



‘The balance of the Spanish Presidency of 2002 with regard to Justice and Home Affairs of the European Union’

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DRAFT

Comments welcome!

CONFERENCE

The Spanish Presidency of the European Union

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Abstract

The 2002 Spanish Presidency of the European Council promised to be a routine follow up of the action plans and schedules agreed at the Tampere European Council on 1999 to achieve a European Area of Freedom, Security and Justice for 2004. Nevertheless the impact of September 11 went well beyond the Belgian Presidency and altered the Spanish agenda. This chapter describes the making and re-making of the agenda on justice and home affairs (JHA) and the foreseen and achieved objectives against the general background of police and judicial cooperation in the European Union. Internal security affairs are increasing their political and social weight within the common policies and institutions with the hope that the political objectives for 2004 may consolidate a future EU internal security policy at the core of common policies. That will be the task for the ongoing Convention Conference but this chapter shows how the JHA agenda of the Spanish Presidency did its best to accomplish the collective planning, to preserve European versus National interests and to promote the internal dimension of the foreign policy and external relations of the European Union.

Introduction

The assessment of any presidency of the Council of the European Union is always a complicated and subjective task because it is contingent upon the accounting criteria employed to be used: national or European interests, activities or results and technical or political outcomes. The Presidency of the Council is an exercise of complex decision-making where many different national, Community and intergovernmental actors intervene and that makes very difficult to identify the quota of responsibility in the final results of each of them. The scoring of results is also difficult because the working system is based on a continuous process and thus, many of the results recorded within a single Presidency may have been introduced, worked out and coordinated by different presidencies. Thus, the present assessment of the Spanish Presidency will be addressed to offer some further argumentation regarding the agenda and decision-making process, the comparison between its official objectives and the results achieved in four main areas of interest: freedom, security, justice and external relations, so that the reader may have a broader perspective to shape his own assessment.

Firstly, it seems mandatory to start by describing the programme and priorities of the Spanish Presidency, the circumstances and the decision-making involved in the determination of the JHA agenda, the interplay between domestic and European interests and actors, the bottom-up and top-down approaches to policy-planning, and the interaction of the JHA issues with the rest of the agenda, given the cross-cutting nature of some phenomena such as terrorism or illegal immigration with regard to Community, intergovernmental and national policies. A second part of the analysis will be devoted to comparing the objectives and results achieved in the field of common policies with regard to asylum, immigration and external borders. Due to the political impact of these issues in the electoral agendas, the European governments are willing to become more and more involved in the technicalities of the policies derived from the freedom of movement of people throughout the European Union. Police and judicial co-operation will be the next areas in which to compare the compromises and achievements of the Spanish Presidency arranged around the third pillar by Member States. The widening and deepening of the intergovernmental collaboration based on the third pillar by the Treaty of the European Union agreed in Amsterdam is a collective response to the international threats transgressing national borders and putting at risks the domestic security of Member States. The intergovernmental and Community actors must accomplish the agreed action plans in time to achieve a European Space of Freedom, security and justice for 2004, hence the need to evaluate the contribution of the Spanish presidency to the common aims. Finally, the results and expectations of the Spanish Presidency will be set against the evolving landscape of European internal security: the emergency of an internal security dimension in the external relations of the Community, its interaction with the foreign policy of the European (Pastore, 2001), the implications of a potential internal security policy, the transatlantic relations or, in other words, the interaction between pillars of the European Union¹.

¹ Documents cited in the text may be found at the web of the Council: <http://council.register.eu.int>.

The planning of the Spanish JHA agenda

The Spanish administration had already chaired community and intergovernmental cooperation on justice and home affairs during its former presidencies in 1989 and 1995 but this time the elaboration of the JHA agenda was much more complex for several reasons. Firstly, the internal security issues were no longer a secondary item in the common agenda but a 'high' policy of the European Union. After the entry into effect of the Amsterdam Treaty, and the establishment of the European Monetary Union, the next collective goal of the European Union is to achieve a space of freedom, security and justice for 2004 (Lobkowitz, 2002). Therefore, the foremost priority of the Council and the successive presidencies has been to accomplish the objectives and deadlines set by the Amsterdam Treaty and the Tampere European Council of 15 and 16 October 1999. The escalating relevance of internal security within the European Union (Monar 2001) coincided with the banner of the Spanish Presidency: 'more Europe' and with the increasing interest of European citizens in their internal security². Accordingly, the content of the Spanish agenda was mainly imposed by the existing compromises and the role expected for the Spanish Presidency was more technical, i.e., to oversee the implementation of the foreseen action plans than political, because its margin of autonomy to introduce 'original' initiatives was very narrow and the fear for failing after creating high expectations was too great.

Second, and due to above, the elaboration of the agenda was contingent upon the JHA working-system and its institutional inertia (den Boer, 2001) based on three different agents: national experts, transgovernmental officials and governments to interact within two areas of cooperation: justice and home affairs (three after the inclusion of civil protection). More than 30 different working groups gather experts from their national agencies and Community officials to negotiate under the chair of the representatives of the Member State holding the Presidency. This is the basic level at which the final results must be elaborated and thus its failure determines the failure of the whole Presidency, hence the importance of the technical input of the experts to the policy-planning of the JHA agenda. The second tier of decision-making is based in Brussels where national delegations and the Committee of Permanent Representatives (COREPER) supervise the status of the proposals to be presented to the JHA or European councils. These diplomats and officials supply first-hand information on the possibilities of compromise and opportunity on each aspect of the programme, which gives them significant influence in the agenda making. Finally, Ministers of Justice and Home Affairs and the Heads of States or Governments can either include their political priorities in the agenda or advance them by setting compromises or removing obstacles when the lower levels of cooperation exhaust their capacity of action.

