

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

EUI Working Paper **LAW** No. 2003/7

**The Twin Towers and the Third Pillar:
Some Security Agenda Developments**

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Printed in Italy in March 2003
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Badia Fiesolana
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Italy

***The Twin Towers and the Third Pillar:
Some Security Agenda Developments***

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*This is the written version of a paper delivered at the European University Institute, Florence on 4 December 2002.

I INTRODUCTION

Given the nature and scale of the outrage perpetrated against the United States on 11 September 2001 - let alone the impact of the televised destruction of the Twin Towers on the general public - it was to be expected that action to combat international terrorism would be propelled to the top of the political agenda. In Europe, as elsewhere, governments proclaimed their solidarity with the American people, sought to reassure their populations, and started to look with new eyes - individually and collectively - at options and strategies to render efforts to combat terrorist activity more effective and comprehensive.

In this the European Union was to be no exception. Acting with unprecedented speed the European Council was able to meet in extraordinary session on 21 September and adopt a detailed and ambitious plan of action to combat terrorism. Characterised as a “coordinated and interdisciplinary approach embracing all Union policies”¹ it laid particular emphasis on the following themes:

- Enhancing police and judicial cooperation;
- Developing international legal instruments;
- Putting an end to the funding of terrorism;
- Strengthening air security;
- Prioritising cooperation with the United States; and,
- Coordinating the EUs global action.

In giving effect to this new “priority objective” the Council would ensure that the “approach is reconciled with respect for the fundamental freedoms which form the basis of our civilisation”².

On the following day the Presidency convened a meeting with the Ambassadors of the candidate countries. They agreed, unanimously to align themselves with the Action Plan³. On 4 October the European Parliament adopted a highly supportive resolution⁴.

What follows seeks to provide an overview of some of the essential elements of the Action Plan, an indication of progress achieved in its implementation, and a few initial thoughts on at least some of its longer term implications. In doing so it will focus on initiatives in the areas of judicial and police cooperation within the Union and efforts to improve and deepen cooperation with the US in these areas. For present purposes some selectivity is essential given the range and complexity of the EU response; a fact well illustrated by the November 2002

¹ “Conclusion and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001”, Council of Europe doc. GMT (2001) Inf 31, p.1.

² *Id.*

³ See “Alignment candidate - countries with conclusions European Council”, Press Release by the Belgian EU Presidency, 22/09/2001.

⁴ Reproduced as Council of Europe doc. GMT (2001) Inf 33.

update to the “Roadmap” for the Action Plan which contains 64 sections and runs to some 52 pages⁵.

II THE CONTEXT

Before turning to these matters, however, it is important to recognise that when the Extraordinary European Council convened in September 2001 it was not addressing a new issue. Rather its discussions took place in the context of over a quarter of a century’s engagement with the complex and multi-dimensional problem of terrorism. It will be recalled that “[i]n the wake of continued indigenous and Middle Eastern terrorism . . . EC ministers of justice and home affairs came together in Rome in 1975 and created ‘Trevi’ (named after the famous fountain in Rome and after its first (Dutch) chairman, Mr Fonteijn). Trevi, under the auspices of European Political Co-operation, was an intergovernmental committee outside the EC framework, intended as a forum to coordinate an effective response to international terrorism”⁶. With the entry into force of the Maastricht Treaty the subject matter was subsumed within the IIIrd Pillar where it still remains.

Pursuant to its mandate in this area the EU has, particularly in recent years, adopted various specific measures having an impact on, or relevance for, terrorism. For example, in the sphere of police cooperation one should recall the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property⁷. In the field of judicial cooperation the issue of the extradition of terrorist suspects and the provision of assistance in the investigation and prosecution of such offences has been oft discussed and - as will be seen at a later stage - some progress recorded. Even in the rather esoteric area (as it was prior to 9/11) of terrorist finances the Council had, as early as 9 December 1999, formulated an open textured Recommendation⁸.

Indeed although not particularly prominent on the Justice and Home Affairs agenda, terrorism continued to be an active subject of policy debate - a fact well illustrated on 5 September 2001 by the adoption in the European Parliament of a resolution on the role of the EU in combating it.

