' imprisonment if the offence has been committed in specifically defined circumstances. The proposal for a Framework Decision on smuggling of migrants with a view to harmonise the Member States penal legislation and to ensure as soon as possible the implementation at

[3] Cf. Communication towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM (2000) 755 final.
[4] Cf. UN Doc. A/55/383 of 2 November 2000 and COM (2000) 760 final
[5] Cf. COM (2000) 854 final).

national level, was politically agreed at the Council in May 2001. Furthermore, common standards are important for dealing with illegal employment, the liability of carriers and regulations on illegal entry and residence. Besides criminal punishment, the cost of illegal immigration should be raised by a number of measures with financial impact on traffickers and smugglers, but also on employers of illegal residents.
In February 2002 Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities was issued as announced. [6] It is clearly intended as an instrument to combat illegal immigration whereby the concept of "victim of action to facilitate illegal immigration" has a very specific meaning of persons who have suffered harm. Although the residence permit itself offers *de facto* "protection" against deportation (it gives access to the labour market, education and vocational training, greater access to medical care, it includes an integration programme with a view to settling or returning to the country of origin), it is not a measure specifically aimed at the protection of victims nor of witnesses.[7]

Furthermore, the Commission communication outlines measures and co-operation for the Action plan, which can be divided into external (such as further harmonisation of visa policy, pre-frontier measures, border management, readmission agreements) and internal measures (such as Aliens and Criminal Law, sanctions concerning smuggling and trafficking, illegal employment and financial advantages from illegal immigration). It also provides the supportive infrastructure and instruments for operational co-operation and co-ordination.

Thus, in the medium term the creation of a single technical support agency could be envisaged for:

(i) information gathering, exchange, analysis and dissemination (European Migration Observatory, Early Warning System (EWS)),
(ii) systems management (SIS, Eurodac, European Visa Identification System), with regard to migration management in general
(iii) the operational concept of European Border Guard (via co-ordination of administrative co-operation such as training and curriculum in police school (CEPOL) and /or European Border Guard School, co-ordination and planning of operational co-operation)
(iv) The advanced role of Europol, in the detection and dismantlement of criminal networks in the fight against illegal immigration. Europol should be given more operative powers in legally binding manner (cf. conclusions of the EU Police Chiefs Operational Task Force in March 2001)
(v) the European judicial network and Eurojust

[6] Brussels, 11.02.2002, COM(2002) 71 final 2002/0043 (CNS).
[7] See also the framework decision of 15 March 2001 on the status of victims in criminal proceedings, OJ L 82, 22 March 2001, p. 1; and the Council Resolution of 23 November 1995 on the protection of witnesses in the framework of the fight against international organised crime, OJ C 327, 7 December 1995, p. 5.

PANEL 2 - "Rights of defence in the Context of Euro-Crimes and EU Criminal Policy" with contributions by Judit Toth, Jorge Costa and Manuel Malheiros

2.1 Judit TOTH believes that JHA is based on constitutional principles and requirements of the rule of law in a democratic society, including civil liberties, human rights and social cohesion. Although the criteria of accession refer to the rule of law and its enforcement, the degree to which the principle is applied has not been tested against a benchmark common to the entire EU. For this reason, the outlined assessment of the rule of law in the candidate countries (Conclusion adopted by the JHA Council on 28 May 1998, Joint Action of 29 June 1998) may be considered as the demonstration of the fact that double standards have been applied, with Member States having to comply with certain criteria while stricter requirements were placed on candidate countries. This double evaluation erodes mutual trust, a necessary requirement of co-operation. In order to make mutual trust stronger a "Scoreboard of the rule of law in JHA" could be created. Such a scoreboard might be drawn up along the lines of that devised to assess the implementation of the Tampere conclusions, and, as its predecessor, should have a section indicating the more apt legal instrument to achieve any given goal. It may include the following elements (or as the Community documents called them "horizontal issues") within a given time-frame:

Goal/Aim	**Deadline**	**Legal instrument (acquis, Union policy)**
Respect for human rights		ECHR with Protocols, jurisprudence of EctHR
Anti-discrimination		12th Protocol of ECHR (discrimination by authorities in proceedings), Directives of …
Independence of the judiciary		
Effective access of citizens to justice		Commission's Green Paper (2000) on legal aid and advice
Respect for judicial decisions		
Objective system of public prosecution		
Operational role of the police on the basis of legality and professionalism		European Police College (training, education)
Proceeding, storage and transmission of personal data on the basis of legality and protection		Council of Europe's Convention (1981), Directives… Regulation….
Democratic principles of accountability of the police within the framework of rule of law		
Protection of witnesses and victims		Commission's Green Paper (2001)
Procedural guarantees (language of the proceedings, ne bis idem, presumption of innocence, legality of pre-trial detention ….)		DG Justice and Home Affairs Consultation Paper…

This comprehensive list of requirements and instruments could be completed, if needed, to adjust possible shortcomings, and it would provide an objective point of reference to assess progress in Member States as well as in Accession Partnerships.

2.2 Jorge COSTA highlighted the main difficulty with the European construction. Even though treaties have been ratified, and a charter of fundamental rights has been drawn up, a proper constitution is still lacking. Instead, in his opinion, Europe needs a Constitution that includes fundamental rights. Not enough thought has been given to the rights (status of) of witnesses, and of those persons collaborating with judges in general. The current debate focuses on how to achieve a minimum of harmonisation, while it might be time to start speaking about more integration and a higher degree of harmonisation. There is a dilemma with regard to the length of investigations: when the police arrest someone, in most European States the apprehended person has to be brought before a judge within 48 hours, but there is no similar provision in the common project. Another question that needs to be addressed is that of the limits to pre-trial detention both for the purpose of investigation and judgement.