The Spanish JHA agenda cannot be assessed outside of this structure of complex decision-making that diffuses the responsibility of advances, stagnations and retrocessions. Its policy-planning is the result of a twofold exercise, a bottom-up process based on the technical assessment of the experts of national ministers and agencies, and a top-down process that brings the political inputs and guidelines into the lower levels of decision making. This double system prevents two dangers: the political trend to introduce 'big issues' within the agenda regardless of their possibilities of being achieved (headlines approach), and the expert trend to proliferate the agenda with minor or corporative items that do not follow any global strategy (technicality approach). The Spanish Presidency discarded taking risky or unilateral initiatives

² According to the database of the Eurobarometer 56, Oct-Nov 2001, 80% of the European citizens are in favour of a EU decision-making in the fight against terrorism (85%), the trafficking of human beings, 53% on refugees, 51% in asylum and 49% in immigration policy (p. 52). The fear to a heavy immigration was the fourth concern in the ranking of the threats to the EU in the next the years (p. 55). At that time, Spanish public opinion considered terrorism as the first problem for Spain (71%) while the concern about drugs and insecurity (16%) was the third after unemployment (62%), according to the CIS survey of November 2001 (www.pre.es), and the Centro de Investigaciones Sociológicas registered in June 2001 a broad support (82%) for a common European policy on immigration.

and opted for a pragmatic programme that could be measured by the Commission scoreboard.³ This cautious approach prevented a gap between objectives and achievements and the spreading of the limited resources into unmanageable agendas.

The General Secretariat of the Ministry elaborated the first draft for the Spanish agenda in November 2000 for Home Affairs on request by the Ministry of Foreign Affairs. The design was based on the assessment that the Permanent Representation (REPER) in Brussels held on the status of each JHA measure under consideration (Reper files). The initial list of proposals gathered those measures with a special priority for advancing towards the European area of freedom, security and justice and included the status of legal residents, the minimum common standards for asylum seekers and refugees, the replacement of the Dublin convention, the exchange of best practices in community policing or the implementation of the European Strategy on Drugs 2000-2004. It also included some collective initiatives that matched Spanish priorities such as the setting up of joint investigation teams, the negotiation of immigration agreements with Morocco, and some new initiatives to promote the co-operation among the Institutes of Police Studies, the operational aspects of the Task Force of Chief of Police, the commonality of criminal statistics and data base or the participation of police contingents within the framework of civilian crisis management.

The Spanish JHA agenda was also contingent upon the working of the previous presidencies and the European Commission. In so much the objectives of the Spanish Presidency matched those of the Community system, the Spanish Presidency received the support of the Commission and the European Parliament. It also coordinated its planning with Sweden and Belgium with regard to JHA issues and with Belgium and Denmark with respect to the internal dimension of the external relations and foreign policy of the European Union, through the so-called multipresidency programmes. After the Swedish priority for asylum and environmental policies, the Belgian Presidency boosted common policies for asylum and immigration, the strengthening of police and judicial cooperation and the development of a JHA dimension of EU's external relations and foreign policy. The Spanish policy-planners adopted the same structure and began to shape it by default according to the results of the previous presidencies and gave priority both to the common policy of asylum and immigration and to the combat against organized crime (Pastor, 2001).

With regard to asylum, immigration and external borders, the planners now included a ministerial meeting Europe-Asia (ASEM) on immigration, the study of action plans on immigration to be negotiated with Morocco -a Spanish priority- and China, origin of the half of illegal immigration towards Europe. The agenda also included the discussion of the proposals of the Commission on legal residents, asylum seekers and readmission agreements. The prevention of drug trafficking and consumption was added to the list of police activities and the European Arrest Warrant and Procedures (euro-warrant, euroorden) became the highest priority for the Spanish Presidency in the field of judicial cooperation. Finally, the Euro Mediterranean and Transatlantic dialogues emerged as candidates in the chapter of external relations of the agenda as well as the development of the civilian aspect of crisis for the security policy. The above-mentioned draft was polished during the Belgian Presidency in order to introduce new objectives such as the setting up of an Institute of Police Studies (5133/02), the establishment of a network of correspondents with the private security sector, the evaluation and assistance to the candidate countries for the enlargement of the European Union and the cooperation with Latin-American countries on drugs.

At this stage of the planning-process, an external and unforeseen factor altered the outline of the agenda. The events of September 11 had a significant impact in the agenda of the Belgian and Spanish presidencies. Spain, for obvious reasons, had always requested the attention and

³ The Commission at regular intervals through a biannual update of the 'scoreboard' is monitoring the progress towards the AFSJ. For its last update in the middle of the Spanish Presidency, see doc. 9704/02 of 6.6.2002.

solidarity of the EU Member States in order to 'Europeanise' its fight against terrorism⁴, the same rationale that gave origin to the setting up of the informal system of police cooperation (the TREVI group) in the seventies when the terrorist threat put at risk several European States, and the same concern that turned internal security problems on asylum, paedophilia or migration into driving factors for the EU judicial and police cooperation in the nineties (Monar 2001). However, this desire stagnated because terrorism was still considered by most of the Fifteen as one among many other transnational risks such as organized crime or drug trafficking and thus it received no particular treatment despite the permanent appeal of the affected Member States. Until 9/11, Spain had few expectations regarding a multilateral advance in anti-terrorist measures or its consolidation in the context of a European area of freedom, security and justice, hence its engagement in a bilateral way to unblock the multilateral way in the long term⁵.

The events of September 11 changed this perception dramatically and terrorism was now perceived as the main threat for international security. The shift reinforced the Spanish position of denying any distinction between domestic and international terrorism and rejecting the excuse of 'political offences' or 'suspect democracies' for not judging terrorists from Member States. After years of slow progress, the mobilization of the JHA working-system in the aftermath of 9/11 was able in a few days to set up a new Action Plan against terrorism that included most of the anti-terrorist proposals that Spain had already on its JHA interim agenda.⁶ The 'new sensibility' of the Fifteen (de Miguel, 2002) transformed the Spanish priority into the 'priority of the priorities' of the European Union and Spain was now tasked by the Fifteen to lead the European reaction against terrorism, what gave the Spanish Government clear dividends in the anti-terrorist field both at domestic and international levels,⁷ but without putting at risk the European character of its agenda.