III THE SEPTEMBER 2001 ACTION PLAN

Given such developments it was perhaps inevitable that one significant dimension of the strategy formulated by the Justice and Home Affairs (JHA)

⁵ Council of the European Union, doc 13909/1/02 REV 1 (14/11/2002).

⁶ M. Anderson *et al*, *Policing the European Union* (1995: Clarendon Press, Oxford), p.53.

⁷ OJ C 26, 30.1.1999, p.22.

⁸ OJ C 373, 23.12.1999, p.1.

Council on 20 September would be “to harness all the measures already adopted at the European Union level . . .” and “to speed up the process of creating an area of freedom, security and justice . . .”⁹. This latter dimension - the acceleration of work in progress - had (whatever its other merits may be) the advantage of meeting the perceived political need to secure speedy and concrete success in the implementation of the plan.

This, in turn, goes some way towards explaining the prominence afforded to the introduction of the European arrest warrant and the adoption of a common definition of terrorism. Both of these issues had been under examination for about two years and sufficient progress had been recorded to permit the Commission to table proposals for relevant Council Framework Decisions as early as 19 September¹⁰. Ministers of Justice and Home Affairs could thus have some confidence that officials could put them in the position to “achieve significant political agreement on both proposals at its meeting on 6 and 7 December 2001.”¹¹

Among the other issues emphasised the following day by the Extraordinary European Council meeting under the heading of “Enhancing police and judicial cooperation” one might mention the following:

- Improved cooperation and exchange of information between all intelligence services within the Union;
- The timely and systematic sharing with Europol of “all useful data regarding terrorism”;
- The creation of a specialist anti-terrorism team within Europol;
- Close cooperation between that team and its US counterparts;
- The conclusion of a cooperation agreement between Europol and the US; and,
- The creation of anti-terrorist joint investigation teams¹².

In these areas the JHA Council’s influence was dominant. The other major contributor to the response of the Union to the events of 9/11 was Ecofin which also convened informally in September. Its primary focus was on the taking of “rapid and coordinated initiatives to combat the financing of terrorism”¹³. This

⁹ “Conclusions adopted by the Council (Justice and Home Affairs)” doc. 12156/01 (25/9/2001), p.1.

¹⁰ See, “Proposal for a Council Framework Decision on the European arrest warrant and surrender procedures between the Member States”, COM (2001) 522 final (19.9.2001), and “Proposal for a Council Framework Decision on combating terrorism”, COM (2001) 521 final (19.9.2001).

¹¹ *Supra*, note 9, p.2.

¹² It also articulated action to be taken by other existing structures including Pro-Eurojust (as it then was), the European Judicial Network, and the Police Chiefs Task Force.

¹³ “Informal Ecofin: Ecofin statement on actions to combat the financing of terrorism”, Press Release by the Belgian EU Presidency, 24/09/2001.

was perceived (somewhat questionably)¹⁴ to be an area of particular vulnerability for terrorist groups.

In this sphere the lead was, in some respects, already being taken by the UN Security Council exercising its extensive - and legally binding powers - under Chapter VII of the Charter. In relation to such matters the role of the EU - a not unfamiliar one - would be to facilitate the harmonised implementation of these obligations¹⁵.

Given the inherently global nature of the world's financial system it was also apparent that considerations of effectiveness would require the approximation of counter-measures well beyond the limited geographical scope of the Union. Consequently the decision was taken to call for the mandate of the Paris based Financial Action Task Force on Money Laundering (FATF) to be broadened so as to specifically cover the financing of terrorism¹⁶. Importantly all 15 Member States, plus the Commission, are members of the Task Force as is the US and most other major financial centre jurisdictions¹⁷. This measure was put into practice at a special FATF Plenary meeting held in Washington, D.C. in late October which adopted eight special recommendations and an associated action plan through which to secure rapid implementation on a world-wide basis¹⁸.

Given considerations of this kind the EU Action Plan came to place considerable emphasis on internal measures such as the early adoption of the 2nd Directive on Money Laundering and the draft Framework Decision on the freezing of assets¹⁹; both being initiatives at a fairly advanced stage of development²⁰.

