JHA 15.A

Brussels, 17 March 1998

DRAFT

BACKGROUND [1]

JUSTICE AND HOME AFFAIRS

Brussels, 19 March 1998

The session chaired by UK Home Secretary Jack Straw will start at 10h00; the Presidency will aim at concluding it towards 19h00. Justice items (points 1 to 6) should be dealt with in the morning.

Attention is drawn to some important texts on which substantive progress might be achieved (Convention on Driving Disqualifications, Eurodac Convention, joint action on participation in a criminal organisation ...).

It has to be pointed out that following a practice started under the Dutch Presidency in anticipation of the entry into force of the Amsterdam Treaty, the European Parliament has been consulted on all legal texts and its non-binding opinions, where already given, have been taken into account.

Not to forget the impressive number of A-points relating to JHA matters which should be adopted at this session (Falcone-, Odysseus Programmes etc).

1. Report on openness

The Council is expected to adopt conclusions promoting openness in the JHA area, drawn up by the Presidency - which attaches great importance to the issue - following discussions held at the informal ministerial meeting in Birmingham on 29/30 January.

In tabling the proposals contained in the conclusions, the Presidency has tried to strike a balance between the acknowledged need for greater transparency in JHA and the necessity to keep certain areas confidential, such as matters relating to national security.

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(1) This note has been drawn up under the sole responsibility of the Press Service.

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On the basis of these conclusions the following measures are envisaged: make available to the public calendars of K4 and other third pillar working groups, hold more briefings during each Presidency, make available progress reports on JHA work, hold open debates where possible every semester, make available third pillar proposals to the public when they are transmitted to the European Parliament, draft explanatory publications on JHA matters, draw up a list of all measures adopted by the Council in the third pillar.

2. Convention on Driving Disqualification

With a view to reaching a global agreement on this draft Convention after almost seven years of discussions, the Council will endeavour to make substantive progress on the last outstanding questions which have proved impossible to solve at a technical level.

The purpose of this Convention is to improve road safety within the EU by giving Union-wide effect to driving disqualifications (withdrawal or suspension of driving licences) which due to increasing international road traffic are frequently imposed by a Member State other than that where the driver normally resides. At present, a driver who has committed a driving offence and has been disqualified from driving in a Member State other than his State of residence, will escape the effects of that disqualification simply by leaving the State of offence.

The draft Convention is based on the principle that the State of residence gives effect to the disqualification following notification from the State of offence. The State of residence can either directly execute the decision of disqualification, or take its own judicial or administrative decision to the same effect. At any rate, it should take into account the period of disqualification already served in the State of offence and not extend the duration of disqualification imposed by the latter. It may also reduce the duration to the maximum term provided for under its national law.

The draft Convention also considers certain cases where the State of residence shall refuse to give effect to the driving disqualification (i.a. when the order has already been fully enforced in the State of offence) or may refuse to do so (i.a. when the conduct for which the disqualification has been imposed in the State of offence does not constitute an offence under the law of the State of residence). It furthermore contains provisions to ensure that the offender is given an adequate opportunity to defend himself.

The decisions on driving disqualification falling within the scope of this Convention are listed in an annex to the Convention (such as reckless or dangerous driving, hit-and-run driving, driving a vehicle while under the influence of alcohol).

In addition to general waiting reservations on the draft Convention by three delegations (which they will lift depending on the solution to be found on specific questions), agreement has still to be reached on the list of cases where the State of residence may refuse to give effect to the driving disqualification imposed by the State of offence. Another outstanding problem relates to the designation of the central authorities to which the driving disqualification has to be notified.

A further issue which has not yet been fully addressed relates to the calculation of the driving disqualification periods which differ from one Member State to another.

3. Joint action establishing the European Judicial Network

Following political agreement reached by Ministers last December on the setting up of a European judicial network, the Council will attempt to solve the only outstanding problem relating to the designation of contact points.

The network would be made up of authorities responsible for judicial cooperation and judicial action against forms of serious crime, such as corruption, drug-trafficking, terrorism. In setting up direct contacts between judicial authorities, the implementation of this joint action would strengthen judicial cooperation between Member States in the framework of the fight against organised crime.

On the basis of the draft joint action, one or more contact points would be established in each Member State to provide relevant legal and practical information to local judicial authorities as well as to contact points and other judicial authorities abroad. The network would hold periodic meetings to discuss practical and legal problems which arise in the context of judicial cooperation.

