

# EUROPEAN PARLIAMENT



## DG INTERNAL POLICIES OF THE UNION POLICY UNIT: CITIZENS RIGHTS AND CONSTITUTIONAL AFFAIRS

Brussels, 28.8.2006

### SESSION 1

#### DATA EXCHANGE AND DATA PROTECTION: OBSTACLES TO IMPLEMENTING THE PRINCIPLE OF AVAILABILITY

##### 1. **Introduction: protection of personal data – legal framework**

Directive 95/46/EC is the basic reference text at European level on the protection of personal data. It aims to strike a balance between a high level of protection of citizens' privacy and the free movement of personal data within the EU. It establishes a regulatory framework, including a personal data protection group referred to as the 'Article 29' group. However the directive does not apply to activities that lie outside the Community sphere and third pillar matters are excluded.

Regulation (EC) 45/2001 – based on Article 286 TEC – lays down rules for the protection of personal data by Community institutions and bodies. This regulation is largely based on the provisions of Directive 95/46/EC and in practice can be seen as the implementation of that directive within the EU institutions. The regulation provided for the appointment of a European data protection supervisor, who started work in January 2004.

The data protection supervisor's tasks include cooperation with the data protection supervisory bodies of Europol, Schengen, Eurojust and the customs information system, set up within the framework of the third pillar, in particular to improve coherence in the application of the rules and procedures for which they are responsible.

Reference should also be made to Article 7, respect for private and family life, and Article 8, protection of personal data, of the EU Charter of Fundamental Rights. These provisions have been included in the draft treaty establishing a Constitution for Europe (Articles II-67 and II-68) which introduces a new general article on personal data protection (Article I-51) under the title relating to the democratic life of the Union.

The protection of personal data is becoming an increasingly important issue at EU level and is recognised as such both within the framework of the Charter of

Fundamental Rights and in the draft Constitution for Europe. The regulatory framework is now clearly established - with the creation of various supervisory and assessment bodies as far as the Community sphere is concerned.

However, when it comes to cooperation in the areas of police and security and judicial cooperation in criminal matters, areas that fall within the third pillar, for the time being there are only specific provisions laid down for particular bodies such as Eurojust, Europol, Schengen and the customs system.

## **2. Provisions of The Hague programme**

The Hague programme, adopted by the European Council in November 2004, establishes two major priorities which are to a large extent linked: the interoperability of information systems, and the exchange of information on the basis of the principle of availability.

The European Council asked the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration. The Commission was to present a communication on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement objectives and safeguarding the fundamental rights of individuals. Emphasis is placed on the 'right balance' between law enforcement objectives and protection of fundamental rights. However, the aim of The Hague programme at this stage is to study the options rather than to adopt specific practical measures.

Efforts to integrate biometric identifiers in travel documents, and information systems are to continue.

From the start of 2008, the exchange of law enforcement information is to be governed by

the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State. The Commission is invited to submit proposals by the end of 2005 at the latest for implementation of the principle of availability<sup>1</sup>. A number of key conditions should be strictly observed: the exchange may only take place in order that legal tasks may be performed; the integrity of the data to be exchanged must be guaranteed; the need to protect sources of information and to secure the confidentiality of the data, supervision of respect for data protection, and individuals must be protected from abuse of data and have the right to seek correction of incorrect data.

Suggested methods of exchange of information are reciprocal access to national databases, interoperability or direct (on-line) access to existing central EU databases, specifically that of Europol.

The Hague programme also says that new centralised European databases should only be created on the basis of studies that have shown their added value.

## **3. Urgent need to adopt a regulation on data protection in 3rd pillar matters**

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<sup>1</sup> See COM (2005) 490 final and paragraph 5.

2006 saw two key events that highlight the urgent need to adopt an overall regulation on the protection of personal data in third pillar matters: firstly the adoption of a directive on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications<sup>2</sup> and, secondly the Court of Justice's decision to annul the Council decision concerning the conclusion of an agreement between the European Community and the United States of America on the processing and transfer of personal data<sup>3</sup>.

These two events clearly illustrate the wide-ranging implications of the protection of personal data collected and used for the purposes of public safety, defence and State security as well as in relation to state measures concerning criminal law and organised crime. In particular, they raise the question of the role of private companies in relation to the public authorities and that of the transfer of data to third countries.

They demonstrate the urgent need for regulation of the third pillar sphere covering all these aspects.

During negotiations with the Council on the adoption of the directive referred to above, Parliament made it clear that its readiness to adopt within a very short deadline the directive which raises numerous problems was conditional on the Council representatives giving an assurance that they would discuss and adopt at an early stage overall regulations governing the third pillar area.

#### **4. Proposal for a framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters**

The proposal for a Council Framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters presented by the Commission<sup>4</sup> aims to ensure the protection of data collected for the purposes of prevention and detection of criminal offences, investigations and prosecutions. The processing of data by Europol, Eurojust and the Customs Information System does not fall within the scope of the proposal as they are subject to specific rules.

The proposal seeks to safeguard the rights of individuals by providing for the establishment of public independent supervisory authorities in the Member States and a data protection group. It lays down arrangements to ensure that the persons concerned are informed and have legal redress in the event of violation of their rights.

Data must be processed fairly and lawfully. Data must be collected for specified, explicit and legitimate purposes. The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life is prohibited. Data can only be transmitted or made available to the competent authorities of other Member States if necessary for the fulfilment of a legitimate task of the transmitting or receiving authority. The data can only be further processed for the

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<sup>2</sup> Directive 2006/24/CE, 15.3.2006, JO L 105, 13.4.2006.

<sup>3</sup> CJ, Press release 46/06, 30.5.2006.

<sup>4</sup> COM (2005) 475 final

specific purpose for which they were transmitted. An adequate level of data protection is required if data is to be transferred to a third country or international body. The proposal for a framework decision also ensures the confidentiality and security of processing.

Parliament was consulted under the simple consultation procedure applying to the third pillar and delivered its opinion in June 2006<sup>5</sup>.

Parliament welcomed the proposal which meets a need to which it had drawn attention earlier. This instrument is necessary for two reasons, to comply with Articles 7 and 8 of the Charter of Fundamental Rights, and to reinforce the principle of mutual confidence. The proposal is linked to several other proposals currently being scrutinised by Parliament, notably those on the VIS and SIS II, which relate to the third pillar. These proposals should include clear references to the principles of personal data protection set out in the future framework decision. The adoption of common rules is a sine qua non for establishing the availability principle. Parliament's aim is to ensure that there is coherence among the data protection rules, whether it be for the first or third pillars.

The principles of Directive 95/46 provide a blue print allowing for the specific nature of police and judicial activities.

The amendments adopted by Parliament seek in particular to ensure that the same data protection rules apply to exchanges within Member States and those between Member States.

Within a certain period the data protection rules should be made applicable to Europol, Eurojust and the customs information system.

Additional safeguards are added to cover DNA and biometric data. Very strict conditions are laid down on access to data held by private parties and for the management and processing of data for security purposes within a public service. This provision follows on from adoption of the data retention directive referred to earlier.

Finally, strict conditions are imposed on the transfer of data to third countries.

##### **5. Principle of availability and interoperability of databases: two important developments with a direct impact on data protection**

In response to the request made in The Hague programme, at the end of 2005 the Commission presented a proposal for a Council framework decision on the exchange of information under the principle of availability<sup>6</sup>.

The exchange of information plays a key role in the EU's security strategy. The exchange of information for law enforcement purposes should be governed by the new principle of availability, which allows an unprecedented degree of cooperation. The principle of availability means that any law enforcement officer in a Member State who needs information in order to perform his duties can obtain this from another Member State. The proposal for a framework decision introduces direct online access to available information and to index data for

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<sup>5</sup> Minutes of sitting of 14.6.2006, report by Mrs Roure, A6-0192/2006

<sup>6</sup> COM (2005) 490 final

information that is not accessible online for the law enforcement authorities of Member States and officers of Europol.

There are currently numerous obstacles to the availability of information, for instance differences in data protection standards. The new principle must ensure full respect for fundamental rights and the right to protection of personal data in particular. The processing of personal data will be done in accordance with the provisions of the draft framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and the Europol Convention.

The adoption of common rules on data processing in police and judicial cooperation will in practice facilitate the movement of data in accordance with the new principle of availability and is all the more essential because implementation of this principle is likely to increase data exchanges considerably.

One expert has pointed out that the principle of availability has more to do with mutual recognition than with standardisation or harmonisation. Its primary advantage is that it challenges the implicit ownership of information by the services that collected the data and its legitimacy. This presupposes agreement on what information is, and on the way data is processed and how it is used. It also presupposes that the culture and organisational structures of the various data protection authorities are sufficiently similar particularly as regards the distinction between intelligence and police powers and as regards what is deemed to be relevant information in Member State procedures<sup>7</sup>.