¹⁴ See, eg, "Terrorist finance: The needle in the haystack" *The Economist* (London), 14/12/2002, p.81.

¹⁵ See, eg, Council Common Position of 27 December 2001 on combating terrorism inspired by UN Security Council Resolution 1373 (2001). OJ L 344, 28.12.2001, p.90.

¹⁶ See, *supra*, note 13. the importance attached to the work of the FATF in this context was further emphasised in the Conclusions of the joint Ecofin/JHA Council held in Luxembourg on 16 October 2001.

¹⁷ For a more detailed analysis of the workings of this specialist (but informal) body see, W. Gilmore, *Dirty Money: the Evolution of Money Laundering Countermeasures* (2nd ed.) (1999: Council of Europe Publishing, Strasbourg), Chapter IV.

¹⁸ The Special Recommendations, designed to supplement the pre-existing 40 Recommendations of the FATF (as updated in 1996), commit its members to: take immediate steps to ratify and implement the relevant United Nations instruments; criminalise the financing of terrorism, terrorist acts and terrorist organisations; freeze and confiscate terrorist assets; report suspicious transactions linked to terrorism; provide the widest possible range of assistance to other countries' law enforcement and regulatory authorities for terrorist financing investigations; impose anti-money laundering requirements on alternative remittance systems; strengthen customer identification measures in international and domestic wire transfers; and, ensure that entities, in particular non-profit organisations, cannot be misused to finance terrorism.

¹⁹ See, *supra*, note 1, p.2.

²⁰ For example the efforts to produce a revised Directive on money laundering had proved to be highly controversial and a compromise text emerged from conciliation in September.

a) Judicial Cooperation within the EU

As previously mentioned, the September Action Plan affords a position of centrality to securing further progress in the area of judicial cooperation. Here particular prominence was afforded to two closely interrelated initiatives:

- Replacing the process of extradition within the EU with a new European arrest warrant system; and,
- Establishing a common definition of terrorist acts and laying down common criminal sanctions for the same.

Both had been under discussion for some time prior to 11 September.

The European arrest warrant initiative has its roots in the decision taken by the Tampere European Council of October 1999 that the principle of mutual recognition should become “the cornerstone of judicial cooperation in both civil and criminal matters within the Union”²¹. The application of this concept to the field of extradition was explicitly requested²².

Subsequently a programme of measures to implement the principle of mutual recognition was formulated containing two components relevant to extradition (measures 8 and 15)²³. Interestingly neither was afforded the highest priority (2 and 3 respectively). With the attack on the Twin Towers, however, the arrest warrant (incorporating both Tampere elements) was fast tracked. Political agreement was reached on it at the Justice and Home Affairs Council on 6/7 December 2001. The Framework Decision was formally adopted in June 2002²⁴: the first mutual recognition measure to be finalised in the criminal justice sphere. It is due to enter into force on 1 January 2004²⁵.

Based on a proclaimed high level of trust in the criminal justice systems of all Member States the arrest warrant seeks to abolish the classical model of inter-state cooperation and to replace it “by a system of surrender between judicial authorities”²⁶. Indeed, it is the decision to remove the executive from its

Interestingly it was not further revised to include specific reference to the laundering of terrorist funds. See, OJ L 344, 28/12/2001, p.76.

²¹ Para. 33 of the Presidency conclusions. Reproduced in P. Cullen and S. Jund (eds.), *Criminal Justice Co-operation in the European Union after Tampere* (2002: Academy of European Law, Trier), p.157, at p.162.

²² *Id.*, para. 35.

²³ OJ C 12, 15.1.2001, p.10.

²⁴ OJ L 190, 18.7.2002, p.1. For statements made by certain Member States on the adoption of this measure see, OJ, L 190, 18.7.2002, pp.19-20.

²⁵ Article 34(1).

²⁶ Recital 5.

previously key role in the process of surrender which constitutes one of the most innovative aspects of the new regime²⁷.

While the new process is to be overwhelmingly judicial in character it is not to be automatic. It may be based on the notion of mutual trust but it also acknowledges that there remain limits to the consequences which flow from such trust. Consequently, the Framework Decision contains both mandatory and discretionary grounds for non-execution (see especially Articles 3-5) as well as a range of other limits on the nature and scope of the process.