2.3 Manuel MALHEIROS stressed that one ought not to forget that an asylum seeker is not an illegal person as such, only when the application has been rejected he/she might become an illegal immigrant. Asylum procedures should not be used as means of dealing with the question of immigration. There is a degree of conceptual confusion on the topic, but in Manuel Malheiros' view it is necessary to bear always in mind that the right of asylum is the right to be protected. Therefore, the right to a fair trial and in particular the right of defence should be granted to everyone. However, one can notice that even such fundamental entitlements have been jeopardised by the climate of fear and distrust that followed the events of September the 11th. The ensuing atmosphere of social alarm led people to see a potential terrorist in every foreigner, with a spiralling of discrimination that made it all the more difficult to ensure a fair treatment to immigrants and to strengthen their rights of defence. To begin with, to bring the system back in line with the European tradition of civil liberties, it is important to harmonise pre-trial detention at a European level, and to use it only as a last resource in very serious cases. In addition, the media, in their coverage of criminal events, should be prevented from disclosing, or worse emphasising, the nationality of the suspect or alleged criminal. Finally, some practical measures would have to be adopted to make the system more effective: a European bail could be established, as well as integrated services for legal assistance, and interpreters/translators.

3. Closing remarks: "The Constitutional debate on Justice and Home Affairs" by Neil WALKER

The approach lobbyists seem to be adopting in respect of the Convention is a "wish-list" one, a method that may risk watering down the constitutional debate.
Part of the Justice and Home Affairs issues has a very low visibility in the Constitutional debate, for example in the white paper on governance and in the Treaty of Nice there is no mention of the third pillar. And even when reference is made to these issues, it is often in a rather rhetorical way. Partly this lack of attention is a result of the institutional focus: policy-makers tend to address the areas where the division of competence is more clear-cut, and the third pillar is quite simply not one of them. Another reason might be the "path-dependency" problem: the EU is always working on the basis of an ongoing but never finished agenda. Every new Treaty deals with the leftovers of the previous one, as, for the sake of continuity, in the IGC there has to be a link with the previous agenda. To make matters worse, the framework of the third pillar is rather ambiguous: even though the measures falling within it are so clearly "Europeanised", they are still dealt with on an intergovernmental basis, because of their proximity to national sovereignty. Accordingly, the only way to overcome this problem would be to build democratically accountable instruments. In such a perspective, the main challenge becomes that of rendering people interested in these issues and to create a polity through a culture of engagement. Usually this challenge is faced in two different ways: one is the response of (malign) indifference. The other possibility is to adopt a populist attitude and to make political capital by talking about these issues.

Neil Walker maintained that the dilemmas on Justice and Home Affairs are exacerbated by the fact that European people experience these issues in a much mediated way, whereas the "rights culture" would entail having a proper democratic representation on all of them. Nevertheless, in Walker's view one has to be aware that the Constitutional debate is not a simple one, quite the reverse, there are various debates going on:

1. A technical debate: This is surprisingly powerful. It revolves around the consolidation of the treaties, looking for a way to simplify them.
2. A polity-building debate: this is about the political status of Europe; which should be the limits of the EU; whether Europe can become an international actor, and if it is a kind of entity that deserves a Constitution. Within this second debate there are strains as well, as the discourse about the European polity status sometimes is used as an argument against the drafting of a Constitution.
3. A political debate: concerned with the possibility of actually changing the Institutions and structure of the Union. However, also in the context of this debate there is a paradox lurking. Indeed, if a Constitution were ever to be drafted, by the Convention for example, it would be a bare document, its content being more limited than that of the Treaties that are now in force.
4. A legitimacy discourse: the very fact of community mobilisation, a very broad, open-ended discourse complicated by the impatience and the resistance of the civil society. Still, there is no strong European identity. The only time when such an identity emerges is when the discourse is about distinguishing ourselves from "others" who by default are not European, as it is the case with immigration.

In conclusion, the demolishing of the pillar structure is not a technical issue, it has only a technical varnish, but in the end it is a political decision. When we engage in the constitutional debate, we have to be aware of the very complex interconnection between these processes.

Annex I

AGENDA FOR MEETING OF 23 MARCH 2002

Venue: CEPS, Working Party Room (third floor)

10h00 – 11h00 ***Administrative and Managerial matters***

1. The preparation of our next high level conference which will take place on 4 and 5 July in Trier (please block this date in your diaries and please refer to the proposal of the conference programme in annex).

11h00 – 16h00 ***Roundtable Debate***

2. Theme for our roundtable debate: **"Trust and co-operation in judicial, extradition, immigration and asylum matters"**.

The debate will take place in two sessions. Each session will be initiated by a round of brief presentations of around 15 minutes each followed by a discussion. The results of the roundtable debate will be published by CEPS both in a hardcopy as well as placed on-line on the JHA section of the CEPS website.