Following on from The Hague programme, at the end of 2005 the Commission presented a communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs<sup>8</sup>. The proposal relates to three existing information systems: SIS II, VIS, EURODAC. Interoperability is defined as the ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge.

Comprehensive supervision by competent data protection bodies will be indispensable and when putting forward possible future proposals, the Commission will make a specific impact assessment of respect for fundamental rights.

As it stands, the communication takes a very open approach and basically aims to launch an in-depth debate on the form and structure of databases in the long term.

One expert has pointed out that one of the greatest obstacles to creating synergies between databases in the JHA area is the dichotomy between matters covered by the first and third pillars, which means that closely related issues are subject to different legislative rules and monitoring and supervisory procedures<sup>9</sup>. From this point of view, the adoption of common rules on data protection in the third pillar would also make it easier to achieve the interoperability of databases.

There are four areas in which the concept of interoperability is controversial and could pose particular risks<sup>10</sup>. These are: interoperability with systems outside the

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<sup>7</sup> Briefing paper, D. Bigo, Principle of availability of information, IP/C/LIBE/FWC/2005-24, 2006

<sup>8</sup> COM (2005) 597 final

<sup>9</sup> Briefing paper, P. Hobbing, Analysis of Commission communication COM (2005) final, IP/C/LIBE/FWC/2005-08, 2006

<sup>10</sup> Briefing paper, P. De Hert, What are the risks and what guarantees need to be put in place in view of interoperability of police databases, IP/C/LIBE/FWC/2005-25, 2006

EU; the distinction between the interoperability of keys and the interoperability of content in connection with the use of biometric data; interoperability between law enforcement and other systems, for instance State held databases and databases held by private actors and, finally the issue of interoperability in the framework of 'intelligence led policing' or proactive policing that uses all information and crime analysis techniques.

Jean-Louis ANTOINE-GRÉGOIRE



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Brussels, 7 September 2006

## Session 2

# WHAT FUTURE FOR EUROPOL?

## Increasing Europol's Accountability and Improving Europol's Operational Capacity

### 1 INTRODUCTION

- The **establishment** of Europol was agreed in the Maastricht Treaty on European Union of 7 February 1992.<sup>11</sup> Based in The Hague, Netherlands, Europol started limited operations on 3 January 1994 in the form of the Europol Drugs Unit (EDU) fighting against drugs. Progressively, other important areas of criminality were added. The Europol Convention was ratified by all Member States and came into force on 1 October 1998. Following a number of legal acts related to the Convention, Europol commenced its full activities on 1 July 1999. Europol, to-date is not an EU agency.
- As of 1 January 2002, the mandate of Europol was extended to deal with all serious forms of international crime as listed in the annex to the Europol Convention.<sup>12</sup><sup>13</sup> Also as of 2002, Europol could sign cooperation agreements with third states and non-EU related bodies.<sup>14</sup>
- The **mission of Europol is to make a significant contribution to the European Union's law enforcement action against organised crime and terrorism with an emphasis on targeting criminal organisations.** This should mainly be achieved through the facilitation of information exchange between Member States and through obtaining, collating and analysing information.

### 2 BROADENING EUROPOL'S OPERATIONAL CAPACITY

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11 The **main legal bases** in the current treaties for Europol are **Articles 29 and 30 TEU**.

12 Europol supports the law enforcement activities of the EU Member States by: facilitating the exchange of information between Europol and Europol Liaison Officers (ELOs); providing operational analysis and support to Member States' operations; providing expertise and technical support for investigations and operations carried out within the EU, under the supervision and the legal responsibility of the Member States; generating strategic reports (e.g. threat assessments) and crime analysis on the basis of information and intelligence supplied by Member States or gathered from other sources.

13 There are currently 590 persons working at the Europol premises.

Europol is funded by contributions from the Member States according to their GNP. Budget 2006: €63.4 M. **This is not part of the COMMUNITY BUDGET.**

14 There are two types of co-operation agreements that can be signed.

- **Strategic agreements** are limited to the exchange of non-personal data, which means strategic and technical data.
- **Operational agreements** include the possibility to exchange personal data, which means data relating to an identified or identifiable natural person.

A more detailed list of the specific agreements can be found on <http://www.europol.europa.eu/legal> .

**Europol's initial role was one of coordination. It was however, increasingly felt that it should have more powers of investigation and discussions in view of the Hague Programme programme were centred on how to broaden Europol's mandate to allow to carry out a more operational role in investigations (e.g. phone tapping for law-enforcement purposes, etc).**

The Hague program includes several items reinforcing Europol's positioning. Three visible trends in relation to the development of Europol can be outlined:

- the shift from focussing on specific crimes, towards (organised) crime in general ;
- the shift from handling information towards operative powers;
- the establishment of specified working groups and task forces within Europol as a reaction to actual issues or problems, e.g. a Counter terrorist unit and a Unit with Euro specialists.

The Hague program also states that the Council should adopt the European Law on Europol. This would have been provided for in the art. III-276 of the Constitutional Treaty and it was normally foreseen to enter into force no later than 1 January 2008, however in the absence of the Constitutional Treaty; it is not clear how this will take place. Article III-276 would have taken into account all tasks conferred upon to Europol as this would have integrated the Europol Convention into the Treaties and bring it also under the scrutiny of the European Parliament.<sup>15</sup>

So far, the operational role of Europol is still in development. However, cooperation with Eurojust<sup>16</sup> in investigations has started: Eurojust and Europol cooperate for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking into account, in particular, the analysis carried out by Europol.<sup>17</sup>

### **3 THE ACCOUNTABILITY OF EUROPOL**

- **Europol is currently accountable to the Council of Ministers** for Justice and Home Affairs. The Council is responsible for the guidance and control of Europol. It appoints the Director and the Deputy Directors and approves the budget. The Council of Ministers contains representatives from all Member States, and the requirement for unanimous decisions helps ensure a democratic control of Europol.
- The Europol Management Board comprises of one representative from each Member State and of the Commission and has the main role in steering the day-to-day work of (Article 28), The Member States' authorities are therefore informed in great detail about Europol's functioning through their representatives in the Management Board where decisions are taken by unanimity.
- There are two executive police powers which are of **particular concern** to the European Parliament as they could potentially infringe the fundamental rights of citizens and thus have to be subjected to an adequate legal basis and have to be monitored by public prosecutors and/or a democratically accountable authority:
  - **handling of personal data; and**
  - **central supervision assigned to the Management Board, in supervising Europol.**
- The **fundamental right of citizens which is potentially most affected** by Europol's work **is the right of access to personal files** (knowledge of the existence and content

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<sup>15</sup> At the moment, though, there is no political consensus on a final decision in how to integrate the Europol convention into the European Treaties and its potential transpillarisation -neither on procedure, nor on its scope - particularly, should the Constitutional Treaty not enter into force.

<sup>16</sup> Eurojust is a European Union body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime.

<sup>17</sup> A cooperation agreement have been concluded with Eurojust in 2004 so that Eurojust lends assistance to Europol in its investigations.

of personal files). Therefore it was particularly necessary to create instruments for the control of Europol in this respect. As a result the Europol Convention provides a great number of articles dedicated to the handling of personal data and data protection.

- One of the most important provisions is the establishment of the **Joint Supervisory Body (JSB)** in Article 24 which comprises two data protection experts from each Member State, monitors the content and use of all personal data held by Europol. This is an independent body responsible for the constant monitoring of the activities of Europol in order to ensure that the rights of individuals are not violated by the storage, processing and utilisation of data by Europol. National Supervisory Bodies in the Member States complement the work of the JSB in ensuring at national level that the handling of personal data received from or sent to Europol does not violate individual rights in accordance with the respective national law.
- Each individual has the right to request the JSB to ensure that the treatment of personal data by Europol is lawful and accurate. Europol needs to inform the applicant that one can present an appeal to JSB should the applicant not be satisfied with Europol's decision. In the case of appeals Europol therefore has the obligation to assist the JSB in carrying out its tasks successfully, in particular to allow free access to all its premises, to supply requested information, to give access to all kind of data and to carry out the JSB decisions.
- Last but not least, very detailed regulations are provided – in the Convention itself and in several complementary Council decisions – which lay down the rules on the use of data and the communication of data to third states and third bodies. This is an essential requirement for the full implementation of close cooperation between Europol and the police forces of candidate countries.