The terrorist attacks of September 11 altered the existing plans that were then reviewed to suppress, modify or add the previous objectives in order to adjust the agenda to the new circumstances. The fight against terrorism became the first of the six main priorities of the Presidency work programme and the first of the five basic priorities of the JHA programme⁸.

⁴ The Spanish initiative, when President Aznar proposed in Pörschach (October 1998) to convoke an *ad hoc* Council on EU internal security (Támpere, October 1999) was backed in a joint proposal by Prime Minister Blair (Barbé, 2001) and transformed the intergovernmental cooperation into a 'political objective' (Lobkowitz, 2002).

⁵ To show just one among many examples of its asymmetric perception, terrorism was not included in the penal legislation of Austria, Belgium, Denmark, Finland, Greece, Luxemburg, the Netherlands and Sweden and some European countries were reluctant to extradite Spanish terrorists declaring constitutional reserves to its procedures. Thus Spain resorted to bilateral agreements with Italy, France, Belgium and the United Kingdom (3.21.2002) to speed up the procedure of delivery in the case of grave offences.

⁶ The extraordinary European Council of 21 September 2001 asked the JHA ministers to devise an action plan that was discussed during the meetings of the days 20, 27 and 28 of the same month and presented (12800/01) to the General Affairs Council in order to be coordinated with other policies of the Union.

⁷ The paramount example would be the offer made by President Bush during the US-EU Summit for antiterrorist cooperation to his 'friend of Spain, Jose María Aznar' and the statement on its availability to support the combat against the vasque terrorism: 'Jose Maria knows that he will always find me at the phone', El País (3 May 2002) 6.

⁸ President Aznar stated that priority before the Spanish Congress (10 December 2001) when explained the programme of his Presidency. See the web: www.ue2002.es. For the priorities in the JHA field, see

Last minute changes caused the logical confusion within the planning system because the anticipation of the approval of the basic Spanish priorities by the Belgian Presidency⁹ created a vacuum and focused the agenda on the implementation versus the approval of new anti-terrorist instruments. The Spanish Presidency also had to restructure its planning when the informal Ghent European Council on 19 October 2001 instructed the General Affairs Council to assume the role of coordinating and giving impetus to the implementation of the anti-terrorist measures included in the Action Plan agreed at the extraordinary European Council on 21 September in several different fields besides the JHA sphere. According to this multi-faceted approach, the Spanish Presidency divided the anti-terrorist task among the different formations of the Council: General Affairs, Ecofin, joint JHA/Ecofin, Transport/Telecommunications and Defence. The escalation of terrorism to the top of EU priorities also forced Spanish planners to modify their strategy of marketing in order to emphasize the anti-terrorist dimension of each objective. In this way, many of the previous objectives foreseen for the JHA agenda were now presented as *ad hoc* measures to combat terrorism and the former rationale of promoting judicial and police cooperation was justified now by its linkage with terrorism instead of the traditional goal of achieving a European space of freedom, security and justice for 2004.¹⁰

Once the global agenda of the Spanish Presidency was arranged the JHA agenda was addressed to attaining the objectives set by the Tampere and Laeken European Councils, achieving the European area of freedom security and justice, the development of the JHA dimension of the external relations and, of course, to the implementation of the European Action Plan against Terrorism agreed at the extraordinary JHA and European extraordinary councils of 20 and 21 September, respectively. All these previous compromises left little margin for the introduction of new initiatives. Therefore, the JHA agenda was marked by the terrorist priorities, in the sense that most of the previously agreed measures were focused on the fight against terrorism, but not limited to it. Terrorism was on an equal footing with four other priorities dealing with immigration, drugs, civil protection and external relations and the number of anti-terrorist initiatives introduced by the Spanish Presidency was very limited while most of the objectives belonged to the broader field of the judicial and police co-operation thought, as it has been explained before, they were grouped and justified under the terrorist orientation of the agenda.

The JHA agenda maintained its compromises for the implementation of the objectives and deadlines set by the Amsterdam Treaty and the Tampere Council for police cooperation but it also made room for new compromises stemming from action plans agreed at the extraordinary European Council of 21 September and the informal Ghent European Council of 19 October. The Belgian and the Spanish presidencies converted the need/mandate to fight against terrorism into the virtue of speeding up the progress towards the European area of freedom, security and justice by taking advantage of the more favourable circumstances.

2. The JHA agenda contribution to the European area of freedom

Within the wide range of fields included in the desired European space of freedom, immigration seemed the ideal field for the leadership of the Spanish Presidency. The final goal of advancing towards a common policy of immigration and asylum enjoyed broad political support thanks to the good momentum gained under the guidance of the Commission and the proposals of the working groups were mature enough for the final political decisions to be taken. However, this

the reports to the Council (5610/02) of 23 January 2002 and to the European Parliament Committee for Public Liberties (1101/02) of 4 February 2002.

⁹ The JHA Council on 6 and 7 December 2001 under the Belgium Presidency arranged political agreements on the European Arrest Warrant and Procedures (Italy would join later), the common definition of terrorism, the list of terrorist organizations and the creation of Eurojust, what left the foreseen Spanish agenda without major questions to be scored?

¹⁰ For instance, the setting up of Eurojust cannot be justified exclusively on the grounds of its anti-terrorist role due to the fact that it extends its jurisdiction over a greater number of matters: drug trafficking, money laundering, cybercrime, among many others.

strategy became entangled when immigration issues became the centre of national electoral campaigns in France and The Netherlands and generated sound political and social debates. The concern for the impact of illegal immigration in the citizen's security (Aznar, 2002) complicated the image of the Spanish Presidency when the external debate jumped into the final straight towards the Seville European Council and Spain was internally and externally criticized (Ortega, 2002) for championing the 'fortress Europe' sector of European governments.