11h00 – 12h30 ***Session 1***

- An evaluation of the Tampere scoreboard post-Laeken and future perspectives ***Joanna Apap***
- The European Arrest Warrant vis-à-vis Extradition ***Bill Gilmore***
- The impact of the September 11 attacks on Third Pillar issues, particularly in relation to the US and UN policy ***Cyrille Fijnaut***
- Development of JHA and the Constitutional Debate ***Neil Walker***

12h30 – 14h00 LUNCH

14h00 – 16h00 ***Session 2***

Panel 1

- Measures to combat human trafficking: Is illegal migration the 'missing link' to a comprehensive immigration and asylum policy? ***Felicita Medved, Olga Potemkina and Kemal Kirisci***

Panel 2

- Rights of defence in the Context of development of Euro-Crimes and EU Criminal Policy **Judith Toth, Jorge Costa and Manuel Malheiros**

Annex II

EVALUATION OF THE PROGRESS ON THE

TAMPERE SCOREBOARD AND WAYS FORWARD

By Joanna Apap*

I. INTRODUCTION

At first sight, the scoreboard produced by the Commission reveals a wealth of achievements in the various areas of police cooperation and judicial cooperation in civil and criminal matters and, to a lesser extent, asylum and immigration.

Recent tragic events have shown that an action plan cannot remain unchanged for too long and is subject to alterations dictated by events. The programme of action to combat terrorism has led the Council, and the European Council, to adopt a detailed programme of measures with priority for the European arrest warrant and the Framework Decision on combating terrorism. At its meeting on 6 and 7 December 2001 the (JHA) Council gave its provisional agreement on the draft Framework Decision on combating terrorism, subject to parliamentary reservations by the Swedish, Danish and Irish delegations and re-consultation of the European Parliament; on 14th December, just before the Laeken summit an agreement was reached on the Framework Decision on the European arrest warrant and the surrender procedures between Member States.

Finally, in accordance with point 61 of the Tampere conclusions, work has also focussed on the external aspects of action in the JHA field. Progress has been made in particular in connection with the transatlantic dialogue and in relations with Russia and Ukraine as well as with the action plans prepared by the High-level Working Group on Asylum and Migration. There have been regular contacts with the candidate countries at all levels. In some areas the Council's action has consisted initially of establishing priorities by means of action plans in order to follow up the Tampere conclusions. This has been the case in the drugs area (definition of a drugs strategy) and in connection with the establishment of a range of measures for implementing the programme of mutual recognition of judgments in civil and criminal matters.

*further updating the Belgian Presidency's assessment of the 6th of December 2001

This is also the case of pursuing or initiating studies into the need to harmonise Member States' legislation in civil matters.

The scoreboard produced by the Commission contains a very full but contrasting account of achievements in the Justice and Home Affairs field since the Tampere European Council.

This assessment focuses on the problems encountered and on the possible reactions to them.

PROGRESS MADE AND RECOMMENDATIONS:

– Improved checks on immigration flows can largely be achieved by improving **checks at the** current and future **external borders** of the European Union and **stepping up consular cooperation** on visas between the States participating in Schengen cooperation. The

– Several Member States have recently adopted or are currently adopting laws on asylum and immigration. The necessary adoption of national laws may, in certain cases, complicate the discussion of proposals for Community legislative acts which the Commission has referred to the Council. The Council/European Council is asked to reflect on **possible ways of ensuring greater convergence in Member State legislation on asylum and immigration**

– Various instruments (e.g. SIS, joint investigation teams) various institutions (Europol,

Eurojust) or fora (especially the Police Chiefs Task Force, European judicial network) have been, or are currently being, set up in order to **enhance police cooperation and judicial cooperation** in criminal matters. The Council/European Council is invited to assess the effectiveness of these arrangements and to propose any measures likely to enhance further **the operational** added value they bring to police and judicial cooperation in criminal matters between the Member States (see in this connection point V of this document).

– The **scoreboard** drawn up by the Commission illustrates the amount of work still to be done before the Union becomes a real area of freedom, security and justice. Given the strict deadlines set by the Treaties and the European Council and the resources available both at national and EU level, it is important that the Council **improve** its **procedures and working methods**. The Council/European Council is invited to continue the discussions begun at the informal meeting of the Justice and Home Affairs Ministers on 18 and 19 February 2001 in Stockholm and to adopt organisational and procedural measures with a view to enhancing the effectiveness of its work, independently of the working party review under way within

Coreper.

II. IMMIGRATION, ASYLUM, CONTROLS AT EXTERNAL BORDERS

Despite the political determination to make progress in these areas, reaffirmed at the European Conference on Migration on 16 and 17 October 2001, current discussions within the Council are not progressing as rapidly as might have been hoped, as a result of the intrinsic technical difficulty of the subjects addressed (e.g. asylum procedures), of real differences on the scope of the instruments to be adopted (e.g. family reunification) and of Member States' reluctance to go beyond the confines of their national laws. Ways of overcoming these obstacles are needed with a view to formulating common policies, the need for which no-one denies, within timeframes compatible with the credibility of the European enterprise in these areas. In this respect, the following guidelines and principles could be set out:

- The **framework defined by the Amsterdam Treaty, the Vienna Action Plan and the Tampere conclusions**, as summarised in the Commission's scoreboard, **must continue to serve as a guide for action by the Union**, its institutions and its Member States in the years to come;

- to take place as soon as possible; this is the case in particular with the proposal for a Directive on family reunification, with the three proposals concerning respectively asylum procedures,

- minimum standards for the reception of applicants for asylum and bringing the Dublin Convention and the proposal for a Directive on the status of long-term resident into the Community sphere;

- In view of the significant responsibilities retained by Member States for the implementation of immigration and asylum policies, the convergence process in these areas could be made easier by the establishment of an **open coordination policy** as proposed by the Commission: the adoption of guidelines could provide an opportunity to define the common terms of reference for agreement by Member States on immigration and asylum matters; this flexible method of convergence could ensure that the prerogatives which Member States consider they must retain, at least during a transitional phase, are respected while ensuring progress towards common objectives; in no circumstances could it replace the legislative work essential to fulfilling the Treaty aims. This approach would accompany and facilitate the legislative process based on the Treaty while allowing harmonisation of mechanisms not directly covered by the latter, and the identification of sectors in which Community legislative intervention seems to be absolutely essential.