Within six months of its establishment, the Council would examine whether the judicial network should be linked by a special telecommunications network.

An initial assessment of the operation of the European Judicial Network would be carried out by the Council after the first year, further reports would be made every three years.

4. Joint action on participation in criminal organisations

Following the deadlock of discussions at the last session in December, the Council will again make every effort to reach agreement on the joint action on making it a criminal offence to participate in a criminal organization in the Member States of the EU, as repeatedly requested by the European Council.

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The implementation of this joint action would provide for a basic tool for combatting organized crime effectively. In fact, police cooperation and mutual legal assistance between Member States depend to a large extent on a common definition of what constitutes such an organization and participation in it. Its adoption would make it possible to punish participants in activities of criminal organizations throughout the EU, irrespective of where the organization was based or where it pursued its criminal objectives. Member States would agree that the types of conduct targeted by the joint action are punishable by effective, proportionate and dissuasive criminal penalties. To this end they would need to provide each other with the broadest possible assistance.

The draft joint action aims at reconciling the continental approach whereby participation in a criminal organization is punishable on the basis of specific evidence (there must be a concrete action such as the renting of premises) with the Anglo-Saxon approach whereby conspiracy (a mere agreement between two persons may be sufficient) is considered punishable.

The definition proposed refers to a structured association, established over time, of two or more persons, acting in concert with a view to committing crimes or other offences which are punishable with not less than a 4 year detention.

One important element of the draft joint action concerns the possibility of incriminating a person who, though not taking part in the execution of a criminal offence, acts intentionally and is aware that his active participation furthers the activities of the criminal organisation. Such cases may arise for example when a lawyer or accountant provide their services to a criminal organisation, knowing that their activity contributes to the aim of the organisation.

The draft joint action also provides for the liability of legal persons, which will not prejudge the criminal liability of the natural persons who were the perpetrators of the offences or their accomplices.

Outstanding questions include the definition of the need to preserve genuine freedom of association as well as the extent of the obligation of mutual assistance.

5. Convention on mutual legal assistance in criminal matters

Following the decision taken at the JHA Council in December to establish the Convention by July 1998 and to set aside certain complex issues which would be dealt with subsequently in a Protocol, the Council will focus on a number of important items with a view to reaching a political agreement at the May session.

The purpose of this Convention is to provide for a more efficient and faster judicial cooperation in criminal matters, taking account of new investigation methods such as hearings by videoconference or interceptions of telecommunications, given that the main international legal instrument in this area dates from 1959 (the European Mutual Assistance Convention drawn up within the framework of the Council of Europe).

The Convention will be a very important tool in the fight against organized crime; the urgency of its completion is indeed highlighted in the Action Plan on organised crime approved by the Amsterdam European Council.

At the forthcoming session, Ministers are asked to focus notably on two particularly difficult issues relating to the hearing by video conference (article 12, i.a. possibility of hearing not only witnesses or experts but also accused persons, protection of the person to be heard) and the timeliness of including provisions on data protection in the Convention (or deal with it in the Protocol, given that all Member States are bound by the 1981 Council of Europe Convention on data protection). Another complex matter concerning interception of telecommunications should be dealt with only at the session in May.

The draft Convention also contains rules on the compliance with the formalities and procedures indicated by the requesting Member State when executing letters rogatory and in this context possible deadlines, restitution of articles obtained by criminal means, controlled deliveries in the framework of criminal investigations into extraditable offences, sending and service of procedural documents, the possibility of temporary transfers of persons held in custody for purposes of investigation, spontaneous exchange of information, requests for mutual assistance (whether to send a request directly to the competent judicial authority, via the central authority, Interpol or other); investigations by officers acting under covert or false identity ("covert investigations").

Difficulties in reaching agreement may be explained by differences in national legislation; for instance a specific action may be regarded as criminal by one Member State but not by another. It also has to be recalled that the completion of the Convention relies on the reciprocal confidence of Member States in the structure and functioning of their legal systems and their ability to guarantee a fair trial.

6. Preparations for enlargement

At at the informal ministerial meeting in Birmingham on 30 January it was already stressed that JHA matters are a key issue in the enlargement process and that therefore JHA Ministers have to be closely involved, both in identifying the JHA acquis and in assessing the progress being made by the applicant states in taking on and implementing the acquis, whilst recognizing the primary role of the General Affairs on enlargement.