The Spanish ministers, Rajoy and Acebes, confirmed this 'favourable' mood among their European colleagues for progressing towards a common visa policy, a visa databank, joint consular offices, readmission agreements, a common policy on the expulsion of illegal immigrants and the reinforcement of the external borders after the preliminary survey sustained at the informal JHA meeting in Santiago de Compostela on 14 February. The JHA ministers backed a comprehensive plan of the European Commission for the fight against illegal immigration and trafficking in human beings at the Council of 27 and 28 February 2002. The plan included most of the basic elements for the future EU common policy and the Spanish Presidency began to coordinate its implementation. The JHA Council on 13 June 2002 took note of the Presidency's work and agreed some measures (9027/02 and 10017/02) to prevent and combat illegal immigration and trafficking in human beings by sea, including some measures against third countries which refused to cooperate with the Union.

At the time of preparing the closing Council of Seville, immigration appeared to be a chapter ready for scoring positive results: the technical drafts were almost completed, there was a broad consensus about its political opportunity and the absence of formal decisions was encouraging unilateral measures in Italy, Denmark and the United Kingdom. Therefore the Spanish Presidency forced the locomotive to bridge the final agreement but the last round of visits to capitals clashed with the social and political division throughout Europe and Spain (Ortega, 2001). The strong reaction caused the rest of the agenda to be overlooked and the success of the Spanish Presidency seemed to depend on the single card of immigration.¹¹ The controversial question was about the criteria to be included in the cooperation agreements with countries of origin and transit of illegal immigrants in order to guarantee their active collaboration and highlight the need to frame the conditions of such agreements within the broader scope of their bilateral relations with the European Union¹². There was a wide consensus on the need to seek the collaboration of all the countries of origin and transit of immigration with the Fifteen with a view to the joint management of border control and readmission to be stimulated with the proper assistance programs¹³ but there were strong differences with regard to the coactive measures to be applied to those countries reluctant to cooperate. The Spanish Presidency opted for the tougher approach and proposed conditioning cooperation agreements with third countries to their active cooperation in the control of immigration. The proposal (9917/02) found clear support from the British and Italian Prime Ministers and the acceptance of other Member States but others explicitly rejected such "conditionality" and the divergences became evident during the General Affairs Council on 17 June when some delegations, led by Sweden, France and Portugal, presented reservations to two particular proposals of the Presidency regarding the cancellation of EU credits, or even the entire cooperation agreement, to those countries unwilling to cooperate with the EU immigration

¹¹ El País, 'Aznar apuesta por la seguridad como la imagen de marca de su estrategia europea' (21 June 2002)

¹² The European Commission presented on 10 April a green paper to start the debate on the creation of a Community return policy (forced or voluntary) for illegal residents of third countries as part of a comprehensive community immigration and asylum policy, while the Council presented some criteria (7990/02 of 4.16.2002) to guide the readmission agreements being negotiated with Morocco, Macao, Russia, Pakistan, Sri Lanka and Ukraine, or to be negotiated in the future with Albania, Algeria, Turkey and China.

¹³ Council decision (8406/02) on the ARGO programme for cooperation in the field of external borders, asylum and immigration of 25 million euro for the 2002-2007 period.

policy. Once in Seville, the Spanish Presidency chaired an agreement on the general criteria to be applied for readmission clauses with third countries that neither punished the lack of cooperation with an automatic regime of sanctions nor excluded the sanctions after a systemic assessment of the non-compliance clause, to be decided by unanimity and without putting at risk the final objective of development.

On the negative side of the immigration balance, the Spanish Presidency could neither achieve the foreseen agreement with Morocco nor the compromise of the Euro-Mediterranean partners to hold a ministerial conference on migration and social integration of immigrants along the second half of 2003. The holding of the EU Presidency did not give Spain a leverage tool to unblock the bilateral confrontation with Morocco and counterbalance the Moroccan manipulation of immigration and drug trafficking to Spain as an instrument of bilateral pressure. The new clause on management of migratory flows and compulsory readmission to be included in any future EU-Morocco cooperation agreement will have no immediate impact in the bilateral –bad-relationship and not even in the long term if the Fifteen do not reconcile their divergences with regard to the ‘conditionality’ of the external aid in the case of unjustified lack of cooperation.

Regarding asylum and refuge compromises, the Spanish Presidency assumed the objective of determining the Member State responsible for the examination of asylum demands. The positions of the Member States were divided with respect to the approval of the Commission project COM(2001)247 to bring the Dublin Convention into the Community framework. The Spanish Presidency circulated a questionnaire (9563/1/02) on 7 June to overcome the divergences and presented a proposal for regulation that will be approved as Dublin II Regulation by December 2002 according to the decision of the Council of Seville (conclusion 37). It also accomplished the mandate of the Laeken European Council to achieve a general agreement on the draft directive (9098/02) of 17 June for laying down the common standards asylum procedures that should be revised and approved before the end of 2003 as stated by the European Council of Seville (conclusion 37). The same conclusion fixed June 2003 as the deadline for the settlement of minimum requirements for obtaining refugee status, provisions of family reunification and the status of long-term legal residents to be approved by June 2003. The Spanish Presidency was less lucky with respect to its proposal on the fair treatment to nationals of third countries. It expected to approve a proposal of directive to regulate the status of legal long standing residents of third countries but only could approve a regulation (7989/02) for uniform format for residence permits based on the proposal of the Commission COM(2001)127 because of the serious divergences and sensibilities regarding the integration of third country nationals in the Member States.

During their informal meeting in Santiago de Compostela on 14 February the JHA ministers agreed a common model of visa that was formally approved at the following Council on 18 February and they reached a political agreement on a common visa policy at the Council on 25 and 26 April. The Spanish Presidency also essayed to develop a visa database and a common system of visa data in order to advance the unification and security of the future EU visas. Nevertheless it only had time for processing the questionnaire on the databank (6645/02), devising the guidelines for a system of data exchange (9243/02) and presenting its conclusions (9615/02) to the Seville European Council. Finally, the Spanish Presidency had to postpone the review of the list of third countries to which nationals will be required visas, the delay relieved the Spanish Presidency of the responsibility of including new Latin American countries in the list despite its readiness to do so if necessary.