- It is necessary to augment the framework defined above, in particular with regard to combating illegal immigration, controls at external borders, visa policy or the policy on return; it would thus seem essential to press ahead along the lines of the initiatives currently being implemented in relation to visas, in particular by encouraging the setting up of a first common office for issuing visas. To give cooperation in this field a more practical bent, it is also desirable to organise at regular intervals operations such as the "High Impact Operation" conducted at the future external borders of the European Union, the results of which were generally regarded as very positive. The need for a common and solidarity-based approach to controls at the Union's current and future external borders leads us to consider drawing up a European management concept on border control which includes, in particular, the strengthening and standardisation of checks on common training courses, exchanges of expertise and coordination of controls between the various competent departments in the Member States with a view, in the longer term, to setting up a European unit for controls at external borders. Reference should also be made to evaluations based on those conducted by the Working Party on Schengen Evaluation which make it possible to verify the proper application of the Schengen acquis and to boost the level of border protection. The catalogue of recommendations for the correct application of the

- Schengen acquis and best practices is an instrument intended to strengthen and standardize border control, assist candidate States, and prevent illegal immigration and other forms of crime.

- This account shows that the changeover to the Community pillar has not been enough to give a decisive impetus to work in the asylum and immigration sector. Maintaining the unanimity rule is clearly a serious hindrance to progress. The move to **qualified majority** voting, as provided for in the Treaties, would allow proceedings to be speeded up.

III. JUDICIAL COOPERATION IN CIVIL MATTERS

Consideration has been given to the need to approximate Member States' legislation in civil matters in accordance with point 39 of the Tampere conclusions. A report on this topic has been adopted by the Council. Discussions are due to continue on this basis. Moreover, it is desirable that certain priorities be reaffirmed and that some proceedings be speeded up. In this connection the following recommendations could be made:

- The principle of mutual recognition should remain the cornerstone of future work on European judicial cooperation in civil matters. The mutual recognition programme adopted by the Council must be applied. In particular, priority should be given to decisions concerning uncontested claims, making it possible to establish a **genuine European Enforcement Order**, and to certain judgments concerning family law disputes, such as **right of access on a cross-border scale**;

- The setting of **minimum standards for procedures for serving documents** in Member States, which is a logical precondition for the full application of the principle of mutual recognition, should also constitute a priority stage while complying with the fundamental principles of Member States' laws;

- The compatibility of the rules applicable in Member States with regard to conflicts of laws, provided for in Article 65 of the Treaty, is also an important element of the mutual recognition programme. In particular, discussions should be started as quickly as possible on the matter of the **law applicable to extra-contractual obligations**;

- **Better access to justice for citizens** remains a priority with regard to civil matters. It is important that the Commission rapidly submit a proposal to the Council covering certain aspects of **legal aid** as well as a proposal on **alternative methods of settling disputes**.

IV. JUDICIAL COOPERATION IN CRIMINAL MATTERS

Several political, legal and institutional difficulties are hampering the setting up of a true European judicial area in criminal matters:

- **Mutual recognition**: in accordance with point 37 of the Tampere conclusions, the Council has adopted, within the time limits set, a range of measures to implement the programme of mutual recognition. Work on the first instruments (e.g. freezing of assets, European arrest warrant) has begun, but major differences of approach have emerged. In order to make it easier for discussions on this matter to be continued, several approaches could be examined:

- – increase mutual trust: some Member States are reluctant to reduce supervisory checks in the State of enforcement to the minimum because they want to ascertain that the State of issue has complied with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" for short) and of the Charter of Fundamental Rights of the European Union. It is therefore proposed that the Commission be called upon to submit to the Council any proposal aimed at strengthening minimum standards of protection in procedural terms developed by the mass of case-law of the Court of Human Rights relating in particular to Articles 5, 6 and 11 of the ECHR.

- It is also proposed, albeit as a medium-term solution, that examination of the French proposal aimed at setting up a network of colleges for the training of magistrates begin as soon as possible.

- **Harmonisation**: several instruments approximating charges and penal sanctions in the areas identified by the Amsterdam Treaty and by the Tampere conclusions have been adopted. The Community is, however, faced with a threefold difficulty:

    – Firstly, a great many Member States are reluctant to review their criminal law. Most of the acts adopted, therefore, merely prescribe minimum penalties, based on the least advanced laws or on definitions already adopted in international conventions;

– Some Member States cite the consistency of their system of penalties as a reason for their opposition to harmonising the length of penal sanctions, especially when it is a matter of setting the minimum length of a maximum sentence. The Council has acknowledged the need for a comprehensive review of this matter, which was the subject of a report examined by the (JHA) Council on 6 and 7 December 2001;

– Finally, Member States have diverging views on the additional or alternative links which should be established between harmonisation and mutual recognition. It is important that the Council/European Council confirm its determination to undertake, as soon and as ambitiously as possible, the exercise of approximating charges and penalties in the areas defined by the Amsterdam Treaty and the conclusions of the Tampere European Council.

- **Determination of the respective jurisdictions of the Community and the Union in criminal matters**: as illustrated by the case of environmental protection through criminal law, where a **proposal for a Directive tabled by the Commission is in competition with a draft framework** Decision brought forward by a Member State, which would oblige Member States to impose criminal penalties for certain forms of conduct prohibited under Community and national law, the Council's work on criminal matters is to a certain extent paralysed by conflicts over legal basis of the "second type".