#### **4 EUROPOL AND PARLIAMENTARY SCRUTINY**

**No formal arrangement for direct scrutiny by the European Parliament is foreseen with regards to Europol. The European Parliament has no real powers in deciding legislation affecting the remit or powers of Europol, it cannot reject legislation or propose measures on its own initiative, whereas parliaments in the Member States must approve rules governing the functioning of national agencies.**

Article 39 TEU lays down an obligation for the Council to consult the Parliament before the adoption of legally binding measures, such as framework decisions, decisions and conventions. This provision also applies to Europol. In quite a number of articles the Europol Convention itself stipulates that decisions have to be taken by the Council in accordance with the procedures foreseen in Title VI of TEU. This means that the above-mentioned obligation of Article 39 TEU to consult the Parliament applies. The European Parliament is consulted in view of the adoption of certain decisions as regards the development of Europol, e.g. any amendment to the Convention but not about the prioritizing of Europol's activities.

Also according to the protocol on the role of the national parliaments in the European Union annexed to the TEC and TEU, the national parliaments have the right to be informed fully by their governments and EU institutions. This therefore applies to measures in the field of law enforcement.

The analysis of the existing controls of Europol indicates that the current system cannot be regarded as legally insufficient, given the limited nature of the powers attributed to Europol by comparison with those of national police forces. The existing controls (through the Parliaments, the national Supervisory Bodies, the Joint Supervisory Body and the

management Board) are, however, exercised in an indirect, fragmented and not in an easily understandable manner. This gives rise to a general feeling as seen in various reports that something clearer and more transparent is needed.

What is felt to be missing at the moment is first of all an institutionalised and regular information exchange between those responsible in national parliaments and the European Parliament. If all the provisions and procedures regarding parliamentary control existing at national or EU level were made known to all the other parliaments, the situation would already be improved considerably.

#### **4.1 Proposals by the European Parliament**

- The European Parliament has raised the subject of democratic control several times. The current treaties do not provide for a modality of transmission of information on Europol's activities to the European Parliament, which could in itself constitute an adequate form of parliamentary control.
- In addition, there are no regular formal exchanges foreseen between the Parliament and Europol and there is also room for improving the information basis of the European Parliament.
- The Parliament regretted that Europol's new powers, based on its support role in the coordination of police deployment made possible by the Amsterdam Treaty, did not fundamentally alter in principle the system of (non)-parliamentary control. The Parliament, therefore:
  - calls on the Council to incorporate into the Treaty provisions on full parliamentary and judicial scrutiny of Europol at the level of the European Union and not to give any operational powers to Europol without providing for adequate scrutiny by the European Parliament. The Parliament urges the Council to take account of the already established rights of the European Parliament to be informed and consulted;
  - proposes to incorporate Europol's budget in the Community budget;
  - suggests that, in the event of Europol's evolving into a police organisation with cross-border operational powers, the Council should look into setting up a European public prosecutor's office or some other judicial body. In this case Europol should be given a basis in Community law and should be placed under the responsibility of a member of the Commission; and
  - calls on the Parliaments of the Member States to take consistent account of their right to supervise the actions of their national Council member responsible for Europol and the Member States' representatives appointed to the Europol Management Board. This should happen in close cooperation with the European Parliament.

#### **5. POSSIBLE WAYS TO BE CONSIDERED TO ENSURE EUROPOL'S ACCOUNTABILITY AND AN EFFECTIVE EVOLUTION OF ITS ROLE**

The role of Europol is still evolving and this is why the question of ensuring its accountability is crucial.

- In the short term and without changing the current legal framework it is necessary to urgently implement the three agreed protocols and Europol will need to prepare for the time when these protocols amending the Convention will enter into force.<sup>18</sup>
- The Hague program has created a new momentum for increased cooperation in the area of freedom, security and justice, and for Europol. A conscientious outlook to future challenges of EU law enforcement cooperation must recognise that it should become easier to adapt Europol's institutional set up. It remains extremely important

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<sup>18</sup> Europol 49, 6 June 2006

to explore which way the Europol convention could be abrogated in case it is replaced by a Council decision. Notably the question whether a protocol abrogating the Convention is a legal prerequisite or not, needs to be resolved.

- Regarding Europol's evolving role, the Finnish EU-Presidency<sup>19</sup>, in view of the Hague review, has stated recently that the improvement of the regulatory framework of Europol, development of Europol's work and the furthering of co-operation between Europol and Eurojust are of utmost importance.

Possible directions to improve legitimacy will therefore be looked at from two angles - **input and output legitimacy** - in view of maximising Europol's accountability in its future role.

### 5.1 Input legitimacy

The European Parliament, in its resolution on Europol's future developments (2003)<sup>20</sup> stated its view that Europol must become an effective tool in the fight against organised crime in the European Union. Europol must be able to operate in a flexible manner so that it may make an effective contribution to the fight against serious crime. It therefore requested that the Council replace the Convention with a decision, given the prevalent major shortcomings:

- that Europol continues to operate within the scope of simple intergovernmental co-operation, at a time when Europol is given an increasing number of tasks to be carried out on behalf of the Union and is being authorised to transfer personal data to third countries and bodies;
- that, in the advent of further enlargement, all decisions relating to Europol should no longer be taken by the Council acting unanimously;
- that the European Parliament must be provided with the legal means and institutional framework to enable it in the future to exercise genuine democratic control;
- and that the current procedure for amending the Convention or replacing it by a Council decision, which requires a Protocol that will have to be ratified by all Member States, is excessively lengthy and cumbersome, and consequently entirely inappropriate.
- the European Parliament has also called on the Council to make Europol part of the first pillar, including the proposal to convert the Europol convention into a regulation to be adopted by qualified majority and by co-decision with the European Parliament and to amend the arrangements for the funding of Europol by replacing part of the contributions of Member States with funding from the EU budget.

### 5.2 Output legitimacy

The national Parliaments of the EU Member States and the European Parliament have a mission and a mandate to monitor and evaluate the activities that take place in the framework of Title VI TEU (Police and judicial co-operation in criminal matters), notably those of Europol and the Member States supposed to actively participate in Europol's activities. Parlopol (a joint committee of members of the European Parliament and national Parliaments to oversee Europol)<sup>21</sup> the Commission and the European Parliament have called on the Council to strengthen the European Parliament's democratic power of control over Europol and, to that end, to adopt:

- a provision amending art. 34 of the Europol convention laying down that one single annual activity report (including data protection aspects). This should be forwarded to the Council and to the European Parliament in view of the annual debate referred to in art. 39 of the Treaty on the EU. This shall afterwards be published together with the opinions of the European Parliament, any observations and appraisal of individual

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<sup>19</sup> Cats 129, 26 June 2006

<sup>20</sup> European Parliament, Resolution on Europol's Future Developments T5-0186/2003

<sup>21</sup> The idea of a joint committee of members of the European Parliament and national Parliaments to oversee Europol was first suggested by the Communication on Democratic Control of Europol of March 2002. This idea was included in early versions of the Danish proposals to amend the Europol convention, but was not included in the version upon which a general approach was reached in December 2002. The reason was that only primary European legislation (European treaties themselves) has the power to establish formal parliamentary committees of any kind.

member states plus a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to hold an exchange of views with the Council Presidency on the annual activity report;

- a regular, formal exchange of information between Europol, the national parliaments and the European Parliament and a formally established Parlopol;
- a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to invite the Director of Europol to appear before the competent committee and make the Director of Europol accountable to the competent Parliamentary committee;
- the establishment in art. 22(2) of the Constitutional Treaty of a legal base for the adoption of measures which will enable the scrutiny of Europol's activities by the European Parliament and national parliaments;
- a provision which guarantees that the data protection provided and the supervision of compliance with these standards are equivalent to those guaranteed under the first pillar plus a provision amending art. 24(6) of the Europol Convention and requiring the joint supervisory authority responsible for data protection to draw up an annual activity report, to forward it to the European Parliament and to give an account thereof before the competent committee;
- a provision amending art. 28 of the Europol Convention on altering the composition of the Europol Management Board to include two representatives of the Commission and two representatives of the European Parliament, in addition to one representative from each Member State;
- a provision amending art. 29 of the Europol Convention and laying down that the European Parliament shall be equally involved in the procedure for the appointment and dismissal of the Director of Europol, jointly with the Council;
- provide for adequate parliamentary control in the event of Europol being given operational powers plus provide for the creation of a European public prosecutor in the event of Europol being given cross-border operational powers;
- the measures required to ensure close co-operation between Europol, Eurojust and OLAF in order to strengthen the operational efficiency of those bodies in the fight against organised crime and terrorism;
- rules on access to documents in conformity with regulation 1049/2001 after consulting the European Parliament and to ensure that any rules on confidentiality of Europol information are compatible with the rules adopted by Europol in conformity with Regulation 1049/2001 on public access to documents.
- the European Parliament also asked the Commission to present a proposal for a comprehensive reform of Europol which would include other topics such as judicial review of the instruments of police and judicial co-operation in criminal matters by the Court of Justice and the funding of the instruments in questions from the Community budget<sup>22</sup>. These proposals have to be introduced as soon as the draft Constitutional Treaty has entered into force.