With respect to initiatives on refugees, the General Secretary of the Council sent the project (6256/02) on February 13 to develop the ‘Eurodac’ regulation (CE)2775/2000 with the footnotes of the delegations so that it could be modified (6328/02) and presented to the JHA Council of Santiago de Compostela. The regulation of the status of refugees was a compromise of the European Commission, therefore the Spanish Presidency only passed a proposal of directive (10279/02) on minimum rules and procedures to be applied by Member States in order to give or suppress the status of refugee. The Seville European Council urged the JHA ministers to adopt by the end of 2002 the minimum standards for qualification and status of refugees, the provision on family reunification and the status of long-term permanent residents (conclusion 37).

The consolidation of an area of freedom, security and justice will not be possible unless the Member States be able to coordinate and strengthen external borders, hence the mandate of the European Council of Laeken to define the proper mechanisms. Control on the external borders has been a traditional concern for the European Union since the establishment of the single market, the disappearance of the borders and the integration of the Schengen *acquis* into the Community system. It being a basic responsibility of the first pillar, the Spanish Presidency helped to promote and harmonize the Schengen *acquis* by drawing and delivering a common manual with the best practices (5018/02) on border control, expulsion and readmission to the candidate countries. The Spanish Presidency also coordinated several multinational police operations to assess illegal immigration risks at the airports (risk immigration operation, RIO I y RIO II) as well as the illegal trafficking of immigrants in containers (Pegasus).

The JHA ministers scheduled in Santiago de Compostela a joint meeting with the candidate countries in Rome to discuss the results of an Italian plan for reinforcing the control of the borders, a question that was further debated at the JHA Council on 28 February. The European Commission also contributed to this aim and presented a communication (9139/02) that emphasized the lack of coordination and the need for an integrated management of external borders¹⁴ that was accepted by the JHA Council on 14 June for discussion (10019/02) and passed on to the European Council of Seville. The Heads of State and Governments called for the implementation of joint operations at external borders, pilot projects and a network of immigration liaison officers before the end of 2002; as well as for a joint assessment risk model, a common core curriculum for border guard training and a study of burden-sharing between Member states before June 2003 (conclusion 32).

2. The European security space, the space for police cooperation

Within the JHA agenda the first priority for police cooperation the implementation of the Action Plan against the terrorism¹⁵. The 9/11 helped to removed most of the obstacles to the advance of those pending measures that included any linkage with the terrorism such as the Euro-warrant, the definition on the terrorism, the fight against the financing of terrorist networks or the approval of Eurojust. The implementation of the anti-terrorist Action Plan introduced some new anti-terrorist measures into the planning priorities such as the creation of an anti-terrorist group within Europol, the development of the anti-terrorist role of this organization, the elaboration of a terrorist threat assessment and the opening of a nuclear, bacteriological, chemical and radiological dimensions of the civil protection. As a particular initiative, it launched a draft recommendation (5715/02) for the establishment of multinational *ad hoc* teams for gathering and exchanging information on terrorists –different from the joint investigation teams foreseen in the article 13 of the European Convention on Mutual Assistance Matters and in the measure 43 of the Tampere scoreboard for investigating cross-border crime that was agreed (14242/01) during the Belgian Presidency and based on a joint proposal of the United Kingdom, Spain, Belgium and France (11990/01)- to exchange information and carry out anti-terrorist operations among national specialists and Europol officers when necessary.

Another compromise for the Spanish Presidency was the drafting of several reports on terrorism. The study was a measure of great relevance for the strategic development of an internal security policy because it combined the autonomy of the European perception together with common criteria and indicators to compare its evolution at a European level.¹⁶ Other

¹⁴ The European Commission suggested in his communication COM(2002)233 the creation of an integrated management system of external borders to guaranty the uniform application of the European legislation and procedures, as well as to complement and coordinate the current national capabilities with new elements such as liaison officers, a European border police or border guards college.

¹⁵ For the evolution of this Action Plan under the Spanish Presidency, see the updating reports: 5600/1/02, 6811/02, 7686/02 and 8547/02.

¹⁶ The available documents (10564/2/01 and 14574/01) reflect the procedure of elaboration of the report but the strategic document approved by the JHA Council of 13 June is classified and open sources only draw some basic guidelines regarding the ‘high’ risk of Islamic attacks in the United Kingdom, Spain and

reports were accomplished during the Spanish Presidency and presented to the JHA councils on 25 and 26 April, with respect to the risk evaluation at European airports, and on 13 June, regarding the security measures taken since 11 September and the updating of the list of terrorist groups¹⁷. On the contrary, the Spanish Presidency was unable to push ahead its proposal for a standard form on the exchange of information on incidents caused by violent groups linked to terrorism. The initiative was linked to the European concern about the violent incidents at the previous summits and, of course, by the Spanish concern on the connection between terrorist movements and violent radical groups. The Spanish Presidency was incapable to transmit its conviction about such linkage to the rest of Member States which were more concerned about the possibility of the form being extended to include anti-globalization movements or alternative non-violent groups¹⁸.

The Spanish Presidency presented on 12 January a special programme (15519/2/01) in the field of drugs that was framed in the EU Drugs Strategy (2000-2004) and its Action Plan. The JHA agenda gave priority to the prevention of drug addiction in school curricula and obtained a joint resolution (5099/3/02) with no binding effect. It also backed the recommendation (7234/02) to enhance the cooperation of specialised units in combating the trafficking of precursors, a draft resolution (5095/02) to prevent the recreational use of drugs for young people, a recommendation (5264/02) of protocol for taking samples of drugs seized, joint declarations of full member and candidate countries (6311/02) and other initiatives to combat drug trafficking (5563/02) in general and cannabis (7657/02) in particular.

