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EDITORIAL COMMENTS

The Tampere summit: The ties that bind *or* The Policemen's Ball

The European Council held a special summit on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. It also gave decisive impetus for the work associated with the drawing up of a draft Charter of fundamental rights of the European Union, called for by the Cologne European Council. The results of the summit are extraordinarily rich. They foresee much closer integration by establishing a common EU asylum and migration policy, a European judicial area, and a concerted effort in the fight against crime.

The first impression of the result of the summit is that we are seeing accelerated progress in deepening the integration process, a natural consequence of the completion of the internal market and the special problems which that brings in terms of movement of persons and goods. The reality of EMU shows that the caravan of European integration has moved on and a quality shift has occurred. The integration process is extending to non-economic areas, and in a very substantial way. At the same time, the parallel developments with regard to the expansion of the Union show that enlargement will impose an enormous strain on the integration process, precisely in the areas discussed at Tampere. We should not be surprised if the real progress achieved at Tampere becomes a victim of the catch-up process of enlargement. The arrangements arrived at in Tampere may, in other words, be suitable for a relatively homogeneous Union of 15; the pressure will be enormous to tailor them for the Union of 25 or 30 countries of which President Prodi spoke in his historical address to the European Parliament.[1] Unless that challenge is met, the Union will dissolve into a loose association of States, with a multiplicity of flexible arrangements.[2]

In one sense the summit was merely fulfilling its duties under the Amsterdam Treaty and in accordance with the Vienna Action Plan in promoting progress in this area, so the result may almost be characterized as to be expected. Nothing could be less true. The summit conclusions are strong, go further than anticipated and show a real determination to achieve pro-

1. Speech to the European Parliament by Mr. Romano Prodi, President of the European Commission, on enlargement. Brussels, 13 Oct. 1999.

2. Cf. report by Dehaene, Von Weizsäcker and Simon on the institutional implications of enlargement, 18 Oct. 1999, points 2.1 and 2.2.8.

gress in this area. They also show the advantages which the many years of cooperation at European level in this area have brought. The early *ad hoc* cooperation and subsequent coordinated efforts culminating in Schengen, the Dublin Convention and the Maastricht Third Pillar are now revealed to be part of a necessary learning process, an evolution towards integration in the non-economic field where issues of sovereignty, national differences and trust could not have been overcome without this prior experience. In that sense, they show the paradoxical advantages which legally unsatisfactory structures such as Schengen and the Maastricht Third Pillar may have, in forming a waiting-room and a common learning ground for achieving real progress at the Union level.

The Tampere Summit revolved around four essential themes: a common EU asylum and migration policy, a genuine European area of justice, the fight against crime and external action in the area of Justice and Home Affairs. It is striking to note that these four themes, which have different legal bases in the Union and Community Treaties, are treated together, as part of a unified project. On the other hand, it is also becoming clear that in this area at least, communitarization is not yet, nor may ever be, the fit destination of this evolutionary process.

The European Council will assess progress at its meeting in December 2001. It promises transparency and democratic control and has underlined the importance of keeping the European Parliament fully informed. This last point is interesting: the Parliament has vastly differing powers in Title IV of Part Three EC Treaty compared to Title VI TEU, both of which are involved here. If the European Council intends to treat the subjects discussed at Tampere as a package – which technicians would say was necessary – then it will be interesting to see if there is an unintended spill-over effect in increased the powers of the Parliament even in those areas where it is legally speaking less empowered. The European Council also suggests an open dialogue with civil society on the aims and principles of the area of freedom, security and justice *in order to strengthen citizens' acceptance and support*. This may be a reference to the increase in racism and xenophobia in the Union and the success of overtly xenophobic political parties, and may represent an attempt to reassure citizens.

The European Council's starting point was that the Union is rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. The challenge facing the Union now is to go beyond the prosperity and peace which the Union enjoys and to guarantee a genuine area of freedom, security and justice. This concept, which is an objective of the Union (Article 2 TEU), is also to be found in Article 61 of the EC Treaty. The European Council recognized the inevitability of immigration and asylum requiring the Union to develop common policies on asylum and immigration

while strengthening and making uniform the control of the external borders. The aim is "an open and secure European union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity."[3]

A common EU asylum and migration policy

This sub-heading is taken from the Presidency Conclusions; it ignores the fact that following Amsterdam, Community powers, and not those of Title VI TEU, apply in this area. On the other hand, it reinforces the perception that in the area of freedom, security and justice, it is increasingly difficult to isolate Community and Union initiatives, which require coordination and need to march in parallel. It is also interesting to note that the Commission is required to produce numerous legislative proposals, allowing it to play a coordinating role; conversely, the European Council is obviously discouraging Member States from exercising their right of initiative. The European Council suggests a partnership approach to countries of origin, addressing political, human rights and developing issues in countries and regions of origin and transit. In a variant of the oft-repeated formula of "if we do not go to the migrant, the migrant will come to us", the European Council refers to improving economic conditions in these countries, thus reducing or eliminating the root-causes of and pressures for migration. The mention of transit countries in this context however suggests an inducement to accept readmission agreements (discussed later).

