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on the measures required to enhance the legitimacy of the area of freedom,
security and justice

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Introduction

1. On 5 November 2004, the European Council intends to lay down its policy guidelines on the multiannual programme aimed at 'developing the EU as an area of freedom, security and justice (AFSJ)'. This new programme will almost certainly be yet another in the series of resolutions adopted by the European Council on the basis the plan of action approved in Tampere in 1999¹.
2. The new guidelines must take full account of four new factors that have substantially altered the situation since the Treaty of Amsterdam entered into force on 1 May 1999:
 - the existence, since 11 September 2001, of a major terrorist threat, which struck the EU dramatically in the form of the Madrid attacks of 11 March 2004 and which has increased the need for a global anti-terrorist strategy, implemented by the Member States of the Union and by the international community, involving all EU institutions and, at the same time, making use of the instruments of the three pillars set up by the Treaty of Maastricht;
 - enlargement to include 10 new Member States, which turns the EU into a democracy with a population of over 450 million people;
 - the entry into force of the Treaty of Nice on 1 February 2004, which provides for the extension of qualified majority voting and of the codecision procedure, in particular to certain important asylum and immigration policy measures as well as to measures on judicial cooperation in civil matters;
 - the signing on 29 October 2004 of the draft Constitutional Treaty, which places the area of freedom, security and justice in a new context.

These four events call for, and allow, robust development of the AFSJ.

Identification of the problem and the objectives to be attained, on the one hand, and consideration of the measures that need to be taken, on the other, must satisfy two requirements: the need for democratic legitimacy and legal certainty aimed at ensuring greater protection of fundamental rights; and the need for effectiveness of action, which requires the establishment and wider application of improved decision-making procedures, as well as increased solidarity among Member States.

Part 1: IDENTIFICATION OF THE PROBLEM AND OBJECTIVES

A. Democratic legitimacy and legal certainty

3. While the objectives traditionally associated with the AFSJ in terms of asylum, immigration and cooperation on legal and police matters may be taken as read, the same cannot be said of the general framework in which the respective policies are drawn up, implemented and monitored. That framework has, to date, failed to take sufficient account

¹ In particular, the conclusions of the Seville European Council (21/22 June 2002) on terrorism and of the Brussels European Council (16/17 October 2003) on immigration.

of ‘*the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law*’ laid down in Article 6(1) of the TEU. These shortcomings had been criticised by the experts even before the Treaty of Amsterdam entered into force, a position strongly supported by the European Parliament. The shortcomings have become increasingly stark and increasingly less tolerable while the EU has been attempting to implement the provisions of the Treaty, particularly on the occasions when it has been prompted to intervene outside the Community framework.

4. Paradoxically, the Member States claim to monitor compliance with the principles for Union action laid down in Article 6 of the TEU without noticing that the EU intervenes in ways which, while formally compatible with the letter of the Treaties, would be considered unlawful in each of the Member States under their own legal systems.

It is particularly difficult to believe that the most basic principles of democracy and legal certainty of persons are being respected when:

- legislative acts affecting personal freedom, such as the framework decisions on terrorism or the European arrest warrant, are adopted without the full involvement of the European Parliament, or without Parliament being given due time to consider the proposals, and without any reliable, accurate and complete information;
- international agreements on extradition and cooperation in criminal matters are concluded without any form of ratification by the European Parliament or by national parliaments;
- measures are taken under the first (Article 68 of the TEC), second (Article 35 of the TEU) and third pillars, although the Court of Justice has little or no say in monitoring these measures and without their being monitored at national level either;
- administrative acts falling within the executive powers of the Commission are adopted, effectively bypassing the national legislation of the 25 Member States, for example in the area of data protection;
- differentiated rights to legal aid create unjustifiable discrimination between citizens, depending on whether or not the trial has a cross-border dimension.

B. Promotion and protection of fundamental rights

5. The ‘area of freedom, security and justice’ cannot involve simply the adoption of a number of decisions on asylum, immigration or judicial cooperation, even if they do respect fundamental rights. The creation of this area is aimed at a higher goal: not simply to respect fundamental rights but to promote them, not simply to develop mutual recognition of current practice in the various Member States but to ensure that such practice is founded on a common foundation of shared principles and rights. The concepts of mutual recognition and judicial harmonisation are not contradictory. Trust, a vital component of mutual recognition, is created when there is certainty that what is being done throughout Europe is being done in accordance with common principles, and this requires a reasonable level of judicial harmonisation. Mutual recognition and legislative harmonisation are not alternatives, they complement one another.