The Spanish backing for Europol obtained some mixed results. In their meeting on 28 February the JHA ministers unblocked the starting up of the European Police College (Cepol) on the base of an interim proposal (6605/02) brokered by the Presidency to recognize Cepol as a legal body and to locate its main office in Denmark on temporary bases. The Spanish Presidency failed in reviewing its Convention to give Europol access to the information systems of Schengen (SIS) and customs (CIS) but it was more successful in achieving its participation in the joint investigative teams after several attempts during the JHA councils of Santiago de Compostela on February 13 and April 25 (6791/02 and 8298/02) as well as in the approval of an additional 3.1 million euro fund for Europol's budget in 2002. Finally, the Spanish Presidency was not successful in creating a European Institute of Police Studies because it found Member States increasingly reluctant to create new institutions and met with the opposition of the European Commission and Parliament to enlarge the third pillar at the expense of the first one¹⁹. The same poor results were achieved in its compromise to advance a network of governmental contacts among responsables for the private security sector, where it only could get a recommendation (9770/02) to encourage and facilitate cooperation, and in the drafting of a common manual of best practices on the community policing due to few contributions received.

Regarding the field of civil protection, the Spanish Presidency had the compromise of starting up the Community Mechanism approved by the Ghent Council on 23 October 2001, in close connection with the Community mechanism for civilian crisis management. The joint Work Programme and the draft resolution of the Council (7551/02) was discussed and reviewed during the Presidency in order to include the nuclear and radiological risks by the experts but the final decision on the Community Mechanism was postponed to the Copenhagen European Council on 12 and 13 December 2002. Neither could the Presidency progress towards the

France. El País, "Un informe secreto de la UE considera alto el riesgo de un ataque terrorista islámico", 20 June 2002, p. 3.

¹⁷ The list of terrorist organizations and persons linked to terrorist activities was first adopted on 27 December 2001 and updated on 2 May 2002.

¹⁸ Article 36 Committee reached an agreement (5712/6/02) to be passed to the Coreper on 29 June 2002.

¹⁹ To give an example, the Commission opposed the initiative of establishing an observatory for cyber-crime under the umbrella of Europol on the ground that protecting electronic communication networks falls under the responsibility of the first pillar and thus it presented its own report (8556/02) on June 6.

creation of a European agency agreed in Tampere (conclusion 17) because it was postponed by the Coreper until it could define the content of the action programme that the agency should coordinate under the Ghent and Laeken European Council guidelines (5824/02). Nevertheless, it was more successful in drawing the attention of the Council for giving special civil protection assistance to outermost and isolated areas (9373/02), a proposal based on the national concern for the location of the Canary Islands, and in advancing two proposals of resolution for the protection of the population against chemical and bacteriological attacks, these being enlarged later in June to include nuclear and threats.

Finally, the JHA agenda contained some measures to improve EU crime prevention policies regarding the impulse of the situation report (9192/02) on organized crime at a European level with the help of the Contact and Support Network and Europol, the presentation to the Council of the conclusions (8591/02) of the first Annual Report on crime prevention elaborated by the European Crime Prevention Network (EUCPN) and the preliminary studies for the creation of a network for the protection of public figures. Also in the preventive field, the Spanish Presidency completed the work of the Belgian Presidency to set-up national centres for the exchange of information on violence at football matches and other international sports events and presented a final proposal of decision (8131/02) to be approved at the JHA Council of 13 April.

3 The European judicial space: from principles to operativeness

The advance in the field of judicial cooperation in civil and criminal matters was much more difficult in this area than in other fields due to the fact that the different European judicial cultures feed distrust and ignorance among judicial agents and cooperation procedures. Under these circumstances, the harmonization of laws and jurisdictional regulations became a tough and slow process of confidence building. The reluctance to import foreign regulations is also reflected in the difficulties for transforming political decisions taken at the councils into national legislation, which maintains the 'soft' nature of most of the judicial decisions of the councils with no significant effect on the daily life of the citizens²⁰.

Under the impact of the 9/11 some of these structural obstacles to the progress of judicial cooperation began to disappear during the Belgian and Spanish presidencies. Among the new instruments for judicial cooperation, the Spanish Presidency pushed through the formal approval of a framework decision (6128/02) to approximate European definitions of terrorism offences, penalties and sanctions. It also concluded the work for another framework decision (7253/02) on the European arrest warrant and surrender procedures to abolish extradition procedures between Member States for 32 grave offences punishable by custodial judgements or a detention order for a maximum period of at least three years. The Spanish Presidency had a particular interest in bringing into effect this framework decision due to the inclusion of terrorism among the 32 offences and lobbied the ministers of Justice during the informal meeting in Santiago de Compostela in order to advance its implementation from the foreseen date of December 2003 to the first quarter of the same year, a result achieved for a group of seven Member States, including the United Kingdom, Germany, France, Portugal, Belgium and Luxembourg, together with Spain. The merit of this decision framework for the Spanish Presidency, apart from its potential anti-terrorist application in Spain, is that it represents the first concrete measure in the field of criminal law to implement the principle of mutual recognition without verification of the double criminality of the act, considered by the European Council as the 'cornerstone' of judicial cooperation, and the beginning of the European judicial space.

The Spanish Presidency continued the work of previous presidencies that had paved the way for Eurojust to become operational in 2002 and prepared its formal approval, finally agreed on 6 March, as well as its internal regulation so that it could become operational, but the Spanish

²⁰ The Pro Eurojust report of December 2001 enumerated Pro Eurojust was an interim office designed to prepare entry into effort of Eurojust. Its first annual report (15545/01) showed the main obstacles to judicial cooperation: distrust among judicial actors and cultures, different legal systems, unequal prosecutorial powers, reluctance to share intelligence, unwillingness to extradite nationals.

Presidency only could accomplish its objective in the last JHA Council.²¹ Another pending objective of the JHA agenda was pushing forward the work of the framework decision for the preventive freezing of assets and evidence so that within 24 hours of a Judge's order, they can be frozen without applying the double criminality requirement. The freezing, when definitively approved, will be applied –though only as a precautionary measure- to most of the transnational offences including terrorism, participation in criminal organisation, trafficking in drugs and human beings among the other 24 offences. After several attempts, the Spanish Presidency brokered a common understanding in the JHA Council on 28 February by proposing a transnational text to overcome the reserves of some Member States that was drafted (6552/02) and sent to the European Parliament.