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<sup>22</sup> 'Democratic control over Europol', European Commission, 24 August 2005



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Brussels, 7 September 2006

## Session 3

# An Integrated Management of Borders for a Safer Enlarged Union?

### 1. INTRODUCTION

- **The aim of Integrated Border Management (IBM)** is to establish common standards with regard to border management and controls at the Union's external borders to establish an area of freedom, security and justice without controls at internal borders for persons, whatever their nationality, within the European Union.
- In 1999, a Protocol attached to the Amsterdam Treaty integrated part of the Schengen *acquis* into the EU legal framework. **Art. 62 Treaties of the European Community (TEC) was designated as the legal base of any measure dealing with visas and borders.**<sup>23</sup>
- During a transitional period of five years (Article 67 TEC) for all the other measures related to Article 62 TEC (apart from those related to Article 62.2(b)) the Commission's right of legislative initiative was shared with the Member States, Parliament was simply consulted and decisions were taken by unanimity. For measures related to Article 62.2 (b) TEC (rules on visas for intended stays of no more than three months) co-decision is used and decisions are adopted by the Council acting by qualified majority since the entry into force of the Amsterdam Treaty.
- The Conclusions of **the Laeken European Council of 14 and 15 December 2001** introduced a new concept, i.e. "**integrated management system for external borders.**" **Integrated border management (IBM)**<sup>24</sup> covers all activities exercised by the public authorities of the Member States with the aim of:
  - accomplishing border control and surveillance
  - analysing the risks,
  - anticipating personnel and facility needs.
- The Constitutional treaty enshrines this concept of Integrated Border Management, providing in **Article III-265 for its "gradual introduction"**.

<sup>23</sup> Since the Nice Treaty, decisions on border management come under **co-decision procedure** (Article 67(5)) and are taken by **qualified majority voting** in the council

<sup>24</sup> The integrated system is based on the principle that already stated in the Tampere Conclusions and later reified in Laeken Conclusions that "better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and trafficking in human beings." (Laeken Conclusions).

- **The Seville European Council of 21 and 22 June 2002** approved an ‘**Action Plan on the Management of External Borders of the European Union.**’ (APMEB) This document, drafted by the Council, sets measures to be taken on the following levels:
  - legislative. The APMEB recommends adopting a ‘common body of legislation’;
  - operational. The APMEB contemplates implementing joint operations between national services responsible for external border control and surveillance. It also expects the introduction of pilot projects in various areas, such as training, repatriation of illegal aliens or cooperation with third countries.
- Since the **Nice Treaty, 1st February 2003**, decisions on border management come under co-decision procedure (Article 67(5)) and are taken by qualified majority voting in the Council.

## **2. THE AIMS OF THE HAGUE PROGRAMME ON IBM IN VIEW OF THE REVIEW OF ITS IMPLEMENTATION AND EFFECTIVENESS**

The Hague programme<sup>25</sup> represents a new phase in the development of a European policy for the management of its external borders. It calls for:

- further gradual establishment of the integrated management system for external borders,
- strengthening of controls at and surveillance of external borders
- a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States’ experts, and including unannounced inspections”.

## **3. THE IMPLEMENTATION OF AN INTEGRATED BORDER MANAGEMENT (IBM)<sup>26</sup>**

- The EU consists of 25 separate legal systems, 13 of which are found (together with those of Norway and Iceland) within the territory of Schengenland. **Border management is performed by 15 distinct national services**, each exclusively responsible for one special section of it. However, following the gradual abolition of internal border controls, the respective shares of the border have become increasingly unbalanced.<sup>27</sup>
- **EU border management is not confined to the simple checking of passports and the prevention of illicit movements across the green border. The requirements are more complex.** As border staff are bound to carry out their assignments in taking account of the “interests of all parties” (Art. 6, Schengen, 1990), and in particular, refuse entry to foreigners “representing a threat to public policy, national security or international relations of any” Schengen member, they must possess a considerable knowledge of the political/legal situation in other countries as well as the appropriate language skills.
- Border management implies considerable **financial spending**, especially if done on behalf of the entire Schengen group.<sup>28</sup> This is key to the debate on the need of ‘**burden-sharing**’ in the EU.

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<sup>25</sup> Adopted by the Hague Council on 4th November 2005, which sets out the objectives for the next 5 years developments of the area of security and justice.

<sup>26</sup> See also Hobbing, P. (2005) Integrated Border Management at EU level, CEPS working document, No. 227/August 2005

<sup>27</sup> cf. press reports on the unbalanced concentration of arrivals of immigrants illegally at the Southern and Eastern borders of the EU as well as the EP Motions for resolutions - Situation with refugee camps in Malta, RC-B6-0241/2006, B6-0241/2006, B6-0268/2006, B6-0269/2006, B6-0270/2006, B6-0271/2006, B6-0274/2006 of April 2006.

<sup>28</sup> For example, Poland needed to recruit 4,000 additional border staff in order cope with the new challenge. There is furthermore the need to upgrade border-crossing installations, surveillance equipment on the green border, linguistic and other special training for control staff, etc. Some assistance is provided by the so-called ‘Schengen facility’, a head-start funding programme providing the newcomers with approximately €63 million (€280 million thereof for Poland) over the period 2004-06 to improve infrastructures at frontiers, staff training, etc. But expenses

- Moves towards establishing a **common corpus of provisions** include: 1) the recasting of the *Common Manual on checks at the external border*; 2) the introduction, into the *Common Manual as a regulation*, of certain ‘best practices’ from the Schengen catalogue; and, 3) the production of a practical handbook for use by border guards. More ambitious items concerned the “**standards and procedures to be followed by Member States in carrying out checks**” and the creation of a “genuine inspection function at the external border”, which have eventually led to the “**Code on the rules governing the movement of persons across borders**” (or **Community Border Code**<sup>29</sup>).
- A permanent structure in the form of an agency was created - the **European Border Agency "FRONTEX"**.<sup>30</sup> The work of FRONTEX is complemented by **ad-hoc centres** created by the member states, each specialized in one type of border management field (Germany: land borders; Greece/Spain: maritime borders; Italy: **airports**; Finland: **risk analysis**; Austria: **training**; and the UK: **control and surveillance technologies**).
- Furthermore, the ‘**security procedure**’ **PROSECUR** was proposed to establish direct links among the authorities involved in order to allow for permanent data and information exchange, whereby the technical infrastructure was provided by existing networks/databases such as SIS.
- From the perspective of avoiding bureaucratic communication structures in cross-border cooperation and taking advantage of direct personal contacts, a number of **joint centres** have been set up that host representatives of various enforcement services from both sides of the border.
- A comprehensive IBM approach may need to be seen in a wider context and cover aspects of **international cooperation** as well the technical infrastructure, as described below, as both are indispensable to ensure the smooth running of the system particularly concerning activities in and arrangements with countries of origin and transit, whereby the focus would first be on the issuing of visa and other consular issues as well as readmission/return matters (dialogue on migration and asylum). There is the technical border cooperation with neighbouring countries (e.g. new neighbours in the east) as well as traditional trading and political partnerships (e.g. the US and Canada), the intention of which is to enhance security but also to create a smoother system of managing borders and anticipating problems. In this context, arrangements with the US on the advanced transfer of **passenger name records and data** (PNR) and **container security** (CSI) are notable, as they embody mechanisms that lead to a ‘virtual forward-shift’ of the borderline, giving border staff added time for control purposes.
- The IBM implies also the development of the internal technical infrastructure in terms of data and communication systems: without the SIS linking relevant authorities – regardless of their geographical location in central offices in the capitals, as border staff right on the front line or consular representations abroad – a coordinated operation of border matters would be unthinkable. The envisaged **Schengen Information System II (SIS II) system** will be able to accommodate links with all 25 member states together. SIS II will share its technical platform with the future **Visa Information System (VIS)** whose purpose is to render visa application procedures more transparent, facilitate consultations and avoid abuse in the form of ‘visa shopping’. **Biometrics** (fingerprints, photos, etc) will be a key feature of SIS II and VIS.

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are a continuing matter that requires solutions beyond 2006. A more progressive framework is expected for the period 2007-13.

<sup>29</sup> Regulation 562/2006/EC of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>30</sup> Council Regulation (EC) No. 2007/2004.

#### **4. ACHIEVEMENTS SINCE THE HAGUE PROGRAMME**<sup>31</sup>

**Two achievements merit particular attention:** In 2005, the central event in border management has – so far – been the *establishment of the European Border Agency (FRONTEX)*<sup>32</sup> Another significant achievements include the adoption of the **Community Border Code**.