Substantively, the European Council agreed on the need to develop a common European Asylum System, respecting the principle of non-refoulement. It sets an ambitious programme, to be achieved in consultation with the UNHCR, but here again much of the ground work has already been set in place since Lisbon: determination of the State responsible for the examination of an asylum application (see the Dublin Convention), common procedural standards, and minimum conditions of reception of asylum seekers. Ambitiously, it seeks the approximation of rules on the recognition and content of the refugee status. In the longer term, Community rules should lead to a common asylum procedure, and a uniform status for those who are granted asylum, valid throughout the Union. The Commission is asked to prepare a Communication on this within a year and to finalize its work on Eurodac (system for the identification of asylum seekers). Finally, and crucially, the European Council addressed the issue of temporary protection for displaced

3. Presidency conclusions, p. 2.

persons, including mass influx, and invited the Council to reach agreement on burden-sharing.

Third country nationals

In one of the most innovative parts of the Tampere Conclusions, the European Council addressed the issue of legally resident third country nationals and stressed the need to develop a common approach to ensure the integration of third country nationals lawfully resident in the European Union.[4] It advocated "a more vigorous" integration policy concerning economic, social and cultural issues which should aim at granting them rights and obligations comparable (or subsequently, in the Conclusions, "as near as possible") to those of EU citizens: right of residence, education rights, economic rights and non-discrimination *vis-à-vis* the nationals of the host country.

The fight against racism and xenophobia is now an objective of Title VI TEU (Article 29), but is not further developed there, although it is mentioned in Article 13 EC. The European Council has remedied this by inviting the Commission to make proposals implementing Article 13 on the fight against racism and xenophobia. Member States are also encouraged to draft national programmes, drawing on best practices and experiences.

In a very significant and realism-heavy passage which recognizes the ageing of the Community population and the contribution which will have to be made by third country nationals, the European Council decided on the need for approximation of national legislation on the conditions for admission and residence of third country nationals, *based on a shared assessment of the economic and demographic developments within the Union.*

Illegal immigration

The European Council recognized that migration flows need to be managed and that illegal immigration needs to be tackled, especially by combating trafficking in human beings (now an objective of Article 29 TEU); legislation is to be adopted by the end of 2000. Closer cooperation between the border control services of the Member States is necessary. In an important passage, the European Council (without apparently the objection of Ireland, Denmark or the United Kingdom) stated that the Schengen *acquis* must be accepted in

4. See the prophetic, brilliant unpublished doctoral thesis of Dr Alavaro Oliveira on this subject presented at the European University Institute a number of years ago, and most recently Staples, "The legal status of third country nationals resident in the European Union" (Kluwer, 1999).

full by the applicant countries. This recalls the similar insistence by Schengen members during the negotiations at the time of the last enlargement, and a stipulation to this effect in Article 8 of the Protocol. The position of the United Kingdom, Denmark and Ireland becomes ever more anomalous in this context. The European Council specifically invited the Council to conclude readmission agreements or to include standard clauses in other agreements (such as Europe Agreements, trade and cooperation agreements, Euromed agreements etc.) between the EC and relevant third countries or groups of countries. As enlargement proceeds, the *cordon sanitaire* will need to be extended to other neighbouring countries and countries of transit. It is essential that the readmission agreements effectively meet the standards of public international law, and respond to the criticism of commentators in this area. It is particularly important that they do not, in law or in fact, frustrate the right to request asylum. In practice, through readmission agreements, the non-EU Member States operate as the first-stage immigration check for the EU.