The importance of JHA matters in the enlargement process has also been underlined at the European Conference in London on 12 March, when Heads of State and Government committed themselves to address as one of the primary issues transnational organised crime, in particular drugs trade, trafficking in human beings and terrorism (cf. expert group).

At the forthcoming session Ministers will examine the state of work with regard to JHA aspects in the enlargement process, notably the consideration to be given to the third pillar acquis in the individual Accession Partnerships and the mechanisms for carrying out the monitoring of the acquis. In this context they will also note progress made on the pre-accession Pact on organised crime which should be agreed upon by Member States, CEEC countries and Cyprus as a political commitment at the forthcoming JHA session in May. Moreover, they will be informed of the progress made in identifying the third pillar acquis, including the Schengen acquis. The issue of how to assist applicant countries in implementing the acquis (Phare, coordination of assistance) is also likely to be raised.

With regard to the monitoring of progress made by the applicants, the Council may express views on mechanisms for giving its input on third pillar implementation. In particular, individual Member States' evaluations in any of the applicants might be conducted on an ad hoc basis and then passed bilaterally to the Commission. Collective evaluations might also be undertaken, i.e. by EU embassies and Commission delegations in the candidate countries as well as by ad hoc teams of EU Member States and the Commission on specific aspects.

7. Europol/European Drugs Unit (EDU)

In assessing progress made, the President will probably first enquire about the state of ratification procedures in Belgium, Greece, Italy and Luxembourg - the last Member States not to have yet completed the ratification procedures, and appeal to Member States to do their utmost to ratify the Convention before the end of May [(2)].

The Council will also consider a Spanish request to extend Europol's mandate from 1 January 1999 in order to include the fight against terrorism which would be sooner than provided for by the Convention (Article 2.2 "within 2 years from the entering into force of the Convention at the latest").

The Spanish delegation argues that because of the much longer than expected ratification period of the Convention signed in July 1995 it would be justified to anticipate this extension of Europol's activities. Preparatory discussions have shown that delegations are in principle not against the Spanish request; some feel, however, that it might be appropriate to commission first a feasibility study by EDU/Europol, focusing not least on budgetary implications, before taking a firm decision on the timing of such an extension.

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(2) The Convention enters into force 90 days after the last Member State has deposited its instrument of ratification.

The Council will also agree (without debate, A-point) on two texts which are necessary for the functioning of Europol relating to confidentiality regulations and to rules concerning the receipt of information by Europol from third States and third bodies. They can be adopted formally only following the entry into force of the Convention.

The confidentiality regulations establish the security measures to be applied to all information which is processed by or through Europol.

According to the second text concerning the receipt of information from third parties, Europol may conclude agreements with third States and bodies on this matter. The text also defines the rules applicable to the assessment of the source and of the information, as well as to the correction and deletion of information. It is recalled that the other texts concerning the handling of information by Europol have already been agreed at the last JHA meeting in December.

The Council will also agree (without debate, "A" point) on an interim solution for the EDU/Europol computer system, due to delays in the set up of the final system necessary to the full operating of Europol.

Other texts which have still to be agreed before Europol can take up its activities, concern the rules of procedure of the joint supervisory body, the headquarters agreement (between The Netherlands and Europol) and the agreement on liaison officers (between the Member States and Europol). Their approval should be possible in time for Europol's entry into force, hopefully well before the end of the year.

8. Review of the Action Plan on influx of migrants from Irak and the neighbouring region

The Council will take note of the progress made in the implementation of the Action Plan adopted on this matter by the General Affairs Council on 26 January 1998. Discussions are likely to focus on the main issue of taking fingerprints from illegal immigrants (which concerns also the following point on the agenda).

The Presidency will also report on the outcome of the meetings it has held with Turkish authorities on 9/10 March in Istanbul and in Ankara.

A series of meetings have been held since January in order to examine each of the 44 points of the Action Plan and to decide how to implement it. The finalisation of the Odysseus Programme as well as of the two joint actions concerning the financing of specific projects in favour of displaced persons (to be adopted by the Council without debate, as "A" points) constitutes a first concrete result of the intensive work already carried out.

In order to avoid overlapping of action in this field, coordination between the EU Presidency, the Schengen Task Force as well as with the meetings of police chiefs chaired by Italy has been ensured.