- This matter is of particular concern as it arises in several areas: public procurement, protection of financial interests, insider trading, etc. In principle, the formula adopted for combating traffic in human beings, is under Community law – where the Community has jurisdiction – to define conduct and for Union law to impose penal sanctions in the event of infringements. Nevertheless, this should not preclude recourse, if clear need arises, to the sole instrument of the framework decision to formulate the definitions, offences and penalties intended for harmonisation.

- The **ratification, transposition and implementation of acts** adopted on the basis of Article 34 of the TEU: as the Commission's scoreboard shows, Member States are slow to ratify Conventions drawn up by the Council. Further, no mechanism has been designed to monitor the way in which the Member States implement framework Decisions and Decisions adopted by the Council. It is proposed that from now on the Commission be asked to make arrangements in all cases to submit to the Council reports on progress with transposing the various instruments adopted in the framework of Title VI of the TEU.

- As the legal framework required for setting up **joint investigation teams** as from 1 July 2002 is on course for adoption, it would be opportune for the Council to reiterate the particular importance it attaches to similar teams being set up without delay to combat terrorism, traffic in human beings and drug trafficking.

- The Tampere European Council was anxious in its conclusions to develop a **preventive approach** in the fields of police cooperation and judicial cooperation in criminal matters. While the creation of a crime prevention network and the setting up of a Forum on the prevention of organised crime constitute two concrete achievements of this approach, work in this area should be actively continued.

- In addition to rationalisation of working methods, increased resources and the above proposals on mutual recognition and harmonisation, the goal of a genuine European judicial area in criminal matters by May 2004 requires the **adoption of more radical institutional measures**. As they stand, the Treaties offer two possible courses for exploration: use of the mechanism provided for in Article 42 TEU for certain subjects ("bridge"), and the possibilities opened up by enhanced cooperation on the other, when it becomes impossible to move forward together and at the same time.

V. POLICE COOPERATION

For various reasons partly connected with the attitude of Member States towards the new tools for police cooperation, it is no exaggeration to say that those tools **have not yet produced the added value in operational terms that was expected of them**.

- **Europol**: by the adoption of the many regulations implementing the Europol Convention, the gradual extension of its powers notably in relation to combating money laundering, the adoption of ever-growing budgets, the Council and the Member States have ensured that Europol has got off to the best possible start. However, leaving aside the delay in installing its computer system,

- Europol is not yet able – despite a staff of over 250 persons and a budget of over EUR 35 million – to provide the Member States' police services with sufficiently refined analyses and information.

- The main reason is the reluctance of Member States to provide Europol with sensitive information. The Director of Europol's report to the (JHA) Council on 6 and 7 December 2001 demonstrated that Member States were more willing to provide Europol with information following the terrorist attacks of 11 September 2001.

- The extension of Europol's powers to all the forms of crime mentioned in the Annex to the Europol Convention requires the Management Board to adopt a much more selective strategic plan. The work begun under the French Presidency and continued under the Swedish and Belgian Presidencies to define a "vision" for Europol should provide the beginnings of a response. The Council should request the Management Board of Europol to continue its discussions on corporate governance and management control.

- In the legislative field, work is under way to identify those articles of the Convention that most need to be amended. This will render binding the two Resolutions adopted under the French Presidency on Europol's participation in joint investigation teams and on the possibility of Europol requesting Member States to initiate investigations. It has yet to be determined whether greater operational powers should be conferred on Europol and, if so, what form of parliamentary control of its activities should be devised and what arrangements should be made for cooperation with Eurojust.

- **Police Chiefs Task Force**: when it became apparent that the Police Chiefs of the Member States had no forum in which to decide to launch police operations on the basis of Europol analyses, the Tampere European Council decided to set up this Task Force. It has met on four occasions since then. The tasks attributed to the Task Force must be specified. By virtue of their function within the Member States, the Police Chiefs have an important role to play in the preparation, implementation and evaluation of the

decisions taken by the Council. While their work has gradually become more specific, it would be better, to meet the expectations of the Heads of State and Government, if it focused to a greater extent on the planning and execution of actual police operations at Union level. After a running-in period, we must also define the exact place of this Task Force in the Union's institutional architecture, and fine-tune its working methods.

- **European Police College**: after a difficult start due to the fact that it lacked legal personality and had no permanent secretariat, the College drew up a more targeted training programme consistent with the Council's priorities. The effectiveness of its activities will, however, depend on the European Council's ability to decide on a headquarters for it. Thought must also be given in the not too distant future to the possibility of transforming the network of police colleges into a genuine autonomous agency.

- **SIS II**: in addition to its function in the immigration field, SIS in its present form is the most operational cooperation tool between the Member States' police services. The need to enhance its functions and modernise its technical capabilities, in order to incorporate the new Member States in due course, also calls for reflection as to the institutional form it should be given. A decision could also be taken on the possibility of contracting its management out to an agency.

VI. EXTERNAL RELATIONS

The Tampere European Council considered it essential for the European Union to develop "**a capacity to act and be regarded as a significant partner on the international scene"** in the JHA field. At the Feira European Council (June 2000), the Heads of State and Government set out the aims, priorities and working methods for external relations. Coreper and the Council were asked to submit a progress report jointly with the mid-term assessment of the Tampere process.

