

Statewatch European Monitor

documenting EU justice and home affairs policy

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Contents:

- * Dutch Presidency & the EU institutions
- * Draft EU Constitution agreed
- * "Tampere II"
- * Policing & criminal law
- * Counter-terrorism, security and civil liberties
- * PNR & the surveillance of air travel
- * Immigration & asylum
- * Civil law
- * Resources on JHA issues

DUTCH PRESIDENCY & THE EU INSTITUTIONS

1. On 1 July the Netherlands took over the rotating six-month presidency of the EU Council from Ireland, see Dutch presidency [website](#) and "[priorities](#)" (pdf file).

See also "[Operational Programme of the Council for 2004](#)" (16195/03, 19.12.03, 51pp, pdf file) and "[Multiannual Strategic Programme 2004-2006](#)" of the six EU presidencies for 2004-06 (Ireland, Netherlands, Luxembourg, UK, Austria and Finland, 15420/03, 1.12.03, 25pp, pdf file).

2. See also the schedules of meetings under the Dutch presidency for the [Article 36 Committee](#) (10830/04), the [JHA Council](#) (11015/04), and the other [EU Council](#) formations (11014/04; pdf files).

3. The last of four EU Justice and Home Affairs Council under the Irish presidency took place on 8 June 2004, see [press release](#) (9782/04 (Presse 173) pdf file), [agendas and background](#).

The first of three JHA Councils under the Dutch presidency was held on 19 July 2004 (see [press release](#), [background note](#), [main agenda](#) and [annotated agenda](#) (pdf files).

4. A European Council summit was held on 17-18 June 2004 - it agreed the draft EU constitution (below), see [summit conclusions](#) (pdf file).

5. The SEMDOC [legislative observatory](#) has been updated with all JHA policy developments during May and June 2004.

6. European Parliament elections took place on June 10-13. New political groupings were announced on 20 July 2004, see [political composition of the EP 2004-2009](#).

7. Amnesty International EU has produced a [report](#): "*The European Union - now more free, secure and just?*" and [Recommendations to the Dutch presidency](#): "*Closing the gap between rhetoric and practice*". AI has also launched a [petition](#) in frustration at the EU human rights policy (word documents).

DRAFT EU CONSTITUTION AGREED

8. Professor Steve Peers, Essex University Human Rights Centre, has prepared consolidated agreed texts of the Constitution, agreed at the EU summit on 17-18 June 2004. See:

- a. Renumbered text of the EU Constitution: [Renumbered text of EU Constitution](#) (pdf)
- b. Consolidated agreed text: [Part I](#) (pdf)
- c. Consolidated agreed text: [Parts II and IV](#) (pdf)
- d. "*Justice and Home Affairs*": [Constitution: JHA](#) (pdf)
- e. [Judicial Provisions](#) (pdf)
- f. Summary of the abolition/retention of vetoes under the Constitution: [Vetoes summary](#) (pdf)

9. The EU Council has also produced a full consolidated text: [CIG 86](#) (pdf, 325 pages, 930k), 88 pages of "Declarations" to be attached to the Constitution: [CIG 86 ADD 2](#) (pdf) and a full list of Protocols - another 351 pages - to be attached to the Constitution: [CIG 86 ADD 1](#) (pdf). This makes the full Constitution 764 pages.

10. For background, analysis and IGC documents see Statewatch [Observatory on the draft EU Constitution](#). An analysis of the implications of the agreement for justice and home affairs policy will appear in the next issue of the Statewatch bulletin.

'TAMPERE II'

11. The European Commission is currently consulting the public on "Tampere II". "Tampere I", a special EU summit in October 1999, adopted a detailed set of "conclusions", also known as the "Tampere milestones" (see [Statewatch briefing](#) on the Tampere process: "The story of Tampere - an undemocratic process excluding civil society").

The Tampere conclusions formed an Action Plan for the development of EU justice and home affairs policy under the Amsterdam treaty. A five-year deadline for agreement on a common EU immigration and asylum policy expired on 1 May 2004. EU police and judicial cooperation, the other aspects of the so-called "Area of Freedom, Security and Justice", have also developed rapidly under the Tampere process - hence the need for a "Tampere II".