With regard to the complex issue of fingerprinting, the Action Plan states in point 40: "In so far as national law provides, and in accordance with the principles of data protection applicable in the EU, Member States have to fingerprint every third country national illegally entering their territory". The Council is asked to solve the basic question whether or at which stage the Eurodac system should be extended to illegal immigrants, given that its present draft concerns only asylum seekers. It will also have to consider interim possibilities for the bilateral exchange of fingerprints of asylum seekers and illegal immigrants, pending the completion and entry into force of the Eurodac Convention. Some delegations strongly favour the immediate exchange of fingerprints of asylum seekers and illegal immigrants and ask for the extension of the Eurodac system to include fingerprints of illegal immigrants, which is not acceptable to the majority of delegations (see following point).

9. EURODAC - comparison of fingerprints of applicants of asylum

The Council will attempt to resolve the last outstanding questions relating to the Convention establishing Eurodac, a central data base for the comparison of fingerprints of applicants for asylum.

As the experience with the influx of Kurdish immigrants has shown, the set-up of Eurodac is of capital importance in supporting the operation of the 1990 Dublin Convention ("determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities") which entered into force on 1 September 1997. Its operation will make it easier to verify whether a person has already lodged an asylum application in one of the Member States and thus avoid parallel examination by several Member States of asylum applications lodged by the same person. It will also prevent asylum applicants from being returned from one Member State to another in succession without any of these Member States accepting competence for examining their asylum application.

According to the draft Convention, Member States will take the fingerprints of every applicant for asylum of at least 14 years of age and transmit the data to the Central Unit. The latter will compare the data with those already stored and inform the Member State which transmitted the data of the results of the comparison. It can therefore be established whether a person has already lodged in a Member State an asylum application or not.

One central issue to be solved by Ministers concerns the determination of the category of persons whose fingerprints will have to be taken. The large majority of delegations is of the view that the Eurodac system can be effective only with an obligation to take fingerprints of all asylum seekers, while one delegation has still problems with this approach; on the other hand, some delegations (representing destination countries for immigrants) want to go further and require the inclusion into the system of not only asylum seekers but of every immigrant without valid documentation. This is, however, not acceptable to most delegations, at least not at this stage, and would furthermore delay completion of the Convention. Moreover, one delegation would prefer to have a lower minimum age limit.

The other crucial question is whether Eurodac should be managed by the Commission or by a Member State and financed by the Community budget or by national contributions. The European Parliament has expressed the opinion that the system should be managed by the Commission. In view of this stance of the other branch of the budgetary authority, the Presidency has proposed two options: management by a headquarters State with Member States funding, or management by the Commission with Community funding. Given the European Parliament's position, the majority of delegations favour the latter.

Other outstanding items concern the designation procedure in relation to the national authorities responsible under the Convention for transmitting data and for supervising data protection, the rights of data subjects to have access to data and to secure correction or erasure of data wrongly stored, the role of the Court of Justice, voting procedure for adopting implementing rules.

10. Implementation of the Dublin Convention

The Council will take note of a progress report on the state of work relating to the implementation of the 1990 Dublin Convention ("determining the State responsible for examining the applications for asylum lodged in one of the Member States of the European Communities") which entered into force on 1 September 1997. No in-depth debate is envisaged at this stage, as work has not progressed sufficiently. Some issues may also be dealt with under the item concerning the action plan on the influx of refugees (see previous points).

Experience thus far shows that only a small percentage of asylum applications falls within the scope of the Convention. According to the Convention, the responsibility for examining an asylum claim lies with that Member State into which, on the basis of proof, the applicant entered the EU. One of the main problems is that immigrants quite often throw away their papers hoping they might get asylum in an EU country other than the one they entered first; proof is therefore difficult to establish (even more so when the person has entered the EU illegally) and the criteria established by the Convention cannot be applied.

Work underway aims at improving the operation of the Convention through measures which would not require an amendment of the Convention.

The following points are being examined:

- encouraging asylum seekers to retain their documentation (i.e. accelerate asylum procedure when applicant refuses to show or destroys his documents);
- ways of dealing with undocumented asylum seekers (i.e. use of other elements such as train tickets, phone cards; information about the ways and means asylum seekers enter the EU to be sent immediately to units responsible for the operation of the Convention);
- enhancing speed and quality of information exchange (i.e. setting formal time limits for responding to urgent requests for information; where possible fingerprint illegal entrants and exchange such information);
- flexible application of Convention criteria and matters of interpretation;
- greater liaison and cooperation among Member States (i.e. more contacts among practitioners of the Convention, possible exchange of liaison officers).

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