The Spanish Presidency continued the legislative task of approaching national legislations regarding critical offences affecting European judicial and police cooperation, a shared goal that was defined into common criteria in the JHA Council on 25 and 25 April. On the one hand, it presented several proposals of framework decision on the offence of drug trafficking, which met the opposition of some Member States.²² On the other hand, it elaborated a project of framework decision to punish the trafficking of human being to be sexually or labourally exploited (9576/02) that progressed quite smoothly, but not in time to be approved by the Seville European Council though it instructed the JHA ministers to approve at their first meeting under the Danish Presidency.

Another significant initiative for the European judicial space after the 9/11 is that for the first time in its history, the EU Council instructed the JHA ministers to open the negotiation for a bilateral US-EU agreement on legal matters, a precedent that opened the way for a second request from Canada in the same direction during the Spanish Presidency. The Action Plan foresaw the opening of a judicial channel of cooperation with the United States, and the president Bush, made a request in a letter on 15 October to the President of the European Commission, Romano Prodi, to suppress any discrimination regarding extradition demands coming from the United States or third countries with respect to the opportunities that the European arrest warrant under discussion was opening for the European judicial space. Such a demand was difficult to be accepted because the responsibility for the extradition of nationals to third countries is still a national versus Community responsibility, due to the lack of any precedent of bilateral agreement between the EU and third parties and, above all, because of the serious divergences on the judicial and constitutional standards on both sides of the Atlantic regarding the death penalty, human rights or data protection²³.

After a technical discussion on 11 January that made quite evident the divergences regarding the American request of extradition, the Spanish Presidency put the request on the table for its discussion two days later during the informal meeting of Santiago de Compostela. The debate opened the way to a ministerial agreement in April on the basic terms of the agreement to be negotiated (6438/02) including the judicial aspects of cooperation and not only the extradition

²¹ The decision project of the Council (11685/6/01) establishing Eurojust to replace the interim body Pro-Eurojust was due to the Belgium Presidency (11.19.2001), but the final decision (5358/02) was adopted during the JHA Council on 6 March and its internal regulation (9499/02) was agreed during the JHA Council on 13 and June 2002.

²² The final proposal (9718/02) was refined after several drafts (6056/02, 6249/02, 7269/02, 7270/02, 8862/1/02 and 9522/02) but it maintained the reservations for study from the Netherlands, Finland and Austria, as well as the parliamentary reservations from Ireland, Denmark, Sweden and The Netherlands.

²³ The request was part of a package of fourteen different measures and met the opposition of the European Parliament due to existence of the death penalty in the United States and the lack of a general framework for judicial cooperation that could guarantee the respect of the European Convention on Human Rights. *Le Monde*, 'Le Parlement européen s'oppose à une coopération judiciaire renforcée avec les Etats-Unis', 14 December 2001.

ones as United States had requested, with respect for the constraints of the legal systems and constitutions of the EU Member States, and in compliance with those countries' procedural guarantees and their bilateral agreements.

The Spanish Presidency pushed forward another common objectives for the achievement of the European judicial space. A common aim of the EU Member States was to implement the principle of mutual recognition of judicial decisions both in penal and civil matters envisaged in conclusion 37 of the Tampere European Council. The Spanish Presidency announced its determination to initiate the work on the European enforcement order to permit the recognition of judicial decisions, by doing away with the declarative phase (*exequatur*) of the order for enforcement, and permit direct execution of judgments issued by a court in another Member State. It also began to extend the regulation on jurisdiction and the recognition and enforcement of judgments to matters of parental responsibility and visiting rights by boosting the draft regulations under discussion, chaired a Council regulation (5201/1/02) establishing a Community framework of activities to facilitate the implementation of judicial cooperation in civil matters, and helped to draft the council conclusions (7266/02) regarding the approximation of penalties. Finally, the Spanish Presidency contributed to combat the crimes of racism and xenophobia by presenting its conclusions (8136/02) on the Commission proposal to the JHA Council on 25 and 26 April and by elaborating the annual report on the fight against racism and xenophobia according to article 30 of the EU Treaty.

4. The widening of the JHA dimension of the external relations and foreign policy of the European Union

Another priority of the JHA agenda was to accomplish its compromises in the field of external relations. The European Councils of Tampere and Feira had given an external dimension to justice and home affairs by integrating their concerns in the definition of other EU policies and by coordinating it with the external relations of the first pillar. Under the rationale of integrating police and judicial cooperation into the more comprehensive framework of the external relations and foreign policy of the European Union, the external dimension of the internal security is being coordinated by the different presidencies and action plans of the European Union. The multipresidency programme (5004/02) planned by the ministry of Foreign Affairs included some JHA aspects regarding the enlargement of the European Union, common strategies regarding Russia, Ukraine, the Mediterranean and the Balkans, some dealing with horizontal questions about immigration, organized crime and crisis management, political dialogue with particular partners of the Union, and relations with third international organizations²⁴. The same transnational logic that made EU Member States cooperate among themselves also helps to explain the increasing cooperation of the Fifteen with third countries or regions with regard to illegal immigration, organised crime, money laundering, trafficking in human beings, drugs and stolen vehicles, *inter alia*. Nevertheless, this necessity became especially evident after the 9/11 due to the proliferation of agreements and contacts with third countries in the field of terrorism.

With regard to the forthcoming enlargement of the European Union, the Spanish Presidency initiated some technical assistance programmes to assist central and eastern European candidates to adjust their internal security structures and procedures to EU standards. Spain also chaired the working party on Enlargement to close chapter 24 with all candidate countries except Poland, Romania and Bulgaria, the working party on Collective Evaluation to finish the second revision of the reports on Romania and Bulgaria, and the elaboration of the scoreboards to monitorize the improvement of the candidates in the JHA fields.