12. The European Commission has produced a [Communication](#) entitled "Assessment of the Tampere programme and future orientations" (COM (2004) 401) and staff working papers on the "most important [instruments adopted](#)" (SEC(2004) 680) and an the [AFSJ future orientations](#) (SEC (2004) 693).

13. Interested parties and individuals are invited to submit their contributions on a new programme to the JHA Directorate in the European Commission by 31 August 2004 (e-mail: tampere-consultation@cec.eu.int).

14. While the Commission is busy consulting civil society, the JHA Directorate in the Council (under the guise of "the presidency") is consulting the member states on the "**political orientation**" of the new programme (11122/04). The Council document sets out a framework for "resolutely pursuing the objective of further developing a common area of freedom, security and justice", leaving the Commission's consultation process looking like a rather redundant exercise.

POLICING AND CRIMINAL LAW

15. Twenty-four of the twenty-five EU member states have now implemented the European Arrest Warrant - Italy is the only state that has not yet passed domestic legislation allowing application of the EAW. See SEMDOC legislative observatory: [European Arrest Warrant](#) (this contains links to the national implementing legislation and application procedures).

16. The European Commission has proposed an EU Common position on the **transfer of "certain data" to Interpol** (COM 2004 427 final). The data in question relates to lost or stolen passports. Under the Common position, EU member states will transmit to Interpol the "passport number, country of issuance and document type" from issued and blank passports that are "stolen, lost or misappropriated". This will be added to Interpol's "Stolen Travel Document database".

More detailed data will be "formatted for integration" into SIS II, the second-generation Schengen Information System, which is currently being developed. "It is intended that the next generation of the Schengen Information System (SIS II) will contain the functionality of direct data transfer to the Interpol database". The draft EU Common Position also states that Europol will have direct access to this data, although this has not yet been formally agreed by the member states.

17. The Commission has also proposed an EC Directive on the "prevention of the use of the financial system for the purpose of **money laundering**, including terrorist financing" (COM (2004) 448). This would amend the 1991 and 2001 EC Directives on money laundering.

The 1991 Directive covered money laundering from drugs offences and imposed obligations solely on the financial sector. The 2001 amendment extended its scope, both in terms of the crimes covered and the range of professions obliged to cooperate with the police. The new proposal deals with terrorist financing and is based in part on revised recommendations from the **Financial Action Task Force** (the FATF is an intergovernmental body dealing with financial crime; [link](#)).

18. Money laundering is also dealt with in a Commission proposal for an EU Common Position on the drafting of a protocol to the 1990 **Council of Europe Convention** on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Under the **draft Common Position** (COM (2004) 444), EU member states agree to negotiate the Protocol on the basis of EU law in this area.

19. The European Commission has produced a Communication on [access to information by law enforcement](#) agencies (COM (2004) 429). The aim is:

to improve information exchange between all law enforcement authorities, i.e. not only between police authorities, but also between customs authorities, financial intelligence units, the interaction with the judiciary and public prosecution services, and all other public bodies that participate in the process that ranges from the early detection of security threats and criminal offences to the conviction and punishment of perpetrators.

The Commission says that the aim of EU policy should be to "make accessible the necessary and relevant data and information, for law enforcement authorities in order to prevent and combat terrorism and other forms of serious or organised crime as well as the threats caused by them".

20. Sweden has proposed an EU Framework Decision on the [Exchange of police data](#) between law enforcement services (10215/04). This too cites "terrorism" as a justification but is clearly aimed at the exchange of police data across the board. It sets out rules:

under which Member States' law enforcement authorities effectively and expeditiously can exchange existing information and intelligence for the purpose of conducting crime investigations or crime intelligence operations and in particular as regards serious offences, including terrorist acts.