From experience acquired since those two European Councils the following lessons have been learned:

- **Growing external pressure**: it is important first of all to recognise that the growing influence of the European Union has led to a steep increase in the expectations of our partners in the JHA field that do not always correspond to the priorities set by the Union and are not always matched by the means and resources available. The occurrence of two major crises in recent months has further accentuated that pressure. Faced with the deaths in Dover and the tragedy of the terrorist attacks of 11 September 2001, the European Union proved that it was able to react effectively and swiftly. Combating illegal immigration networks was, prior to the fight against terrorism, the common theme of external action in the JHA field. Implementation of a strategy and a plan of action against terrorism bring together energies and expertise outside the JHA dimension.

- Nevertheless, the latter remains a key feature. Coreper and the GAC are fully playing their role in monitoring, coordinating, evaluating and giving an impetus to activities. A subsequent, fuller evaluation of these measures will make it possible to draw any conclusions from the action taken.

- **Priorities and continuity of external action**: over and above the reactions to the crises mentioned, the external relations programmes in the JHA sphere implemented since Feira have broadly complied with the desired objective of contributing to the establishment of an area of freedom, security and justice and the priorities, both geographical and thematic, that were set.

- The main results concern the preparation of the Union for enlargement, the fight against illegal immigration and against organised crime.

- The Union's role in the JHA sphere has also become more established amongst the strategic partners: Balkans, Mediterranean countries, Russia and Ukraine, both through the instruments devised (regional programme, action plan, regional cooperation) and through the methods used (funding of MEDA, TACIS and shortly CARDS).

- **Visibility of JHA external action**: the need for integration and cohesion means that, far from developing along its own lines, the external aspect of JHA must serve the main political interests of the Union vis-à-vis the outside world. That requirement comes up against too many different cooperation frameworks: a common strategy and an overall action plan (Ukraine) or a targeted action plan (Russia – organised crime), a stability pact and a stabilisation and association process (Balkans), a common strategy and the Barcelona process (Mediterranean), an informal dialogue "Agenda" alongside the Task Force or the Joint Cooperation Committee (United States, Canada), a High-level Working Party, a common approach or a joint position within international organisations, etc. These different structures are multiplied by the number of players (EU, Council of Europe, United Nations, FATF, G8, Conferences, etc.). When Member States' initiatives are added in, visibility is further decreased. The external relations of JHA would be clearer if they were part of a more integrated, overall vision and approach that was better understood by those responsible at the technical level. The EU could, as it did with regard to combating terrorism, draw up a roadmap against organised crime. There should at least be regular assessments of each priority set out on a list, as is already the practice for the Balkans.

- **Complexity and methods of JHA external action**: more attention should be paid to the external aspect of JHA issues in the Article 36 Committee and SCIFA discussions, with greater involvement of the representatives of the relevant national Ministries. However, the central role of Coreper, the only Committee in a position to assess the Union's objectives as a whole, must be upheld and reiterated. The system adopted at Feira has not been implemented consistently:

- JHA/RELEX Counsellors were called in only twice immediately after the Feira Council (for matters relating to the EU's relations with China and Russia respectively) before the structure was abandoned and, recently, a procedure was used which, although perhaps more practical, was only implicit in the Feira document, that of involving JHA Counsellors in the discussions of the relevant geographical working parties (COEST for the Ukraine action plan, COWEB for the Balkans). This procedure enables specialists with responsibility for external relations to take advantage of JHA expertise but should not lead to the elimination of the regular horizontal review by Coreper's RELEX Counsellors of the JHA aspects of the Union's external action.

- **Controlling immigration must be given greater priority in the Union's foreign policy.** The High-level Working Group on Asylum and Migration (HLWG) set up by the Council (General Affairs) at the end of 1998 was established to give form to the comprehensive approach to migration referred to in point 11 of the conclusions of the Tampere European Council.

- Experience has shown that the implementation of the action plans drawn up by the HLWG can be achieved only in partnership with the countries concerned. The partnerships currently being developed with the Albanian, Moroccan and Sri Lankan authorities bear witness to the relevance of this approach.

- It must be acknowledged that the innovatory nature of the HLWG's cross-pillar approach has not been without teething troubles, involving either coordination between the various Community bodies and within national administrations or the financial means required to implement the measures contained in the action plans. In the report it drew up for the Nice European Council, the HLWG described its work as "both promising and difficult", particularly on account of the constraints described above. Although relatively modest at the outset (EUR 10 million for 2001), the existence of a specific budget heading for external action regarding migration should make it possible to achieve progress in implementing action plans. The HLWG should continue implementing existing action plans by stepping up the dialogue with the countries concerned as well as with the other bodies involved (international organisations, NGOs) and ensuring good coordination and consistency between the actions to be implemented. One basic lesson to be drawn from experience acquired to date is the fact that no future action plan should be drawn up except in close partnership with the "target" country. For immigration also, a road map of measures taken and to be taken by all players under the different EU pillars and beyond would provide an integrated and consistent overview of the efforts achieved.

- **The development of judicial cooperation in civil matters leads to the extension of Community powers** both internally and externally. This consequence, arising from the transfer of certain powers from Member States to the Community, has both legal and political effects.

- Certain instruments adopted as a consequence of the Tampere conclusions (in particular the Brussels I Regulation) result in difficulties occurring on a regular basis where instruments of a mixed nature that may affect Community law are negotiated in other international forums. Thus, without calling into question the "acquis communautaire" as regards the external powers of the Community; in particular the case law of the Court of Justice of the European Communities, the Commission should submit an overall report on this issue to the Council.

VII. WORKING METHODS

Following the initiative taken under the Swedish Presidency, a very extensive study of working methods in the JHA sector was begun. Although the study has not yet been completed, a consensus has been reached within Coreper on many of the principles.

The questions which have yet to be examined include: the possible restructuring of working parties with the aim of reducing their number, and a debate on their workload – and that of the GSC – in relation to the preparation and discussion of reports on the implementation of third-pillar instruments.