Police and judicial cooperation has been also included on the agenda of political dialogue with Russia, Ukraine, the Mediterranean countries and Asia. The JHA dimension of the EU's common strategy for Russia of 1999 included an action plan to fight against organized crime, illegal trafficking and law enforcement. The JHA ministers met the Russian counterparts at the

²⁴ The register of the Council offers the full text of the general background to the Multipresidency programmes (7635/00), the initial programme of the Spanish Presidency (5004/02) and its memorandum on the EU's external relations in the JHA field at the end of the rotation (10835/02).

margin of its Council in Luxembourg on 25 April to discuss the status of judicial and police cooperation, explore the creation of points of contact and search a solution to the issue of the visas for Kaliningrad inhabitants.

In the case of Ukraine, the Action Plan in the JHA field was adopted in November 2001 and the Spanish Presidency had to initiate the implementation of cooperation provided on immigration, asylum, control of borders, visas, judicial and police cooperation and the strengthening of justice and rule of law. The Balkans are a laboratory for the internationalisation of the JHA dimension and to experiment with the new security mechanisms of the European security to promote stability in the region. The decision of the Barcelona European Council (6296/02) to offer a EU Police Mission in Bosnia and Herzegovina to take over the current UN operation as from 1 January 2003, including an important contingent of Spanish Guardia Civil and National Police Corps forces, to replace the UN International Police Task Force in Bosnia-Herzegovina represented an opportunity to evaluate the effectiveness of the existing tools in the field of the civil management of crises. Judicial cooperation was also discussed with Norway and Iceland regarding their participation in the Euro-warrant system, with the United States to negotiate the mentioned bilateral agreement and with the United Nations to advance global conventions on terrorism, corruption or the financing of terrorist operations and networks.

The September 11 introduced judicial and police cooperation into transatlantic relations in order to increase the contact of experts, joint threats assessments, joint investigation, common positions in multilateral organizations and the exchange of best practices. The anti-terrorist experience of some Member States favoured the diversification of cooperation channels and prevailed (Solana, 2002) against those considering the military instrument as being the only answer to the international challenge of terrorism. The Spanish Presidency could escape neither to the doctrinal and institutional debates on the division of labour with respect to terrorism among military, police and intelligence agencies nor to the inter-pillar complexity of the European Union decision-making and inter-pillar that caused some troubles in the understanding of the JHA agenda because the same measure could be understood as belonging to one field or another according to the audience.²⁵ The international projection of the JHA permitted Spain to chair transatlantic meetings at the level of working groups in Brussels on January 2002 or at the level of Chiefs of Police in the Canary Islands on April 2002²⁶ but it also gave Spain the opportunity –perhaps for the last time– to discuss security affairs at the Summit of the G-8 of Kananaskis, Canada, on 26 May 2002.

The migratory issues were discussed with the regional partners of the ASEM Ministerial Conference on 5 April and at the Euro-Mediterranean Conference on 22 and 23 April in order to consolidate the JHA dimension of regional cooperation, including a regional fund of 6 million euro for the MEDA programme. The Barcelona Process has been a traditional priority of Spanish Foreign Policy and the Valencia summit allowed Spain, not without many difficulties because of the absence of Lebanon and Syria and the conflictive situation in the Middle East, to essay the entry of a JHA dimension of the Euro-Mediterranean strategy by discussing the joint management of immigration fluxes, the fight against the trafficking of human beings and the reinforcement of the anti-terrorist cooperation.

4. Some remarks on the activities and results of the JHA agenda

The balance of the Spanish Presidency in the internal security field will be associated with terrorism and immigration; no matter how many others above-mentioned activities and results may have been developed. The need to respect 'the priority of the priorities' displaced the focus

²⁵ For instance, the promotion of the anti-terrorist dimension of the transatlantic relations by the Spanish Presidency could be understood either as an objective for the EU foreign and security policy (second pillar) or as an opportunity for the internationalisation of internal security (third pillar).

²⁶ For an American assessment of the anti-terrorist cooperation since the 9/11, see the communique of the press secretary of the White House (2.6.2002) on the occasion of the US-EU biannual meeting, and the note of the Office of European and Euroasian Affairs of the Secretary of State (28.6.2002).

from the creation of a European Area of Freedom, Security and Justice for 2004 to these two more brilliant issues.

The convergence of national and European priorities on the fight against terrorism was more based on the impact of the 9/11 than on the influence of the Spanish Presidency. Spain took advantage of the new anti-terrorist context to advance its long standing proposals for the 'Europeanization' of its main security problem but the agenda was addressed more to achieve the European Area of Freedom, Security and Justice for 2004 than to obtain short-term national goals. The margin of autonomy for a national agenda was constrained by the previous political compromises, the increasing weight of the European and national JHA working-systems and the fear to generate false expectations. The agenda was more focused on deepening than on widening the JHA *acquis* and thus its profile was more conservative than aggressive.

The international support gave new instruments to the Spanish anti-terrorist policy but more because of the favourable context of the Fifteen, the United States and third countries and organizations, than due to its skilful handling of the EU Presidency. Nevertheless, the outcomes would have been less positive if Spain had not mobilized so many human and material resources, anti-terrorist expertise and political willing during its rotation, well beyond its expected capacities as a medium European power.

The Spanish Presidency reaffirmed its standing position to promote judicial and police cooperation to cope with transnational security risks (Europeanization), backed the Commission initiatives to develop common policies regarding asylum, immigration and external borders (communitarization) and contributed to frame both trends within the broader scope of the EU's foreign policy and the external relations (the globalization of the Europeanization). However, those three long-term objectives (more Europe) did not exclusively depend on the efficient management of its Presidency but on the political compromise of the Fifteen.

Finally, the internal perception of the Spanish Presidency balance was more attentive to terrorism and immigration than to the technicalities of the European police and judicial cooperation. From a national viewpoint, these two objectives were measured by its potential contribution to solve domestic security problems. The activities and results in the anti-terrorist field feedback the domestic consensus though most of the merit was accounted on the side of the September 11 syndrome. On the contrary, immigration increased internal divisions regarding the immigration policy and the Spanish Presidency could not present short-term gains to its public opinion.

Notes

(TO BE INCLUDED IN THIS BLANK SPACE IN THE FINAL VERSION)

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