ILPA Response to the Commission's Communication : Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations COM (2004)401 final, 2 June 2004[1]

INTRODUCTION

On 2 June 2004, the Commission adopted its assessment of the progress in achieving an area of freedom, security and justice as set out in the European Council Conclusions of Tampere, October 1999. In the document, the Commission congratulates itself for "progress to date which has been undeniable and tangible". The Commission indicates that where there have been weaknesses, these have been the result of the fact that "it was not always possible to reach agreement at European level for the adoption of certain sensitive measures relating to policies which remain at the core of national sovereignty".

The Commission also indicates that it considers that once the instruments are adopted "the institutional limits regarding the real possibilities for verifying the implementation of policies by national authorities, given the limited role of the Court of Justice and the restricted powers of the Commission as regards police and judicial cooperation in criminal matters are a real obstacle to ensuring that the instruments and decisions adopted are actually effective".

In light of the Commission's own assessment, inherent in these statements, it is difficult to accept that the first five years of an area of freedom security and justice have been a success at all.

The Tampere Conclusions: A measure of success?

If regard is had to the principles set out in the Tampere Conclusions and the measures adopted, the assessment must be even more negative.

The Tampere Conclusions call for:

1. Respect for the "shared commitment to freedom based on human rights, democratic institutions and the rule of law".

The measures which have been adopted in the field of immigration and asylum have noticeably failed to fulfil the commitment of respect for human rights – we would refer you in particular to the action of the European Parliament regarding the failure to respect the right to family life protected by Article 8 European Convention on Human Rights in the Family Reunification Directive for third country nationals. Unfortunately there are many other examples of measures adopted where the standards of human rights compliance have been abysmal. We refer you to this association's alternative scoreboard on the measures. While the adopted instruments proclaim (often in their Preambles) that they are in conformity with the ECHR, the EU Charter of Fundamental Rights and the Geneva Convention relating to the Status of Refugees, such mere references are hardly the same as provision for a robust framework containing detailed human rights safeguards.

We would further draw attention to the draft Directive on Asylum procedures represents

a significant diminution of the protection of refugee. Many provisions aim to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU. This amounts to an abdication from international law obligations. Indeed, the UN High Commissioner for Refugees Ruud Lubbers expressed concerns about the Directive, 'warning that several provisions … would fall short of accepted international legal standards … [and] … could lead to an erosion of the global asylum system, jeopardizing the lives of future refugees.'[2] The day after political agreement on the Directive was reached, UNHCR reiterated its concerns, in particular in relation to the Directive's safe third country provisions and those non-suspensory appeals, which would allow Member States to deport asylum seekers whilst their appeals were pending. It noted in particular that the Directive would allow 'a number of .. restrictive and highly controversial practices that are currently only contained in one or two member states national legislation but could, as of 1 May 2004, be inserted in the legislation of all 25 EU Member States.'[3]

As regards respect for the principle of rule of law, again the measures have failed to meet this objective either. The action by the Commission against the Council regarding the latter's assumption of powers to adopted delegated legislation referred to elsewhere in these submissions indicate the degree of disregard for the principle of rule of law at the heart of the project. Moreover, the Council has also adopted measures without waiting for the opinion of the European Parliament. For example, both the Directive on the obligation of carriers to communicate passenger data and the Decision on the organisation of joint flights for removals, were adopted in this way by the JHA Council at its meeting on 29 April 2004 on the somewhat spurious basis that the Council had "exhausted all the possibilities to obtain in time the opinion of the European Parliament". [4] Given the potentially serious impact of these measures on the human rights of returnees, such disregard in the legislative process for the role of the EU's elected representatives can hardly advance adherence to the rule of law principle.

2. The aim is an open and secure European Union fully committed to the obligations of the Geneva Convention.

Respect for the Geneva Convention relating to refugees has been most conspicuous by its absence in the legislative programme of the first five years of JHA. The UN High Commissioner for Refugees himself has heavily criticised the proposed directive on asylum procedures, a key element of the common asylum policy, on the grounds that it does not fulfil the requirements of the Convention. Instead of taking those criticisms into account, the Council appears to have aggravated those parts of the directive which were already considered unacceptable to the guardian of the Geneva Convention. This is rather far from the "respect" called for by the Ministers at Tampere.