##### **4.1 EUROPEAN BORDER AGENCY (FRONTEX)**

The agency's role is based on the following cornerstones in terms of assignments, i.e. to:

- assist member states in training matters;
- carry out risk analyses;
- follow-up on research relevant for border control and surveillance; and,
- support member states in organising return operations.

Although operational action remains the prerogative of the member states, the Agency appears to have sufficient means to put its own stamp onto this sector as well. FRONTEX is responsible not only to coordinate operational cooperation among member states; evaluate, approve and coordinate proposals for joint operations and pilot projects made by member states, but also to 3) launch its own “initiatives” in this field. Further, member states shall report to the Agency on operational matters occurring outside the framework of the Agency.

##### **4.2 THE EUROPEAN BORDER CODE**

Presented in May 2004, the regulation was the first to be treated according to the new legislative procedure for border measures in force since April 2005 following agreement on The Hague Programme, i.e. qualified majority voting in the Council and co-decision within the Parliament. Major changes proposed by the Parliament included the treatment of asylum seekers, checks on family members of EU citizens, non-discrimination standards to be respected by border guards and new procedural rights for persons checked at the border.

##### **4.3 THE PROPOSED REGULATION FOR LOCAL BORDER TRAFFIC BETWEEN THE EU AND THIRD COUNTRIES AS A THIRD ACHIEVEMENT ONCE IT'S ADOPTED AND IN FORCE.**

This proposed regulation is to be seen in the context of the ‘fortress Europe’ discussions of recent years, in which the EU has been widely criticised for introducing a new ‘iron curtain’ between the new member states and neighbours in the east. Although the proposal cannot do away with the basic visa requirements imposed by the Schengen mechanism, there are a number of ways to soften the rules. The facilitation measures proposed centre around a special ‘L’ visa for border residents (‘L’ being taken from ‘local’).

The advantages granted to holders of an ‘L’ visa would be numerous:

- As a *multiple-entry visa*, it is issued for at least one year and for a maximum of five years, entitling the holder to stay in the border area of the issuing member state for seven consecutive days maximum and without exceeding, in any case, three months within any half-year period.
- The issuing member states may decide to *reduce or waive the visa fees* normally foreseen.
- *Specific border crossing points* open only to border residents may be set up or specific lanes reserved for border residents at ordinary border crossing points.

The implementation would be by the member states concerned, i.e. by conclusion of a specific agreement with the neighbouring country (e.g. Poland with Ukraine).

#### **5.0 CONSIDERATIONS IN VIEW OF THE HAGUE PROGRAMME REVIEW**

- Reinforced supervision of the level of control and surveillance to ensure that it is

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<sup>31</sup> for a more detailed discussion of such, see Hobbing, P. (2005) - *ibid*.

<sup>32</sup> FRONTEX is based in Warsaw. The Finnish Colonel Ilkka Laitinen is its executive director.

equivalent all along the external border – the Commission is to propose a supervisory mechanism, based on member states' experts and including unannounced inspections. This would replace the current peer-review function of the Working Party on Schengen Evaluation (Sch-Eval) and represent a big step forward towards an autonomous pool of inspectors, who could directly file infringement procedures against non-complying member states.

### **5.1 OPERATIONAL FUNCTION OF FRONTEX**

- Although the Hague Programme duly refers to the traditional concept of operational IBM as a national prerogative, various action items definitely pave the way towards an operational function of the FRONTEX: 1) the set-up of teams of national experts who can provide rapid technical and operational assistance to member states requesting it; 2) an explicit instruction that the forthcoming review of the FRONTEX and its tasks “should include the feasibility of the creation of a European system of border guards”; 3) an “assessment of whether the Agency should concern itself with [still] other aspects of border management”; and, 4) establishment of a Community border management fund.
- This focus on increased powers of the FRONTEX together with the reference to “long or difficult stretches of external borders...where Member States are confronted with special and unforeseen circumstances due to exceptional migratory pressures on these borders” can easily be interpreted as preparation for a new phase of European border management marked by a strong central element.
- The work of FRONTEX could be developed further to enable an EU-wide coherence of operational border management through:
  - evaluating the results of joint operations (including the establishment of a “comparative analysis in view of enhancing the quality, coherence, and efficiency of future operations”);
  - co-financing such operations;
  - developing and applying a common integrated risk analysis;
  - establishing a common core curriculum for border guards' training;
  - following the development of research related to control and surveillance equipment and disseminating results to member states;
  - providing “organizational and operational assistance” to member states in cases of need and at their request, including the “deployment of its experts for support”; and
  - facilitating operational cooperation with third countries;
  - commissioning an independent external evaluation of its performance, such a study would include the item of the “need for and feasibility of setting-up a European Border Guard” as requested by the European Parliament.
- It may be argued that the Hague Programme should have gone one step further to directly propose two full-fledged experiments with expert teams, one on land and one at sea or even an “EU Multinational Coast Guard Corps”.<sup>33</sup> Not only would this represent the management of maritime borders (one of the ‘hotspots’ on the outer demarcation line), but it would also establish the presence of a multinational force carrying out controls mainly outside the ports, thus being less likely to evoke national resentments in the population.

### **5.2 BIOMETRICS AND INFORMATION SYSTEMS**

- “Biometrics and information systems” imply another integrative task, i.e. to examine how to maximise the effectiveness and interoperability of EU information systems (SIS II, VIS, EURODAC) by using compatible biometric identifiers to make immigration documents secure against forgery and abuse. The same applies to EU travel documents

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<sup>33</sup> (Callovi, 2004 in Hobbing, P. (2005) Integrated Border Management at EU level, CEPS working document, No. 227/August 2005

(passports). So far agreement has been reached to use two identifiers (facial image and fingerprint images) for immigration purposes as well as EU travel documents (the Commission and Parliament had foreseen the facial image plus optionally a second identifier, but were overruled by the Council in 2004).

### **5.3 COMMON VISA OFFICES**

- On “Visa policy”, The Hague Programme promotes the concept of “**Common visa offices**”, which again represents a proposal to streamline existing border procedures as it will reduce national diversities in the application of visa rules. To this end the Commission has recently published a Communication on the revision of the Common Consular Instructions.

### **6.0 OBSERVATIONS BY THE EUROPEAN PARLIAMENT**

- The European Parliament supports the introduction of a European policy for the management of external borders.
- The European Parliament endorses the idea of strengthening international cooperation between national services and supported the creation of the Border Management Agency. However, it is wary about the possible attribution of powers to the agency for the repatriation of foreigners, which could make it simply an "expulsion agency" (Resolution of 9 March 2004).
- It also supports the creation, in the medium term, of a Community-financed European corps of border guards "which would in an emergency and at the request of the Member States, be deployed to assist national authorities temporarily at vulnerable sections of the EU's external borders." (Resolution of 15 January 2003).
- It calls for Member States to share the burden of border control and surveillance and likewise encourages sharing of the effort between Member States and third countries.

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Brussels, 7 September 2006

## Session 4

# A BALANCE BETWEEN THE INTEGRATION OF LEGAL MIGRANTS AND THE FIGHT AGAINST ILLEGAL MIGRATION?

### 1. INTRODUCTION

During the 1990s, Justice and Home Affairs (JHA) moved to the centre stage in the European debate. Concern had been growing about immigration policy since the **Maastricht Treaty** institutionalised the third pillar of the European Union (EU). This concern had been stimulated by several factors – the persistence of **irregular migration and tragic incidents** (many persons lose their lives during the journey to Europe); the **need for immigrant workers in the labour market**; and the spectre of **an ageing European population**.

The **Treaty of Amsterdam**, since its entry into force in 1999, established a community competence in immigration matters (as well as asylum). The aim is **define a balanced approach to immigration** by developing **measures on the legal basis in the treaties Article 63 TEC in order to open legal migration channels as well as tackle illegal immigration**. Proper management of migration flows also entails ensuring **a more effective integration policy and access to rights by third country nationals within the EU** as well as greater **cooperation with non-member countries in all fields, including the readmission and return of migrants**.

### 2. DECISION-MAKING IN THE FIELD OF MIGRATION POLICY

Article 67 TEC allowed for derogation on numerous points from the supranational approach and permitted for a transition period - 5 years after the entry into force of the Treaty before majority voting could be introduced.

The **Treaty of Nice** states that matters related to immigration policy are to be decided mainly by the co-decision procedure. The shift to qualified majority voting is provided for under Article 63 of the EC Treaty for matters concerning:

- illegal immigration and the repatriation of illegally resident persons - the shift to qualified majority voting and co-decision has taken place as of 1 May 2004 (without the need for a unanimous decision as initially foreseen by Article 67 TEC);
- regular migration once a "common framework" has been completed - which is still not the case.