That said, there is no doubt that significant strides have been taken towards the removal of some of the traditional barriers to cooperation. Indeed, it goes well beyond the benchmark set by the EU Extradition Convention of 1996²⁸. This can well be illustrated by reference to two of the most controversial and difficult issues in the field of extradition: namely,

- 1) the political offence exception; and,
- 2) the requirement of double criminality.

1. The Political Offence Exception

The European arrest warrant performs radical surgery on the so-called political offence exception to extradition. Over many years the Member States of the Council of Europe have played a key role in promoting the incremental abolition of this controversial barrier to extradition: a process commenced in the 1957 Convention, and carried forward by Protocol I in 1975 (crimes against humanity and war crimes), and, more significantly, by the 1977 European Convention on the Suppression of Terrorism²⁹. In so doing the Council of Europe has also pioneered a substitute form of protection for the individuals concerned; namely, the so-called fair trial or asylum clause. The major defect in this approach was the continued ability and willingness of countries (including certain of the Member States of the EU) to undermine the effectiveness of these developments by having (frequent and extensive) recourse to limiting reservations and declarations.

The 1996 EU Convention recorded some progress in this sphere by establishing both a new general principle or goal and a new minimum standard. Article 5(1) sets as the general principle that no offence may be regarded as political *inter se*.

²⁷ For an overview of this measure see, Bill Gilmore, The EU Framework Decision on the European Arrest Warrant: An overview from the Perspective of International Criminal Law (2002) 3 *ERA-Forum*, pp.144-146.

²⁸ OJ C 313, 13.10.1996, p.12. As of November 2002 France and Italy had still to ratify this text.

²⁹ In the wake of the events of 11 September 2001, the decision was taken within the Council of Europe to negotiate an amending Protocol to the 1977 Convention. The substantive work on this was completed in Strasbourg in December 2002.

Departures from this may be effected by state declaration. However, Article 5 also sets a limit to this process in the form of a common minimum standard; that no EU member can regard the offences covered by the European Convention on the Suppression of Terrorism as political. By way of compensation the fair trial or asylum provisions would, however, continue to apply.

The European arrest warrant has taken this process an important stage further: namely, the *abolition* of the political offence exception as such. This major achievement is not, however, specifically proclaimed in the text. Rather it flows from the fact that political offences are not enumerated as mandatory or optional grounds for non-execution. The sole remaining element of the treatment of this subject is confined to the recitals and takes the form of a modernised version of the fair trial or asylum provision³⁰. The change brought about in this delicate area is indeed a substantial one.

2. Double Criminality

The feature of the European arrest warrant scheme which has attracted perhaps the greatest public attention to date is the exceptions which it creates to the traditional requirement of double criminality; i.e., the rule which, in essence, provides that there shall be no surrender for acts which are not also categorised as criminal by the law of the state of refuge³¹. This traditional barrier to extradition, it should be noted, was left largely intact by the 1996 EU Convention (though relaxed by Article 3 for conspiracy and association to commit terrorist, organised crime and drug trafficking offences).

These limited exceptions to the double criminality rule are significantly widened by Article 2(2) of the Framework Decision. As Hans Nilsson has remarked:

In respect of a very broad list of 32 generic types of offences, it abolished the possibility of examination of double criminality. If a foreign judge certifies that he is investigating a particular offence which is punishable by imprisonment in his country of at least 3 years and if that offence is on the list of 32 offences, the judge in the executing state shall not examine the facts of the case and control double criminality³².

While this list includes “terrorism” it is by no means restricted to this sphere. Indeed its very broad converge - from rape to corruption - has been heavily influenced by the content of the annex to the Europol Convention. It is important

³⁰ See, recital 12.

³¹ See, eg, Article 2(1) of the 1957 European Convention on Extradition for the orthodox approach to this issue.

³² H.G. Nilsson, “Mutual recognition and mutual trust; new European developments”, Salerno, 2 March 2002 (typescript), pp.4-5.

to stress that for the purposes of the European arrest warrant it is the act as defined by the law of the issuing state which governs.