This Framework Decision would add to three existing EU frameworks for the exchange of police data: the Schengen Convention (and the Sirene system for the exchange of data), the exchange of data through Europol (the reason the agency was created) and the Mutual Legal Assistance Convention (which provides for case-by-case and spontaneous exchange of data). In this context it can be questioned whether more legislation is justified or proportionate. See [Statewatch analysis](#): "free market" for law enforcement database access proposed.

21. The European has produced a Communication on [Police/customs cooperation](#) (COM(2004) 376; pdf file). The Communication is divided into two parts. Part one covers achievements under the Amsterdam Treaty: "Legal Obligations and political Commitments for Police and Customs Co-operation (TEU, Schengen, Vienna Action Plan and Tampere European Council Conclusions); Police Co-operation; Police aspects of Schengen Co-operation; Operational police co-operation, including the Task Force of EU Police Chiefs; The European Police College (CEPOL); Art. 30 TEU; Investigative techniques; Forensic science; Other subjects of police co-operation; Terrorism; Customs co-operation; and the OISIN and AGIS programs as instruments to promote police and customs cooperation in the EU".

Part two sets out new proposals under the following headings: "Factors affecting police and customs co-operation; Nature of police work; strategic approach; Proliferation of non-binding instruments; Decision-making procedures in the Third Pillar; implementation of legal instruments adopted by the Council; and empirical research on police and customs co-operation".

22. EC Regulation 871/2004 "concerning the introduction of some [new functions for the](#)

Schengen Information System, including in the fight against terrorism" has been published in the Official Journal. A corresponding **draft EU decision on the SIS** has not yet been adopted and the new Regulation will not enter into force until it is.

23. In June the General Affairs Council agreed on the new functions for **SIS II** (10125/04). For background see Statewatch analysis of the development of the **SIS, SIS II and VIS** (the Visa Information System - see below).

24. EU Decisions on the **Europol staff regulations** and salaries (**correction & update**) and the Council Act on **Europol financial regulation** have all been published in the Official Journal.

25. Statewatch news online reported that the EU Justice and Home Affairs Council in Luxembourg on 8 June 2004 gave what is called "political guidance" on the question of "**biometrics in EU citizens' passports**". It was "broadly agreed that the EU citizens' passports should contain a first mandatory biometric identifier, a facial identifier, and an optional one, in principle fingerprints." This "guidance" is likely to be reviewed later as there is a major disagreement over whether the second identifier - fingerprints - should be optional.

26. The European **Data protection** Commissioner has launched a new website (link).

COUNTER-TERRORISM, SECURITY & CIVIL LIBERTIES

27. The Council of the European Union (the 15 EU governments) decided on 17 May 2004 to update the European Union **list of terrorist organisations** and persons linked to terrorist activities. The updated list was published on 3 June 2004; the first list was agreed in December 2001 in the wake of the terrorist attacks on 11 September 2001. The latest change to the list of groups and individuals *inside* the EU (which was last updated on 2 February 2004) is the addition of 10 groups from Italy.

28. The EU terrorist list has effectively been extended to the "Candidate Countries" (Bulgaria, Romania and Turkey, the Countries of the "Stabilisation and Association Process"), "potential candidates" (Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Serbia and Montenegro), and the remaining EFTA countries (Iceland, Liechtenstein and Norway) - all of whom declared their intent to ensure that their national policies conform, see **press release** (10466/04, pdf file).

29. An evaluation report on the implementation of the 2002 **EU Framework Decision on terrorism** has been produced by the European Commission, fuelling public criticism of the efforts of Greece and Italy in the European media (COM (2004) 409, 8.6.04). There is more detail in the **annex to the implementation report** which is available as a Commission staff working paper (SEC (2004) 688, 8.6.04, pdf).