However, **in matters of regular immigration** the Council will continue to act unanimously and **the European Parliament is simply consulted** as the condition of a '**common framework**' is still far from fulfilled.

**The Hague programme retains the current procedure.** Decisions will continue to be taken unanimously by 22 States:

- by virtue of a Protocol annexed to the Treaty of Amsterdam, Denmark has no vote,
- the United Kingdom and Ireland also abstain from voting, by virtue of another Protocol to the Treaty of Amsterdam, but an opt-in clause allows them to participate, on a case-by-case basis, in texts negotiated by the EU.

### **3. TOWARDS A COMMON EU IMMIGRATION POLICY**

As a result of the need of new approach to managing migration EU leaders set out at the October 1999 European Council in Tampere (Finland) the elements for a common EU immigration policy namely that:

- it be based on a comprehensive approach to the management of migratory flows so as to find a balance between humanitarian and economic admission;
- it include fair treatment for third-country nationals aiming as far as possible to give them comparable rights and obligations to those of nationals of the Member State in which they live;
- a key element in management strategies must be the development of partnerships with countries of origin including policies of co-development; many measures were initiated as part of the Tampere programme and a significant number of them have been adopted.

**The fine balance that Tampere tried to define between, on the one hand, measures for legal migration and granting rights to third country nationals and, on the other hand, measures to combat illegal immigration has been tilted over time significantly in favour of more repressive measures rather than proactive migration ones.<sup>34</sup> This was very**

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#### **34 Regular immigration (Article 63.3 (a) and Article 63.4 TEC)**

The main EU legislative measures:

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004.

Council Directive and two proposals for recommendations on the admission of third country nationals to carry out scientific research in the European Union, COM(2004) 178, 16.03.2004.

#### **Other relevant EU legal measures:**

Council Directive 2000/43/EC of 19 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

#### **b. Irregular immigration (including return measures) (Article 63.3 (b))**

The main EU legislative measures:

Council Decision of 27 March 2000, on the improved exchange of information to combat counterfeit travel documents. (OJ L 081 of 1.4.2000, p. 1)

Council Directive 2001/51/EC, of 28 June 2001, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. (OJ L 187 of 10.07.2001, p. 45)

Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking of human beings, OJ L 203/1, 1.8.2002.

Council framework Decision of 28 November 2002, on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. (OJ L 328 of 5.12.2002, p. 1)

**much evidenced by the predominant focus given in the Seville European Council in 2002 to combating illegal migration with relatively very little discussion on legal migration.**

**The Hague programme in 2004** set the objectives for strengthening freedom, security and justice in the EU for the period 2005-2010. **It aimed not only to build upon the achievements of Tampere but also, and most importantly, to re-establish the original spirit of Tampere, by emphasizing the importance of legal migration measures as well as a common integration policy.** The **Hampton Court Informal European Council of October 2005** reaffirmed the importance of such measures and placed migration policy at the top of the EU agenda.

#### **4. INITIATIVES TAKEN ON THE BASIS OF THE HAGUE PROGRAMME**

##### **4.1 Economic migration**

The European Commission put forward in July 2001 a proposal for a Directive on the conditions of admission and stay of third country workers. However, due to Member States' diverging views on this issue, the negotiations did not lead to the adoption of legislation. The Commission re-launched in 2005 the debate on the need of common rules for the admission of economic migrants with a **Green Paper on an EU approach to managing economic migration (COM (2004) 811)**. This consultation led to the adoption **in December 2005 of a 'Policy Plan on Legal Migration' (COM (2005) 669)** which lists the actions and legislative initiatives that the Commission intends to take, so as to pursue the consistent development of the EU legal migration policy.

##### **4.2 Integration**

In September 2005 the Commission adopted the communication "**A Common Agenda for Integration - Framework for the Integration of Third-Country Nationals in the European Union**" (COM (2005) 389). This Communication provides new suggestions for action both at EU and national level. Member States are encouraged to strengthen their efforts with a perspective to developing comprehensive national integration strategies, while new ways of ensuring consistency between actions taken at EU and national level are proposed.

##### **4.3 Illegal immigration and return**

In order to fully implement the Return Action Programme agreed in 2002, the Commission adopted **in September 2005 a proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals**. The objective of this proposal is to provide for clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry while taking into full account the respect for human rights and fundamental freedoms of the persons concerned. This proposed directive is now being discussed within the European Parliament.

##### **4.4 Migration and development**

**In September 2005 the Commission adopted the communication "Migration and development: some concrete orientations" (COM (2005) 390)**. This Communication

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Council Directive 2002/90/EC, of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence. (OJ L 328 of 5.12.2002, p. 17)

Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328/1, 5.12.2002

Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 6.12.2003

Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are the subjects of individual removal orders, OJ L 261/28, 6.8.2004.

Council Regulation (EC) No 377/2004, of 19 February 2004, on the creation of an immigration liaison officers network. (OJ L 064 , 02/03/2004 P. 0001 - 0004)

constitutes the response of the European Union to the invitations made by the Council in March 2003 and the European Council in November 2004 to submit concrete orientations to improve the impact of migration on the development of countries of origin in a number of fields. It constitutes therefore a contribution by EU immigration policy to the objectives of development policy. The Communication highlights measures and initiatives which are likely to lead to concrete progress particularly if these are also guided by the results of the Rabat (Morocco) Conference.<sup>35</sup>

The Communication on Migration and Development identifies a number of possible orientations in the following areas: Remittances; Facilitating the involvement of willing diaspora members in the development of countries of origin; Facilitating brain circulation; and Limiting the impact of brain drain.

The LIBE Committee of the European Parliament has been actively discussing these various dimensions linked to the development of a Common EU Migration Policy in its reports proposing possible ways forward to ensure the full protection of fundamental rights in all the proposed measures.

## 5. THE POSITION OF THE EUROPEAN PARLIAMENT

The European Parliament supports very much the developments which Article III-396 of the Constitutional Treaty would bring about in this field should it enter into force because of the extension of its co-decision powers as well as qualified majority voting (QMV) to all matters under Article 63 TEC.

On **immigration policy** the Constitutional Treaty aimed to incorporate the provisions of the Treaty of Amsterdam. It would provide for:

- placing European policy for legal immigration in the context of the management of migration flows;
- the creation of a clear legal basis for the integration of third-country nationals.

The European Parliament actively supports the introduction of a European immigration policy. On the admission of third-country nationals, it calls for the development of legal means, particularly to reduce incentives for illegal immigration. Parliament supports "controlled immigration" and considers that the EU admission policies must take into account reception capacity and enhanced cooperation with the countries of origin.

The European Parliament adopted a resolution on 9th June 2005 on the link between legal and illegal migration and the integration of immigrants.<sup>36</sup> Parliament agreed with the Commission that the mass regularisation of illegal immigrants is not a solution to the problem of illegal immigration. In the absence of a common immigration policy, it should be a one-off event, since such measures do not resolve the real underlying problems. It called upon the Commission to study the Member States' good practices, to be developed in the framework of an information-sharing and early-warning system.

In response to the Commission's Green Paper on an EU Approach to Managing Economic Migration the European Parliament adopted a resolution on 26th October 2005 on economic migration.<sup>37</sup> Parliament regretted that the Council had decided to maintain unanimity and the consultation procedure in the whole area of legal immigration. Parliament felt that only by means of the co-decision procedure will it be possible to adopt effective and transparent legislation in that field. It recalled that migrants have made a major contribution to the

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<sup>35</sup> This Inter-Ministerial Conference took place on 10 and 11 July with the aim of strengthening cooperation between the EU and North African countries as well as to stimulate dialogue between the two shores of the Mediterranean regarding legal immigration, development and counteracting irregular migration.

<sup>36</sup> T6-0235/2005

<sup>37</sup> T6-0408/2005

prosperity and the economic, cultural and social development of the Member States, and continue to do so. Economic migration is a positive human phenomenon which has always promoted the development of civilisations and cultural and technological exchanges. Parliament also regretted that the Council had not yet managed to adopt a common immigration policy, and has concentrated essentially on the punitive aspect (readmission agreements, police checks at borders, etc). It indicated that the effective development of a common migration policy with due regard for fundamental rights and international human rights obligations is a priority goal of European integration.

On the **integration of third-country nationals**, the European Parliament:

- supports the Commission's idea of civic citizenship. It calls for the grant of political rights, including the right to vote in local and European elections;
- considers that EU policy must find the golden mean between immigrants' rights and obligations and those of the host society;
- warns that Member States must not misuse integration policy as a way of rendering immigration impossible in practice.