While some progress had been recorded in the approximation of certain of these offences prior to 9/11 this was not the case in relation to terrorism. Indeed only six Member States had in place specific legislation on terrorism, in which the words ‘terrorism’ or ‘terrorist’ were used explicitly³³. Elsewhere it was common for such acts as are normally associated with terrorism to be prosecuted as offences under the ordinary criminal law.

The September 2001 Action Plan sought to address the concerns which arose in this context by calling for a common definition to be formulated for both terrorist offences and offences relating to a terrorist group. This is one of the primary aims of the Council Framework Decision on combating terrorism of 13 June 2002³⁴.

This is not the time or place to examine these and other controversial aspects of this initiative which must be implemented by 1 January 2003³⁵: one year earlier than the arrest warrant. It will suffice for present purposes to note that the approximation of these definitions goes a long way towards addressing the double criminality issue (although it does not eliminate it where national legislation adopts a broader view). It might also be remarked in passing that the jurisdictional obligations (set out in Article 9) will also serve to facilitate surrender when the arrest warrant becomes operative (double extraterritoriality being an optional ground of non-execution under Article 4 (7)).

While this approach constitutes a radical departure from pre-existing European and international precedents it is of importance to stress that the requirement of double criminality has *not* been abolished. As Article 2(4) makes clear this doctrine *may*, at the option of individual Member States, continue to be applied to other criminal offences³⁶.

For these reasons among others the European arrest warrant can properly be characterised as the single most important development to emerge from over 25 years of EU engagement with the issue of judicial cooperation. If one thinks of extradition as involving or reflecting some sort of balance between its cooperative and protective purposes there has now been a sea change in favour of cooperation.

From its entry into force it will be (or should be) significantly easier to secure the speedy surrender of terrorists and common criminals alike. However, the Framework Decision on the arrest warrant is also likely to have a much wider

³³ See, “Proposal for a Council Framework Decision on combating terrorism”, *supra*, note 10, at p.6.

³⁴ OJ L 164, 22.6.2002, p.3. See in particular Articles 1 and 2.

³⁵ Article 11(1).

³⁶ See also, Article 4(1).

impact. As the first (and hastily drafted) mutual recognition text to be adopted it has assumed major precedential value and is clearly, even now, being used as something of a template for those which follow. Let us take the draft Framework Decision on the execution of orders freezing assets or evidence. This had the highest priority in the programme of measures on mutual recognition and, prior to the attack on the Twin Towers, was regarded as something of a pilot project for the programme as a whole.

When first introduced by France, Sweden and Belgium for consideration its scope was strictly circumscribed. It was to apply to freezing orders arising out of only six categories of offences: viz,

- Drug trafficking;
 - EC fraud;
 - Money laundering;
 - Corruption;
 - Counterfeiting the Euro;
- and,
- Trafficking in human beings³⁷.

Even this limited ambition proved to be controversial in some circles.

This initiative was not entirely sidelined post 9/11. Indeed, the September 2001 Action Plan called for it to be adopted “as soon as possible” and for its scope to be extended to terrorist related crimes³⁸. However, under the obvious influence of the European arrest warrant the text, which received political approval on 28 February 2002, went much further³⁹. For instance, Article 2 replicates the same list of 32 offences to which it will apply without verification of double criminality. As with the arrest warrant the list can be extended by the Council acting unanimously. Again in an echo of the arrest warrant Member States can subject the recognition and enforcement of a freezing order to the double criminality test if the predicate offence falls outwith the list. The same influences are also evident in more recent mutual recognition proposals such as the July 2002 Danish initiative on the execution of confiscation orders⁴⁰.

³⁷ OJ C 75, 7.3.2001, p.3 (Article 2).

³⁸ See, *supra*, note 9, p.8.

³⁹ See. “Draft Framework Decision on the execution in the European Union of orders freezing property or evidence”, Council of the European Union, doc. 6552/02 (22/2/2002).