3. The common policies must be based on principles which are both clear to our citizens and also offer guarantees to those who seek protection in or access to the European Union.

If there is one part of the JHA acquis which lacks any clarity or consistency it is the rules regarding access to the EU territory. The incorporation of the Schengen acquis regarding the common visa and border policy has lacked any sort of transparency. Individuals who seek visas to come to the EU for short stays are still subject to a bewildering collection of different rules, partly in the Common Consular Instructions, partly in national law or practice at the consulates. Even agreement on a simple decision on border crossing points was only just adopted on 29 April 2004. There is still no agreement on the proposed measure defining the standard rate of subsistence which an individual seeking a visa must show in order to satisfy the support requirements. So instead at each consulate the officials responsible for visas are still setting their own rates either on the basis of their

own opinions, or national circulars. Any attempts to introduce a right of appeal against refusal of short stay visa has met with fierce resistance even though only such a right of appeal will result in a common interpretation of the rules.

4. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.

In EU law regarding migrant workers, integration involves two key elements: the right to equal treatment in employment and the right to family reunification together with the best conditions for those family members joining the worker. When the principle of integration is applied to third country nationals lawfully resident in the Union a completely different and contrary picture seems to be emerging. It is about denying the right to move for the purposes of employment (for instance in the Long Term Residents Directive) unless integration tests have been satisfied; preventing family members from joining their principal in a Member State unless they have fulfilled integration requirements (see the Family Reunification Directive). Far from faithfully implementing the Tampere Council call for 'integration' as it was understood at the time of the Council Meeting in 1999, the Commission has participated in the deformation of the concept into a mechanism for denying equal treatment and family reunification.

In our view the self-congratulatory tone of the Communication is not justified in light of the Tampere Conclusions and the results of the first five years of an area of freedom, security and justice. In our view the Commission needs to consider very seriously its role in the undermining and abusive interpretation of the European Council's Conclusions in Tampere which has taken place over the past five years.

Is the Council solely to blame?

One common refrain in the Communication is underlying criticism that while the Commission has proposed adequate and measured proposals, the Council has changed them and undermined their effectiveness or efficiency. We do not consider this argument to be justified. A quick perusal of the minutes of meetings where the different adopted measures in JHA are considered reveals the proposed changes and discussion of each measure and the actor suggesting the change. What is most noticeable is the silence of the Commission in these documents. From the records of proceedings, it would appear that the Commission did no more than present a proposal and then leave it to the Member States representatives from the working groups to COREPER to distort the measure. There are very few indications of the Commission taking a position in the meetings and assisting the resolution of issues in a manner favourable to its initial proposal. In two instances in particular, the Commission has effectively relinquished legislative initiative to the JHA Council as seen in the latter's adoption of Conclusions on conditions for the reception of asylum seekers and the development of the proposed Visa Information System (VIS),[5] which have both preceded the Commission's own legislative proposals in these areas.[6]

This apparent lack of "ownership" by the Commission as regards the proceedings in the Council regarding its proposals must be laid at the feet of the Directorate General responsible: DG Justice and Home Affairs. At the same time as the proposal of measures in DG JHA, another DG, Employment successfully negotiated the passage through the Parliament and Council of two directives on discrimination (on the basis of race and other grounds contained in Article 13 EC) and a directive extending the EU coordination of social security mechanism to third country nationals lawfully within the Union. Both of these fields are highly sensitive and touch central issues of state sovereignty yet they were successfully adopted without their content being irreparably compromised as has happened with so many of the JHA proposals.