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## Directorate-General Internal Policies

### Policy Department C

#### Citizens Rights and Constitutional Affairs

## SESSION 5

### EUROPEAN JUDICIAL COOPERATION IN CRIMINAL MATTERS 10 YEARS AFTER THE "GENEVA APPEAL"

#### 1. THE GENEVA APPEAL

On 1 October 1996, seven anti-corruption European magistrates<sup>38</sup> launched an appeal for the creation of a "European judicial area" in order to tackle the cross-border nature of crime. The signatories of the Appeal stated: "we must act swiftly to eliminate outdated protectionist tendencies in police and judicial matters. It is becoming **necessary to establish a single European judicial** area within which judges would be able to seek and exchange the information they needed to pursue their investigations without any obstacles save the requirement to uphold the law". **Ten years later, what has been achieved?** Some progress has been made in this direction, such as the harmonisation of several crimes at the EU level, the improvement of the principle of mutual recognition, the creation of the European Judicial Network and of Eurojust. However, there are still some obstacles to face.

#### 2. PROSECUTING CRIMINALS AND GUARANTEEING INDIVIDUALS' RIGHTS

The **progressive elimination of border controls** within the EU has considerably facilitated the free movement of European citizens, but has also made it easier for criminals to operate transnationally, especially since the scope of the EU law enforcement authorities and criminal justice system has been for a long time largely limited to the boundaries of their respective States. In order to face the challenge of international crime, the EU is progressing toward a single area of justice. Since the adoption of the **Amsterdam Treaty**, which officially states that the creation of a common area of freedom, security and justice is an aim of the EU, actions have been developed in four directions regarding judicial cooperation in criminal matters<sup>39</sup>. First, EU Member States have agreed to **approximate the definition of offences** and the level of sanctions for certain type of offences, in particular when they had transnational aspects. Second, **mutual recognition of decisions** taken by national judges is set to become the cornerstone of judicial cooperation in criminal matters. Various **specific tools** to facilitate practical judicial cooperation have also been adopted and are now effective. Finally, the EU is starting to be perceived as a specific partner on judicial cooperation on the

<sup>38</sup> From Belgium (Benoit Dejemeppe), France (Renaud Van Ruymbeke), Italy (Edmondo Bruti Liberati and Gherardo Colombo), Spain (Baltasar Garzón Real and Carlos Jiménez Villarejo) and Switzerland (Bernard Bertossa).

<sup>39</sup> See also the Action Plan of the Council and the Commission on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice - Text adopted by the JHA Council of 3 December 1998 in Vienna.

**international scene.** While developing its activities in those directions, the EU has carefully insisted on ensuring a **high protection of individuals' rights**<sup>40</sup> which characterise our democracies.

Building from the 4 above-mentioned axes, the European judicial cooperation has made some progress from the Geneva Appeal in 1996. Some important developments are represented by the European Council Conclusions of Tampere in October 1999 and by Programme adopted at the European Council in The Hague in November 2004<sup>41</sup>. The Council and the Commission have then adopted a specific Action Plan in May 2005<sup>42</sup>.

### 3. APPROXIMATION OF LEGISLATION

The functioning of the European judicial area could be undermined by **differences between national criminal legislation**. Approximation of legislation is needed to avoid criminals using differences between national legislations to their advantage, to give EU citizen a common sense of justice, and to facilitate mutual recognition. That is why all the areas where international crime could develop by using the suppression of border controls have led to approximation of legislation. As regards **international trafficking** (such as trafficking in Human beings, illegal immigration, sexual exploitation of children and child pornography), **terrorism**<sup>43</sup>, **financial crime** (in particular fraud<sup>44</sup>, money laundering<sup>45</sup>, corruption<sup>46</sup>), **cyber crime, environmental crime**<sup>47</sup>, **counterfeiting and piracy**<sup>48</sup> or **racism and xenophobia**<sup>49</sup>, **legal texts** have been adopted or are being negotiated in order **to adopt common definitions and to harmonise the level of sanctions**. It should be recalled that by "approximation" of criminal law in the EU context what we mean is adjustment to a common minimum standard, not full-scale unification.

The example of the proposal for a framework decision on combating racism and xenophobia is a good illustration of the difficulties sometimes encountered in harmonising laws. This proposal dates from 2001. It was approved by the European Parliament in July 2002<sup>50</sup>. Its aim is to ensure that racism and xenophobia are subject in the EU to effective and proportionate

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<sup>40</sup> The EU Charter of Fundamental Rights, which was solemnly proclaimed at the Nice European Council in December 2000, is a key instrument of political legitimacy. Far from extending Union jurisdiction or affecting the treaties, the Charter - as the sum of the values recognised and shared within the Union - is the moral foundation that will enable the establishment of an area of freedom security and justice within the EU, in accordance with the principles of the rule of law.

<sup>41</sup> The Hague Programme strengthening freedom, security and justice in the European Union. OJ C53 of 3 March 2005

<sup>42</sup> OJ C 198, 12 August 2005

<sup>43</sup> The Framework Decision of 13 June 2002 on combating terrorism contains a definition of terrorist offences, while also defining infringements linked to terrorist activities. The FD approximates the level of sanctions between Member States and contains provisions for the protection of victims of terrorist acts.

<sup>44</sup> A Framework Decision on combating fraud and counterfeiting of non-cash means of payment was adopted on 28 May 2001.

<sup>45</sup> A Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime was adopted on 26 June 2001.

<sup>46</sup> In November 2005, Austria, Finland, Greece, Hungary, Lithuania, Luxembourg and Slovakia presented an initiative for a Council decision on the setting up of a European Anti-Corruption Network.

<sup>47</sup> On 27 January 2003, the Council adopted a Framework Decision on the protection of the environment through criminal law. The FD was then annulled by the European Court of Justice (case C-176/03, 13 September 2005).

<sup>48</sup> On 26 April 2006, the Commission adopted a proposal for a Directive to combat intellectual property offences, while withdrawing a previous proposal for Council Framework decision on the same matter.

<sup>49</sup> Commission Proposal for a Council Framework Decision on combating racism and xenophobia.

<sup>50</sup> Plenary sitting of 4.7.2002.

penalties with a deterrent effect. The proposal has still not been adopted. The discussions in the Council, which were suspended in April 2003, were not resumed until early 2005. Member States' ideas on the subject – ranging from those who would like to penalise all racist and negationist acts and words to those who give priority to freedom of speech – are too disparate to allow of a compromise at present. Parliament has repeatedly stressed the need to adopt the decision.

### **3.1. LEGAL BASIS FOR APPROXIMATING CRIMINAL LEGISLATION UNDER THE EC TREATY**

Case 176/03 of 13 September 2005 appears to offer the Community legislator new possibilities to approximate criminal law. **The European Court of Justice annulled a Framework Decision of the Council which required Member States to impose criminal sanctions for breaches of EC environmental law.** It stated that the Community legislature may take measures in the criminal law field "when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences ... in order to ensure that the rules which it lays down on environmental protection are fully effective". The precise extent and limits of the criminal competence of the EC cannot be judged on the basis of this case alone. The Commission believes the case applies to other Community policies, allowing the Community legislator to use EC Treaty provisions to enact criminal law measures, provided this is necessary to ensure full effectiveness of any Community policy. The case concerned substantive law, particularly penalties. It does not seem to have any direct implications for criminal procedure.

### **3.2. LEGAL BASIS FOR APPROXIMATING CRIMINAL LEGISLATION IN THE EU TREATY**

Title VI of the Treaty on European Union confers authority to approximate certain substantive criminal law rules ("**minimum rules**"), including penalties, in the specifically named fields of "organised crime, terrorism and illicit drug trafficking". The list given in Article 31 (1) (e) has been regarded as illustrative rather than exhaustive, leaving it unclear how far the Council could take approximation. The Constitutional Treaty would offer greater precision on this issue, while adhering to the phrase "minimum rules". It would also, as already mentioned, provide a clearer basis for the approximation of rules of criminal procedure.

#### **Characteristics of the third pillar.**

The characteristics of 3<sup>rd</sup> pillar (criminal matters) are: shared right of initiative between the Commission and the Member States, adoption of instruments only by unanimous vote, consultative role of the European Parliament (art 39), role (art 35) of the European Court of Justice (not compulsory for states to accept the preliminary ruling procedure), and no infringement proceedings by the Commission.

The main types of instruments are: **Framework Decisions** (similar to the directives used under the first pillar), **Decisions** (similar to Regulations) and **Conventions** (to be ratified).

#### **Art. 42 TEU bridging clause.**

The Commission has recently suggested that Article 42 of the Treaty on European Union be invoked to avoid blockages in the Council owing to the unanimity requirement for decision making under Title VI. Even if agreement to use this provision were achieved, it can be argued that this step would not bridge the "competence gap" of the Treaties, where criminal procedures and safeguards are concerned. Article 42 TUE cannot be used to establish competences which are not already present in Title VI, as it cross-refers to Article 29. By creating the possibility of decision-making by qualified majority, the adoption of one or more safeguards measures would, however, become much more likely. Probably, Member States in

the minority would then challenge the legality of such measures. Certainly, the Article 42 route is inferior to the Constitutional Treaty, but it offers a chink of light for the "approximators".