6. In the spirit of the Charter of Fundamental Rights, which was adopted in Nice in December 2000, and in keeping with Title I of the Constitutional Treaty, which emphasises the link (Articles I-2 and I-4) between the creation of the AFSJ and the promotion of the EU's values and fundamental rights, reference to these values and rights must be more than just a safeguard aimed at limiting the powers of the European legislature. As the Preamble to the Charter rightly states, it is the individual who is at the heart of the EU's activities, and it is the individual who justifies a positive policy of promoting fundamental rights and not simply a restrictive one of protecting the Member States from the potential excesses of the EU. Fundamental rights know no borders within the Union. The EU must ensure that these rights are applied everywhere with the same rigour and with the same zeal. A European constitutional state must be established.

7. These general observations give rise to the following conclusions:

- the European Council must not merely take account of action which falls within the remit of the Justice and Home Affairs Council, it must also tackle, for example, issues falling within the remit of the General Affairs Council: fundamental rights, citizenship, the fight against discrimination, transparency, and data protection.
It should be noted that these policies, which are supported by foundations enshrined in the current treaties, are an integral part of the reports presented by the Commission on the action taken on the Tampere Programme;
- the promotion of fundamental rights, for which the Commission reiterates the need in its contribution to the debate on the future AFSJ, requires the European Council to make the protection of rights and the development of citizenship the keystone of its future policy. This entails in particular:
 - (a) the strengthening of prior monitoring of the respect of fundamental rights in the legislative provisions of the three pillars;
 - (b) the development of a culture of fundamental rights common to the EU institutions and Member States. This implies the launching of a concerted dialogue between the highest courts: Member States' constitutional courts, the European Court of Justice and the European Court of Human Rights. It also implies the development of exchanges of officials and of mutual supervision between public administrations and law professionals, particularly in terms of establishing a common legal area and a common asylum policy. Lastly, it implies the setting up or strengthening of European networks of research workers, NGOs and senior public officials;
 - (c) the creation of reference standards common to all Member States with a view to simplifying the mutual recognition of different national laws;
 - (d) the creation of a European Fundamental Rights Agency to serve European and national institutions and to be responsible for a systematic evaluation of current fundamental rights policies throughout the EU. This Agency would act in cooperation with the corresponding bodies of the Council of Europe (Council of Europe's Fundamental Rights Commissioner) in anticipation of the

accession of the EU (pursuant to Article 7 of the Constitutional Treaty) and of the United Nations to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);

(e) the conversion of Europol into an agency subject to the controls applicable to such bodies.

C. Protection of citizens

8. Article 29 of the TEU confers on the EU responsibility for providing citizens with ‘a high level of safety within an area of freedom, security and justice’.

It must be said that the results achieved to date are not commensurate with the stated ambitions, as has been emphasised by the findings of the Convention, the evaluations of the Commission and the conclusions of the European Council of 24/25 March on the fight against terrorism. One figure is particularly revealing of the paralysis suffered by the European institutions regarding the AFSJ: this area alone generates 30% of the translations produced by the Council and yet it accounts for only 5% of the decisions taken annually by that institution.

Moreover, the decisions taken are poorly and unevenly applied, and they are monitored poorly, if at all, which hardly makes for an accurate evaluation of their merits. Despite the paper mountains created by Brussels, little or nothing is actually being done.

9. This situation may be attributed to various factors, of which the two most important are:
- the unanimity rule, which, while not making it impossible to take the obvious decisions, makes it very difficult to take binding decisions, with national governments seeking to hold their ground rather than imposing excessive constraints on themselves;
 - the excuse of sovereign powers, which is used in practice to conceal the corporate reflexes that are particularly strong within judicial and police administrations.

Such a situation is deeply unsatisfactory for all parties that have an interest in the establishment of the AFSJ, particularly for:

- European citizens, who note, at times in pain and mourning as on 11 March 2004 in Madrid, that the promised level of security is far from being provided;
- the Member States, who should be able to rely on effective cooperation from their counterparts when confronted with terrorist and criminal threats and who are suffering because such cooperation is not forthcoming. Whether that involves, for example, border controls to prevent trafficking in human beings, security information or judicial cooperation, they find that the most basic solidarity is afforded to them only with the greatest reluctance;
- the EU itself, which adopts internal measures or concludes international agreements without being sure that its decisions will be implemented effectively or that the commitments which it makes will be considered.