A lack real substance in the Commission's assessment

The Commission's assessment of the Tampere programme is unacceptably lacking of substance. This is most evident in the absence of any meaningful evaluation of the measures adopted in the areas of justice and home affairs. Achievement appears to be measured solely in terms of meeting the objective of adopting the legislative programme called for at Tampere while ignoring compliance with the fundamental principles set out in the Tampere Conclusions. We have examined above how the Tampere promises have been broken by a consistent failure to adopt human rights compliant standards, most notably in the failure to fulfil the requirements of the 1951 Geneva Convention on the Status of Refugees. We have also highlighted how disregard for fundamental rights in the substance of the measures adopted is likely to ensure a worrying volume of litigation, evidence of which are the challenges currently pending before the European Court.

The Commission cannot seriously be suggesting that it "has embarked on an exercise to evaluate a first generation of instruments adopted following the Tampere European Council." Other than lacking a substantive analysis of the legislative programme, it fails to examine key questions in relation to the impact of the measures on those directly affected and to draw the necessary conclusions from member states selective display of enthusiasm for harmonisation in these areas – all of which will have a bearing on any future legislative programme.

European member states' little sense of solidarity in pursuing their narrow national agendas has come at great cost especially to refugees and to the building of a fair and efficient European protection system. Institutional problems and national susceptibilities are being cited to excuse the shortcomings in the process, particularly the failure to achieve a significant level of harmonisation of asylum laws across the European Union. Lack of solidarity and effective substantive harmonisation is of particular concern in the context of the regulation to determine which member state is responsible for dealing with an asylum application (Dublin II Regulation), which creates a heavy burden on the new EU member states.

We are given no indication as to how these shortcomings and imbalances will be addressed in the second phase of harmonisation. It is particularly worrying that the Council and the Commission are in the process of pursuing the objective of further developing a common area of freedom, security and justice in the vacuum of a substantive analysis of the impact of the measures so far adopted, some of which are severely frustrating the achievement of the Tampere objectives.

Lack of transparency and dialogue

While welcoming the Commission's call for contributions on the "Future of Justice and Home Affairs", we are bound to question the value of a consultation process for which no follow up is being envisaged in the agenda for meetings of the JHA Council during the Dutch Presidency (Council document 11122/04). Lack of transparency and meaningful dialogue with civil society is a serious deficit in the areas of Justice and Home Affairs, which needs urgently to be addressed. The Commission's communication acknowledges this in concluding that "there must be a public debate on subjects which cover fundamental questions for our societies and closely affect citizens' daily life." We call upon the Commission to ensure that the Council's views on the future of JHA are informed, amongst others, by the responses received as a result of this consultation.

Inter-institutional litigation: the warning shots

It should also be noted that in the process of the development of legal measures in the

first five years of the Title IV competence, the Commission has both provoked and been party to internal disputes between the Institutions which have given rise to litigation in three instances already.

Visa Regulations

The *Commission itself* has considered it necessary to take legal action to challenge the legality of the Council's reservation of implementing powers to itself in Regulations 789/2001 and 790/2001. Advocate General Léger has recently delivered his opinion in this case, and has indeed suggested that the two Regulations are invalid on the basis that the Council did not provide specific enough reasons for reserving implementing powers, and that they should be annulled. This raises interesting supplementary questions on the measures amending the Common Manual or CCI since 2001.

Family Reunification

The European Parliament, concerned about the restrictive nature of certain provisions of the family Reunification Directive, has referred the matter to the European Court of Justice. There are serious questions raised about the compatibility of certain Articles of this Directive with the right to family and private life guaranteed by Article 8 ECHR – notably in the case of one of the most vulnerable groups in society, children, and one of the most fundamental, closest, and important formative of family relationships, that between parent and minor child. Notwithstanding concerns raised during the process, and warnings from NGOs concerned in this field (one even calling at one stage for the withdrawal of the Directive entirely), the Commission and Council have effectively collaborated in the production of a final document parts of which the Parliament has considered it right to challenge before the Court of Justice.