A European area of justice

The European Council seeks to establish a genuine area of justice where people can approach courts and authorities in any Member State as easily as in their own, and not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. This anodyne objective starts innocently enough with an information campaign on access to justice in Europe. Subsequently, however, in proposals which are breathtaking in their scope, the European Council calls for legislation on minimum proposals on legal aid in cross-border cases throughout the Union. Common minimum standards should be set for multi-lingual court forms in cross-border cases and minimum standards should also be drawn up for the protection of victims of crime, victims' access to justice, and rights to compensation including legal costs. It is trite to say that these proposals are far-reaching: they constitute nothing less than the seeds of a European Criminal Code, particularly as some provisions are not related to cross-border issues, such as compensation for victims of crime. On the other hand, it could fairly be remarked that in this way, the European Council has accepted the non-discrimination principle established by the European Court of Justice in *Cowan*.[5]

In civil matters, special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims/visiting rights and uncontested claims are

5. Case 186/87, [1989] ECR 195.

called for, to enable automatic recognition and enforcement of judgments and decisions. Judgments should be respected and enforced throughout the Union while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of the Member States must be achieved.

With regard to criminal matters, criminals should not be able to exploit the judicial differences between the judicial systems of the Member States, and the European Council calls on all Member States to ratify the 1995 and 1996 EU Conventions on Extradition. Formal extradition procedures should be abolished among the Member States in the case of fugitives from justice after they have been finally sentenced. Quite apart from the national constitutional ramifications of this, the definition of final sentence varies between Member States. Pre-trial orders concerning taking of evidence and seizure of assets should be admissible before the courts of other Member States in accordance with the principle of mutual recognition. A European Enforcement Order is to be created and necessary minimum procedural standards are to be adopted.

The European Council also requests greater convergence in civil law matters. As regards procedure, the Council and Commission are to prepare procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial cooperation and to enhanced access to law. As to substantive law, the Council is to report back by 2001 on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The upshot of these developments could well be a nascent European Code of Civil Procedure and/or Civil Law.

Fight against crime

Amongst numerous operational steps, the European Council proposes funding for a Community programme on crime prevention. Joint investigative teams (with Europol in a support capacity) should be set up when investigating cross-border crime (as envisaged by Article 30 TEU), with priority being given to combating trafficking in drugs and human beings, as well as terrorism. A European Police Chiefs operational Task force should be established and a European Police College. Europol should be strengthened and it should be authorized to ask Member States to initiate, conduct or coordinate investigations or to create investigative teams in certain areas.

Controversially, a EUROJUST unit is to be set up, composed of national prosecutors, magistrates or police officers of equivalent competence, detached from the Member States. It will have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investig-

ations in organized crime cases. Legislation is to be adopted by the end of 2001. Quite how this is to be achieved, given the different status of pubic prosecutors (the single career of Italian public prosecutors and judges is just one example), the constitutional difficulties and the different national roles is unexplained. The protection afforded by the national constitutional courts will be decisive.

Work is to proceed on the reform of national criminal law, in particular as regards common definitions, incrimination and sanctions for certain key offenses such as financial crime, drugs trafficking, trafficking in human beings, sexual exploitation of children, high tech crime and environmental crime. Whereas the first four had been specifically mentioned in Article 29 TEU, the last two are new, and seem to go beyond the provisions of Article 31 TEU, which allows for the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking (unless high tech crime and environmental crime are organized crime). Further measures are to be taken against money laundering.

The Summit conclusions end by highlighting the need to integrate Justice and Home Affairs concerns in the definition and implementation of external Union policies and activities. This may be done by means of Articles 24 and 38 TEU. The Council is to make specific recommendations by June 2000. The European Council also highlights the need for regional cooperation with neighbouring countries.

These comments can only give the flavour of an immensely ambitious task. The aim, that of creating an area of freedom, security and justice, is a laudable one. The difficulties arising from the differences between national legal systems and differing constitutional provisions are formidable. The intensification of Union-level police and judicial cooperation is inevitable and necessary given the growth of cross-border crime in the internal market. As always, however, the devil is in the detail. Human rights need to be respected, the rights of the defence guaranteed, and national constitutional rights honoured. The debate with civil society to which the European Council refers should not be long in coming. This is a lot more serious than British beef. here we are talking of the rights of the individual and the powers of the public authority. A good deal of our different legal and constitutional histories – and our national constitutional provisions – has been taken up precisely with that topic. The criticism of Schengen and the Maastricht Third Pillar showed that scrutiny by national law-makers, public debate, academic criticism and policy-making input from sectors of civil society can have an effect. Such scrutiny and debate will be necessary as the Community and Union institutions respond to the requirements of the Tampere summit. The proposed draft EU Charter of Fundamental Rights seems all the more necessary should Tampere

turn out not to have been the launching of the area of freedom, security and justice but rather an invitation to the (Euro) Policemen's Ball.[6]

6. See Toth, "The European Union and human rights: the way forward", 34 CML Rev. (1997), 491; Turner, "Human Rights protection in the European Community", 5 *European Public Law* (1999), 453.