Pending the conclusion of these proceedings within Coreper, the following proposals are made by way of initial measures, to be implemented gradually, aimed at making work undertaken in the JHA sector more effective:

(a) Adopt the principle of one JHA Council per month, without prejudice to the onus remaining on the Presidency to determine the need for this on the basis of progress on the issues.

(b) Limit these Councils to one day with shorter agendas.

(c) Focus Council discussions on legislative activities and policy definition.

(d) Continue to implement the recommendations set out in the "Trumpf/Piris" report

Annex III

Extending the Area of Freedom, Justice and Security through enlargement: Challenges for the European Union

Venue: ERA, 4 Metzer Allee
D-54295 Trier
Date: 4 - 6 July 2002

4 July 2002 - Enlargement and Justice and Home Affairs

09h15 **Welcome to participants**

09h30 – 11h00 **Session I: Roundtable discussion on the consequences of enlargement for the area of Justice & Home Affairs**
Chairperson: ***Wolfgang Heusel*** *(ERA)*

- *Consequences for the German Justice & Home Affairs policy:* **Otto Schily** *(*German Minister of the Interior)♦
- *A view from the other side of the Negotiating Table:* **Endre Juhász** *(*Chief of the Mission of the Republic of Hungary to the European Union)♦
- The European Area of Freedom, Security and Justice: How integrated should policy be?: ***Antonio Vitorino*** *(Commission for Justice and Home Affairs, EU Commission)*♦
- The priorities of the Danish Presidency: ***Bertel Haarder*** (*Danish Minister for the Interior)*♦
- Maintaining the Justice and Home Affairs Acquis in an enlarged Union***: Jörg Monar*** *(Co-Director of Sussex European Institute)* ♦

11h00 – 11h15 Coffee Break

11h15 – 13h15 **Session II: Fundamentals of an EU Justice & Home Affairs policy post-enlargement**
Chairperson: *Peter Ekholm* ***(Sitra)***

- A Constitution for Europe: ***Baroness Sarah Ludford*** (*MEP, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs*) ♦
- Division of competencies between national and European levels in Justice & Home Affairs: ***Paul De Hert*** *(University of Tilburg, Netherlands)*

- Protecting fundamental rights in an enlarged Europe: what ways forward? ***Sir Nicolas Bratza*** *(Judge, European Court of Human Rights, Strasbourg)* ♦

13h15 – 14h30 **Lunch**

14h30 - 16h30 **Session III: Security and Migration: Implementing Tampere**
Chairperson: ***Olga Potemkina*** *(Academy of Sciences, Moscow)*

- Security in Europe post September 11: consequences for free movement of persons?*:* ***Didier Bigo,*** *(FNSP-CERI, France)*
- Migration: myths and realities: ***Ferruccio Pastore,*** *(CeSPI, Rome)* ♦
- The "destabilizing" potential of migration in the context of EU enlargement?: ***Erikas Slavènas****,(IOM, Helsinki)*

5 July 2002 - Two parallel sessions: Openness and Control in an enlarged Europe

Session IV: Scenarios on Crime, Law and Justice in an enlarged European Union
Chairman: ***Peter Cullen*** *(ERA)*

09h30 – 10h00 Impact of crossborder crime on legal and economic systems of the enlarged Union: ***Ernesto Savona*** *(Transcrime – University of Trento, Italy)*

10h00 – 13h15 (coffee will be served at 11h15)
New criminal challenges in the field of:

- Traffic in human beings: ***Andrea Di Nicola*** *(Transcrime – University of Trento, Italy)*
- Drugs: ***Sandeep Chawla*** *(Chief Research Section, Division for Operations and Analysis – ODCCP, Austria)* ♦
- Financial crimes (fraud, corruption and money laundering): ***Michael Levi*** *(University of Cardiff, UK)* ♦
- Terrorism ***Robert Fox*** *(School of Defence Studies, King's College London, UK)* ♦

13h15 – 14h45 **Lunch**

14h45 – 17h00 (coffee will be served at 16h00)
Institutional and Law Enforcement Responses at European Level

- Eurojust versus European Public Prosecutor : ***Jorge Costa*** *(office of the attorney general, Portugal)*
- Europol and other forms of police co-operation *:* ***Monica den Boer*** *(EULEC, The Netherlands)*
- OLAF and its co-operation with the Institutions of new Member States : ***Franz-Hermann Brüner*** *(OLAF, Belgium)* ♦

Session V: What immigration policy for Europe
Chairperson: ***Judith Toth*** *(University of Szeged, Hungary)*

09h30 – 10h00 An overview of the evolution of immigration policies in Europe since Maastricht: ***Joanna Apap*** *(CEPS, Brussels)*

10h00 – 13h15 (coffee will be served at 11h15)

On the way towards a more open immigration policy in Europe?