Passenger Data Transfer Agreement

Although not formally a title IV measure, this is clearly a closely linked issue. The high profile and controversial conclusion of the Decision to conclude an agreement with the United States in relation to the transmission of Passenger Name Record (PNR) Data is yet another example of litigation emerging from the decision making process in the implementation of the Title IV competence. Again, despite vocal warnings from the Parliament, the Commission and Council have proceeded, first with a Commission determination that Data Protection arrangements are adequate, followed the same day by the conclusion of the Agreement. The Parliament's requests were that it be adequately involved in the process (assent rather than consultation), that data protection and privacy should be adequately protected in accordance with EU law, and that the Agreement not be concluded before the request for the Opinion of the Court of Justice on the pending agreement to clarify these points has been dealt with. These basic requests are hardly such that they should have been ignored in this way, even with the constraints of time and the pragmatic difficulties of negotiating such an agreement with the US. The Commission decision that the data protection arrangements under the agreement are adequate as well as the Decision to enter into the Agreement are now both subject to a pending challenge which might result in their annulment. In Commission and Council's rush to get the agreement concluded – even if not perfect, by its own admission – has now predictably resulted in the real prospect of retrospective annulment with all of the difficulties that this will entail. Another related example of the same worrying disregard for the Parliament is the adoption of the Passenger Data Directive without even the Opinion of the Parliament, even though it appears that this will not be the subject of a formal legal challenge.

Asylum Procedures Directive

At the present time the Asylum Procedures Directive is in the very final stages of negotiation, with political agreement having been reached shortly before the accession of ten new Member States and the final expiry of the first five-year period of the Amsterdam competence in May 2004. Nonetheless, serious criticisms have been made of the text, and if the Directive is passed as it is there is an emerging likelihood that this too will be challenged in the Court of Justice. ILPA has produced a detailed document setting out the reasons why we consider this Directive as drafted to be seriously defective and setting out the case for annulment. Again there is a mixture of procedural and substantive Fundamental Rights issues involved. With the record of other pending litigation the Commission and Council should note the gravity of these concerns in order to avoid yet another high profile and potentially damaging case in the Court of Justice. It is abundantly clear from the short survey above of pending and possible litigation that the process of decision-making has included a pattern of disregard for procedural propriety (in the way legislation is passed and structured to permit future decision-making) and for fundamental rights in the substance of the measures adopted. A worrying volume of litigation has emerged already in a short period of time. Clearly it is right that such defects should be challenged and opportunity be given for them to be corrected, but the necessity for this remedial action after legislation has been concluded is regrettable – and is a sad reflection on the quality of the legislative process that has been undertaken in the past five years. Closer attention to procedural propriety, and taking more seriously the fundamental rights obligations by which the EU and its Member States are bound, would have avoided this spate of litigation which can only bring the EU and its processes into disrepute and fuel public scepticism about the legitimacy and desirability of this legislative process at the EU level.

Conclusions

ILPA considers the European Commission's Assessment of the Tampere programme to be extremely disappointing. The Commission has failed to acknowledge the shortcomings of the first five years of an area of freedom, security and justice. It has fails to make any real assessment of progress in this area against the Tampere Conclusions. An assessment of adherence to the Tampere Conclusions reveals that in fact the last five years have been marred by the adoption of standards which fall well short of international human rights standards.

ILPA's disappointment stems from the fact that unless there is a realistic assessment of "progress" so far the future for the European Union's activities in this area is gloomy. The Commission must take seriously its responsibility to ensure that standards in the area of freedom, security and justice are high and full compliant with international standards.

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[1] The communication is available at

http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0401en01.pdf

[2] UNCHR Press Release *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004).

[3] UNCHR Press Release *UNHCR regrets missed opportunity to adopt high EU asylum*

*standards (*30 April 2004).

[4] See respectively Council docs 8078/04, 6379/04 and 6379/04 COR 1.

[5] See respectively Council docs 13117/1/00 REV 1 and 6534/04.

[6] The Commission has not yet issued its proposal on the VIS because it has first undertaken a public consultation but the legislative agenda in this area has now clearly been set by the JHA Council as expressed in the Conclusions.