#### 4. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

On 29 May 2000, the EU Council of Ministers adopted the **Convention on Mutual Assistance in Criminal Matters**<sup>51</sup>. This convention aims to encourage and modernise cooperation between judicial, police and customs authorities within the Union by supplementing provisions in existing legal instruments and facilitating their application. The State receiving a request must in principle comply with the formalities and procedures indicated by the requesting State. Laying down the conditions under which mutual assistance is granted, the new convention stipulates that such mutual assistance shall respect the basic principles of each MS and the **1950 European Convention for the Protection of Human Rights**. A number of agreements have been adopted by international organisations such as the **1959 Council of Europe Convention** and its 1978 Protocol on Mutual Assistance in Criminal Matters, the Benelux Treaty of 1962 and the **1990 Schengen Convention**.

#### 5. MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS

The **European Council of Tampere** stated that mutual recognition should become the cornerstone of judicial cooperation in criminal matters. The mutual recognition principle was confirmed in the Treaty establishing a **Constitution** for Europe and in The **Hague Programme**, which links its development to enhanced mutual trust between Member States. This means that once a decision has been made by a judicial authority of one Member State, this decision shall be recognised and executed in other MS as quickly as possible, as if it was a national decision. On the basis of this principle, the EU has adopted a programme of measures which has led to the adoption of specific texts<sup>52</sup>, such as the **Framework decision of 13 June 2002 on the European arrest warrant and surrender procedures**<sup>53</sup>. In 2003 the Commission issued a **Green Paper on procedural safeguards** for suspects and defendants in criminal proceedings throughout the European Union<sup>54</sup>. In May 2005, the Commission presented a **Communication on the mutual recognition of judicial decisions in criminal matters** and the strengthening of mutual trust between Member States. On 23 December 2005, the Commission presented a **Green paper on conflicts of jurisdiction and the**

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<sup>51</sup> On 16 October 2001 a Protocol concerning mutual cooperation on banking information has been adopted, aiming at fighting against money laundering and financial crime.

<sup>52</sup> Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence.

<sup>53</sup> A European Arrest Warrant (EAW), valid throughout the European Union has replaced extradition procedures between Member States of the enlarged Europe. Such a warrant may be issued by a national issuing judicial authority if the person whose return is sought is accused of an offence for which the maximum period of the penalty is at least a year in prison, or if he or she has been sentenced to a prison term of at least four months. A decision by the judicial authority of a member state to require the arrest and return of a person should therefore be executed as quickly and as easily as possible in the other Member States of the European Union. The EAW means faster and simpler surrender procedures and no more political involvement. It also means that Member States can no longer refuse to surrender to another Member State their own citizens who have committed a serious crime, or who are suspected of having committed such a crime in another EU country, on the ground that they are nationals. Simplifying and improving the surrendering procedure between EU MS was made possible by a high level of mutual trust and cooperation between countries who share the same highly demanding conception of the rule of law.

<sup>54</sup> At the Council of 1-2 June 2006, the Justice and Home Affairs Ministers held an exchange of views on the Commission proposal of May 2004 for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.

**Principle of *ne bis in idem* in criminal proceedings.** The Commission has presented other texts<sup>55</sup> in this area.

Mutual recognition is a key concept for the European Judicial Area, as it is the only way to overcome difficulties created by differences between national judicial systems. Nevertheless, ***mutual recognition can only develop if there is a high level of mutual confidence between Member States.*** Mutual confidence shall be based in particular on strict respect by each of the national judicial systems of high standards concerning the protection of individual rights.

In order to facilitate the implementation of this objective, the European Parliament has called for the definition, in cooperation with Member States, of a "Quality Charter for Criminal Justice in Europe"<sup>56</sup>.

## **6. EUROJUST, COORDINATING CROSS-BORDER PROSECUTIONS AT EU LEVEL**

Eurojust is a new European Union body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime. Eurojust stimulates and improves the co-ordination of investigations and prosecutions between competent authorities in the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust is the first permanent network of judicial authorities to be established anywhere in the world. Eurojust hosts meetings, with translation facilities, between investigators and prosecutors from different states dealing with individual cases and at a strategic level and specific types of criminality. Eurojust fulfils a unique role as a new permanent body in the European legal area. Its mission is to enhance the development of Europe-wide cooperation on criminal justice cases.

One thing that Parliament stresses is the need to harmonise the status and powers of the national members of Eurojust. At present, under Article 9 of the decision setting up Eurojust, their status is subject to national law and the nature and extent of their powers is defined by each Member State.

## **7. THE EUROPEAN JUDICIAL NETWORK**

By means of a Joint Action of 29 June 1998, the EU Council of Ministers created the European Judicial Network (EJN) in criminal matters to improve judicial cooperation between EU Member States, particularly to combat organised crime, corruption, drug trafficking and terrorism. The EJN is made up of judicial contact points in each EU Member State. It aims at helping national judges and prosecutors to carry out cross-border investigations and prosecutions, thus improving judicial cooperation in relation to transnational criminality. The Secretariat of the EJN forms part of the Eurojust Secretariat, functioning as a separate and autonomous unit.

## **8. COOPERATION BETWEEN THE VARIOUS COMPETENT NATIONAL AUTHORITIES**

In addition to Eurojust and the EJN (without referring to Europol), a number of legislative acts seek to improve cooperation between the various competent national authorities<sup>57</sup>.

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<sup>55</sup> -- Proposal of 22 December 2005 for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between MS.

-- Green Paper of 28 April 2006 on the presumption of innocence.

<sup>56</sup> Minutes of sitting 22.2.2005, Report by Mr Costa, A6-0036/2005.

## 9. LATEST DEVELOPMENTS IN THE FIELD OF EU JUDICIAL COOPERATION SINCE JUNE 2006

The JHA Council of 1-2 June 2006 reached a general agreement on a Commission proposal (of November 2003) for a **Council Framework Decision on the European Evidence Warrant** for obtaining object, documents and data for use in proceedings in criminal matters<sup>58</sup>.

The JHA Council of 1-2 June 2006 reached an agreement on a general approach on a draft Decision establishing the **specific Programme on Criminal Justice**<sup>59</sup>.

On 29 August 2006, the Commission presented a **Proposal for a Council Framework Decision** on the European supervision order and mutual **recognition of non-custodial pre-trial supervision measures** between Member States of the EU.

On 7 August 2006 the Commission adopted a **Communication** on developing a comprehensive and coherent **EU strategy to measure crime and criminal justice: an EU Action Plan 2006-2010**<sup>60</sup>.

On 29 June 2006 the Commission adopted a **Communication on Judicial Training** in the EU.

On 28 June 2006 the Commission adopted a **Communication on implementing the Hague Programme: the way forward**.

The Council is currently reviewing a Commission **proposal** of October 2005 **for a Council framework decision on the protection of personal data** processed in the framework of police and judicial cooperation in criminal matters.

The Council is currently reviewing a proposal for a **Council Decision** on the conclusion, on behalf of the European Community, of the **United Nations Convention against corruption**.

## 10. CONCLUSIONS

Some achievements have been reached in the field of judicial cooperation in criminal matters, however many difficulties remain in this sensitive area, which is at the heart of national concerns. For instance, we do not have at EU level a common criminal procedural code. As regards substantive law, after five years of difficult negotiations, the Framework Decision on racism and xenophobia has not been approved yet. It should also be stressed that discussions on the setting up of a European Public Prosecutor (envisaged in the Treaty establishing a Constitution for Europe, which has not been ratified) have not been successful. This affects

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<sup>57</sup> -- Council Decision of 28 May 2001 establishing a European Crime Prevention Network (EUCPN), which seeks to promote exchanges of information and best practices in the field of crime prevention.

-- Council Framework Decision of 13 June 2002 on Joint Investigation Teams, which aims to carry out criminal investigations in one or more Member States.

-- Council Decision of 22 July 2002 establishing a framework programme (AGIS) on police and judicial cooperation in criminal matters.

-- Council Framework Decision on the fight against organised crime (agreement reached at the JHA Council of April 2006).

<sup>58</sup> The aim of this proposal is to establish a mechanism to facilitate the obtaining of evidence in cross-border cases based on mutual recognition principles.

<sup>59</sup> The General Programme on Fundamental Rights and Justice, proposed by the European Commission, covers the period 2007-2013 under the new financial perspectives.

<sup>60</sup> The Commission has also decided to set up a group of experts to support the implementation of the Action Plan.

the credibility of the European Union, which is therefore not perceived as a fully reliable partner on the international scene.

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