- Member States' Labour Markets: Impact on immigration*:* ***Elspeth Guild*** *(University of Nijmegen, Netherlands)*
- *The New German Immigration Law:* ***Doris Schmidt*** *(European Parliament/ University of Berlin)*

- Family Reunification as a constitutional right?: ***Ryzsard Cholewinski*** *(University of Leceister)*
- Developments and setbacks for a common European Asylum Policy*:* ***Johannes Vander Klauw*** *(UNHCR, Belgium)* ♦

13h15 – 14h45 **Lunch**

14h45 – 17h00 (coffee will be served at 16h00)

Balancing openness with control

- Is illegal migration the 'missing link' to a comprehensive immigration and asylum policy?: ***Felicita Medved*** *(University of Stockholm)*
- Taking the "bogus" out of the discourse concerning asylum: ***Kemal Kirisci*** *(Bogazici University, Turkey)*
- Management of border controls in Europe: The feasibility of a Euro-Border guard: ***Gerardo Cautilli*** *(Italian Ministry of Interior)* ♦

6 July 2002 - 2004 and beyond

Chairperson: ***Manuel Malheiros*** *(Constitutional Court, Portugal)*

9h30 – 10h00

- Reviewing the Tampere Scoreboard with respect to the balance between freedom, security and justice: ***Gilles de Kerchove*** *(Director DGH, Council of the European Union)* ♦

10h00 – 10h30

- What institutional changes should be foreseen for an effective implementation of the JHA agenda post enlargement**?:** ***Elmar Brok*** *(MEP, Chairman of the committee on Foreign Affairs, Human Rights, Common Security and Defence Policy)* ♦

10h30-11h00 Discussion

11h00 – 11h15 Coffee Break

11h15 – 11h45

- Options for treaty reform and practical improvements to manage the JHA agenda in an enlarged Europe: ***Malcolm Anderson****,(CEPS, Belgium)*

11h45 – 12h30

- What place for forms of flexible integration in Justice and Home Affairs?: ***Neil Walker,*** *(European University Institute, Florence)*

13h00 **End of Conference**

ABOUT THE CEPS-SITRA NETWORK

CEPS, with financial assistance of the Finnish SITRA Foundation, embarked at the end of 2000 on a programme to examine the impact of Justice and Home Affairs acquis on an enlarged European Union, the implications for the candidate countries and for the states with which they share borders. *The aim of this programme is to help establish a better balance between civil liberties and security in an enlarged Europe.*

This project will lead to a series of policy recommendations that will promote cooperation in EU JHA in the context of an enlarged Europe as well as institutional developments for the medium- to long-term in areas such as a European Public Prosecutors Office, re-shaping Europol and a developed system of policing the external frontier (Euro Border Guard). These must be made within a balanced framework. *There are two key issues:*

First of all, to prevent the distortion of the agenda by "events" – some items are being accelerated and other marginalised, which risks upsetting the balance, carefully crafted by the Finnish Presidency, between freedom, security and justice. The current 'threat' is that security issues, at the expense of others, will predominate after the catastrophic events of 11th September. The monitoring of items, which could be marginalised and the nature of the institutional/political blockages that could distort the Tampere agenda, is our priority.

Secondly, how to look beyond the Tampere agenda, both in terms of providing a flexible approach during the period of completion of the Tampere programme as well as what should come afterwards. Much detail remains to be filled in about rigid items on the Tampere agenda and CEPS will continue to work in three very important areas:

- Arrangements for managing and policing the external frontier
- Judicial co-operation leading to the development of a European Public Prosecutor
- Strengthening of Europol, particularly in the field of serious trans-frontier violence and moves towards a more federalised policing capacity

The CEPS-SITRA programme brings together a multi-disciplinary network of 20 experts drawn from EU member states, applicant countries as well as neighbouring states: the European University Institute in Florence, the Stefan Batory Foundation (Warsaw), European Academy of Law (ERA Trier), Academy of Sciences (Moscow), London School of Economics, International Office of Migration (Helsinki), Fondation Nationale des Sciences Politiques (CERI) in France, Universities of Budapest, Université Catholique de Louvain-la-Neuve, University of Lisbon (Autonoma), University of Nijmegen, University of Burgos, CEIFO in Stockholm, University of Tilberg and University of Vilnius, as well as members with practical judicial and legislative backgrounds

A Note about SITRA (Suomen itsenäisyyden juhlarahasto

Is the Finnish National Fund for Research and Development. It is an independent public foundation under the supervision of the Finnish Parliament. The Fund aims to promote Finland's economic prosperity by encouraging research, backing innovative projects, organising training programmes and providing venture capital.

ABOUT CEPS

MISSION

The Centre for European Policy Studies is an independent policy research institute founded in 1983:

- To produce sound policy research leading to constructive solutions to the challenges facing Europe.

GOALS

- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

ASSETS AND ACHIEVEMENTS

- Quality research by an international staff of 30 drawn from fifteen countries.
- An extensive network of external collaborators, including some 35 senior associates with extensive experience working in EU affairs.
- Complete independence to set its own priorities and freedom from any outside influence.
- Ability to anticipate trends and to analyse policy questions well before they become topics of general public discussion.

PROGRAMME STRUCTURE

CEPS is a place where creative and authoritative specialists reflect and comment on the problems and opportunities facing Europe today. This is evidenced by the depth and originality of its publications and the talent and prescience of its expanding research staff. The CEPS research programme is organised under two major headings:

Economic Policy

Macroeconomic Policy
European Network of Economic Policy Research Institutes (ENEPRI)
Financial Markets and Institutions
European Credit Research Institute (ECRI)
Trade Developments and Policy
Energy for the 21st Century
Efficiency in the Pursuit of Collective Goals

Politics, Institutions and Security

Political Institutions and Society
The Wider Europe
- South East Europe
- Caucasus and Black Sea
- EU-Russian Relations

The CEPS-IISS Security Forum
South East European Security Cooperation
Justice and Home Affairs

In addition to these two sets of research programmes, the Centre organises a variety of activities within the CEPS Policy Forum. These include CEPS working parties, the lunchtime membership meetings, network meetings abroad, board-level briefings for CEPS corporate members, conferences, training seminars, major annual events (e.g. the CEPS International Advisory Council) and internet and media relations.