⁴⁰ See, “Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders”, Council of the European Union, doc. 10701/02 (18/7/2002).

b) Extradition and the United States

The issue of judicial cooperation is also central to that part of the Action Plan which is designed to improve cooperation with the United States. On 20 September Justice and Home Affairs Ministers agreed in principle to propose to the US that an agreement be negotiated “in the field of penal cooperation on terrorism”⁴¹. This elicited a positive “in principle” response from the US Mission in Brussels the following day⁴². It was not long, however, before this terrorism specific focus was lost. Similarly it soon became clear that the discussions would extend beyond extradition to embrace improvements in mutual assistance in the investigation and prosecution of crime. At the informal JHA meeting in Santiago de Compostela in February 2002 the process was given the necessary political endorsement. This was followed by the adoption on 26 April of a negotiation mandate thus paving the way for the first round of negotiations which took place at the end of June. Since that time there have been a further five meetings with the United States. A report on progress was discussed at the JHA Council meeting on 28-29 November 2002 where Ministers were asked to provide guidance on outstanding issues⁴³.

Two points should be made about this as yet unfinalised initiative. First, negotiations by the EU with third states on such issues, while not entirely unprecedented, represent a major departure from the pre-existing tradition of individual action by Member States⁴⁴. All 15 have bilateral extradition treaties with US while 11 of 15 have mutual legal assistance agreements in place.

Second, the discussions have (understandably) taken place in the strictest of secrecy. Formal announcements as to the scope and ambition of the enterprise or progress achieved have been infrequent and uninformative⁴⁵. However, early in

⁴¹ *Supra.*, note 9, p.12.

⁴² See also, the Joint EU-US Ministerial Statement on Combating Terrorism of 20 September 2001 which identified “police and judicial co-operation, including extradition” as one of the areas in which they would “vigorously pursue co-operation ... in order to reduce vulnerabilities in our societies”.

⁴³ At the time of writing the possibility still existed that a draft agreement might be presented to the same forum for discussion at its 19-20 December 2002 meeting.

⁴⁴ The most obvious precedent is the recent mandate by the Council to the Presidency to negotiate the application of relevant parts of the 1996 EU Convention on extradition and the 2000 EU Convention on mutual assistance with Norway and Iceland. The stated legal basis for such an exercise is said to be Articles 24 and 38 TEU.

⁴⁵ The Press Release containing the conclusions of the Justice and Home Affairs Council meeting of 28-29 November 2002 is fairly typical. It reads, in full, as follows on this point: “The Council took note of the state of play of negotiations on the draft agreement between the European Union and the United States of America on judicial cooperation in criminal matters and extradition and agreed on the strategy that the Presidency will have to follow for the further conduct of the negotiations with the United States of America.” Doc. 14817/02 (Presse 375), p.15.

2002 a draft version of the negotiation mandate was placed on the website of “Statewatch”⁴⁶. This reveals that, in addition to what might be described as proposals for modernisation and best practice, a host of issues of difficulty and sensitivity were expected to be discussed. The US had, for example, raised both the narrowing of the political offence exception and the problems associated with the extradition of nationals. The EU was minded to raise, among other matters, guarantee and safeguard concerns in relation to such contentious issues as death penalty and life imprisonment cases, and the perceived need to maintain the protections afforded by the doctrine of speciality⁴⁷.

In December 2001 the European Parliament adopted a cautious resolution on the subject of these negotiations in which it requested that it be fully informed and consulted prior to the adoption of any agreement⁴⁸. It is to be hoped that this call will be satisfied in a meaningful manner should a text actually emerge from the current negotiations.

c) Police Cooperation

While the September 2001 Action Plan contains numerous initiatives to be taken in the sphere of police cooperation these are, in two important senses, somewhat less problematic than those discussed in relation to judicial matters. This is so, in part, because they are overwhelmingly focused on terrorist activity as such. Furthermore, and as noted at an earlier stage of this paper, terrorism was already part of the subject matter mandate of Europol. Consequently the natural emphasis was on enhancing its existing role in this area rather than having to conceptualise *de novo* about what that role should be. Indeed, in some respects it can be said that the September 11 attacks provided the necessary political impetus to address some concerns of long standing.

One such has been the perceived lack of appropriate levels of cooperation between police services (including Europol) and security and intelligence agencies⁴⁹. The Action Plan called for several steps to be taken to improve this

⁴⁶ <www.statewatch.org/news/2002/jul/11useuag.htm>. Statewatch is a UK based NGO.

⁴⁷ In a background paper issued by the Presidency Secretariat at the informal JHA Ministerial Meeting in Copenhagen on 13-14 September 2002 it is stated: “The Danish Presidency finds it essential that an agreement between the US and the EU adds value to the existing co-operation between the US and the Member States of the European Union, which is based on bilateral agreements. The Danish Presidency concentrates on the subjects contained in the negotiation mandate, including the new forms of legal assistance, which modern technology has made possible, such as exchange of information on bank accounts and video conferencing. Preliminary discussions with the US on some of the US priorities, such as extradition of own nationals, have been held and appropriate guarantees and safeguards have been addressed during these discussions.”

⁴⁸ “European Parliament resolution on EU judicial cooperation with the United States in combating terrorism” of 13/12/2001.

⁴⁹ See, eg., *supra.*, note 6, at pp 172-175.

situation in the terrorism sphere. For example, it urged Member States to “share with Europol, systematically and without delay, all useful data concerning terrorism”⁵⁰. On this matter the Director of Europol has made periodic reports to the JHA Council on progress and the decision has been reached to undertake an intensive mutual evaluation process to examine the effectiveness of information exchange both as between Member States and between Member States and Europol⁵¹.

The Council also decided to set up within Europol, on a “trial” basis a team of counter-terrorist specialists. Its tasks would include undertaking operational and strategic analysis of the current threat, and, drafting a threat assessment based on the information received from Member States⁵².

All 15 Member States have since sent specialist to form part of this Europol team which became operational in November 2001⁵³. At its meeting on 28-29 November 2002 the JHA Council endorsed a proposal from the Europol Management Board that this body should become part of the permanent structure of that institution with effect from January 2003⁵⁴.

Given the emphasis on enhanced cooperation and coordination many of these initiatives could be implemented within existing structures and mandates. In some areas, however, legislative action was required. This was the case, for example, with the perceived need to facilitate the establishment of joint investigation teams⁵⁵. This was the subject of a Council Framework Decision of 13 June 2002⁵⁶. However, this did not require - unlike the European arrest warrant - the formulation of a new and complex legal text under extreme pressure of time. EU policy had been elaborated in Article 13 of the 2000 Convention on mutual assistance which had not yet entered into force. The Framework Decision in essence permits the advance application of those provisions of the Convention which define the nature and scope of, and set out the limitations and conditions surrounding the creation of, such multi-national law enforcement teams⁵⁷.

The measures in the Action Plan designed to improve police cooperation with the US were not quite as straightforward. One of the central themes was to improve

⁵⁰ *Supra.*, note 1, p.2.

⁵¹ *Supra.*, note 5, p.27.

⁵² See, *supra.*, note 9, p.5.

⁵³ See, *supra.*, note 5, at pp. 31-32.

⁵⁴ See, *supra.*, note 45, at II. Further measures to reinforce the effectiveness of cooperation between Europol and the intelligence services were discussed by JHA Ministers on 28-29 November 2002.

⁵⁵ See, *supra.*, note 9, p.3.

⁵⁶ OJ L 162, 20.6.2002, p.1.

⁵⁷ The JHA Council of 28-29 November 2002 adopted a Protocol to the Europol Convention which, *inter alia*, regulates the participation of Europol officials in joint investigation teams. It also addresses the issue of requests made by Europol to initiate criminal investigations. See, *supra.*, note 45, at III.

and consolidate a framework of cooperation between Europol and the US. However, no formal agreement had yet been concluded between them. Consequently Ministers urged that the maximum opportunities afforded by the Convention should be taken to establish informal cooperation pending the expedited conclusion of such an agreement⁵⁸.

An interim agreement (excluding the transmission of personal data) was signed on 11 December 2001⁵⁹. Its purpose is to enhance cooperation in the prevention, detection and investigation of crimes within the subject matter mandate of Europol including, but not limited to, terrorism⁶⁰. These goals are to be achieved, in particular “through the exchange of strategic and technical information”⁶¹. It also provides for the exchange of Liaison Officers - an option since taken up by both parties⁶². This development has, in turn, assisted in meeting associated goals such as the establishment of close working relations between the Europol team of counter-terrorism specialists and their American counterparts.

In December 2001 the Council also authorised the Director of Europol to open negotiations for a further agreement which would include exchange of personal data and related information. Substantial progress is said to have been made and it is possible that this process will be concluded in the relatively near future⁶³.

IV CONCLUSION

The events of 11 September 2001 propelled, at least temporarily, the issue of counter-terrorism to the top of the political agenda within the EU. The Action Plan to which the destruction of the Twin Towers gave birth was both broad and complex. Implementation has gone forward with unparalleled speed. Several of its key components are now in place; others are still to fully emerge from the corridors of Brussels.

While a final appreciation must wait until the entire package is in the public domain some tentative conclusions can be drawn⁶⁴. First, there have been several developments of a highly positive nature. For instance long overdue steps have been taken to make a reality of Europol’s formal mandate in the counter-terrorism field. Furthermore Ministers have significantly reinforced the emphasis on both formal compliance with IIIrd Pillar measures and their

⁵⁸ See, *supra.*, note 9, at p.11.

⁵⁹ See “USA and Europol join forces in fighting terrorism”, Europol Press Release, 11/12/2001.

⁶⁰ See, Articles 1 and 3.

⁶¹ Article 1. These terms are defined in Article 2.

⁶² See, Article 8.

⁶³ See, eg, *supra.*, note 45, at p.19.

⁶⁴ See also, M. Anderson and J. Apap, *Striking a Balance Between Freedom, Security and Justice in an Enlarged European Union* (2002: Centre for European Policy Studies: Brussels).

effective implementation. Indeed, on 29 November 2002 they adopted a new peer review mechanism to carry out country specific evaluations in the anti-terrorist field and a small number of national experts have been seconded to the Council Secretariat to assist with this process⁶⁵.

Some of the other features of the post 9/11 reaction of the EU are of a somewhat more worrying character. That response (perhaps unsurprisingly) has many similarities with that demonstrated by national governments the world over. In August 2002 *The Economist*, in commenting at length on what it regarded as a miserable year for personal freedom, remarked: “Most countries have taken the opportunity of September 11th to tighten up in the name of security. Common to most of these efforts . . . is the long-standing nature of the desire behind them”⁶⁶.

As was noted at an earlier stage, this aspect of the post 9/11 EU agenda of change is highly evident in the judicial cooperation area⁶⁷. Developments in the same sphere also well illustrate another major (and closely related) element of commonality with purely national responses; that is, seizing the opportunity to give effect to policies which go well beyond (and on occasion arguably have little to do with) the need to combat terrorist activity more effectively⁶⁸. It must, however, be open to serious doubt whether such political opportunism constitutes an appropriate basis upon which to build key parts on an enduring area of freedom, security and justice.

In sum, the response of the EU to the outrage of 11 September 2001, has demonstrated the best of the IIIrd Pillar at work as well as a less flattering side. It is to be hoped that in its deliberations the European Convention pays due attention to the lessons to be learned from both.

⁶⁵ This takes the form of the “Council Decision establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism”. See, *supra*, note 45, at III. It is of interest to note that the final report of Working Group X of the European Convention (CONV 426/02) of 2 December 2002 lays particular stress on mutual evaluation or peer review systems in addressing the persistent problem of insufficient national implementation of IIIrd Pillar measures more generally. Indeed, it sees merit in an explicit mention of this technique in any new Treaty. See, pp. 20-21 of the report.

⁶⁶ “For whom the Liberty Bell tolls”, *The Economist* (London), 31/8/2002, p.19, at p.20.

⁶⁷ An important but frequently overlooked element in the conclusions of the Extraordinary European Council of 21 September 2001 was the specific instruction to the JHA Council “to implement as quickly as possible the entire package of measures decided on at the European Council meeting in Tampere”. *Supra.*, note 1, p.2.

⁶⁸ See, eg, the Anti-terrorism, Crime and Security Act 2001 enacted by the UK Parliament. The inclusion of non-terrorist related provisions (such as Part 12 on Bribery and Corruption) has resulted in it being oft described as a “Christmas tree” measure.