30. A number of EU documents on counter-terrorism were prepared for the JHA Council and EU summit in June 2004. These include:

- a. **EU Action Plan on terrorism** final version (10586/04, 15.6.04, pdf)
- b. **European Commission Compendium** of Counter-terrorism Actions: (SEC (2004) 669,

25.5.04, pdf)

c. [Implementation report](#) to Council (10009/04, 1.6.04, pdf)

d. [EU Counter-Terrorism Coordinator](#) report on two "peer" evaluations (9876/04, 26.5.04, pdf)

e. [Terrorism Working Party](#) document on role of terrorism WP (8673/1/04, 7.5.04, pdf)

f. [Working structures](#) options paper (9791/04, 25.6.04, pdf)

g. [Solana statement](#) statement to JHA Council by Javier Solana, EU security policy chief (pdf)

31. Statewatch is monitoring the implementation of the EU's counter-terrorism plans, set out in a far-reaching [Declaration on combating terrorism](#) (pdf). See Statewatch's [timetable on implementation](#) (updated 2 June 2004) for the EU Declaration on combatting terrorism (pdf file). See also Statewatch's analysis of the Declaration which found that 27 out of 57 proposals have little or nothing to do with tackling terrorism - they deal with crime in general and surveillance: [Statewatch Scoreboard](#) (pdf).

32. When the EU adopts anti-terrorism measures is it trying to combat [terrorism or crime?](#) asks Statewatch news online. A UK parliamentary committee says the supposed link between terrorism and organised crime in the Commission's Communication (COM (2004) 221) is based "more on assertion than on evidence", reports *Statewatch news online*. A Commission proposal on exchange of information on terrorism could lead to hundreds of innocent people being put on "watch-lists" for each anti-terrorist investigation; companies, charities and all bank accounts are to be targeted; and a European Criminal Registry is to be set up including data on all those charged - whether they are found guilty or not.

33. An [EU-US summit](#) on 26 June 2004 issued a joint declaration on combatting terrorism listing thirty-nine specific areas of cooperation in the "war on terrorism".

SURVEILLANCE OF MOVEMENT: EXCHANGE OF PASSENGER DATA (PNR)

34. Statewatch has reported all developments leading to the adoption of the EU-US Treaty on the exchange of passenger data ("PNR"). The controversial treaty was opposed by EU Data Protection Commissioners and the European Parliament (EP), but EU governments ignored their views (and those of civil society) and adopted a Decision to conclude the Treaty anyway, on 14 May 2004.

35. On 6 July 2004, the Official Journal published the Commission [Decision on "adequacy of protection"](#), approving the US "Undertakings" on data protection and authorising completion of the Treaty (pdf file).

36. On the same day the "[Undertakings of the Department of Homeland Security](#), Bureau of Customs and Border Protection (CBP)" were published in the US Federal Register (pdf file). In a markedly different legislative procedure to that in the EU, the agreement will not come in force in the US until (a) enacted by Congress, (b) properly promulgated as a regulation, under authority of Congress, by a Federal agency, or (c) ratified by the Senate as a treaty.

37. Back in the EU and the European Parliament has formally initiated [court action to annul the Decision](#) of the Commission at the European Court of Justice, see letter from Pat Cox, President of the EP, 28 June 2004 (pdf file). This followed a vote by a large majority in the [EP](#)

[Legal Affairs Committee](#) to take court action.

38. If the Court takes the same opinion as the EC [Article 29 Data Protection Working Party](#) (WP 95; pdf file) it will almost certainly annul the Treaty on the grounds that the US authorities do not offer an adequate level of protection for personal data provided by the EU. The opinion notes that:

"The Commission has only partially taken into account the demands made by the Article 29 Working Party regarding, in particular, the scope of the data to be transferred, their retention period and the way in which they are used".

The Data protection Commissioners call on European airlines to replace the "pull method" of data transfer (where US authorities have *direct access* to their reservation databases) with the "pull method" (where the US authorities would be *sent* only the data they actually need). They also call for better information to be given to European travellers about the passing of their personal data to the US authorities.

39. The [Trans-Atlantic Consumer Dialogue](#), a coalition of civil society groups, sent a resolution calling for the suspension of the Treaty to the EU-US Summit meeting in Dublin on 25 June.

40. For full background, see Statewatch's [Observatory on EU-US PNR agreement](#). See also Statewatch's [Observatory on EU PNR scheme](#).

IMMIGRATION AND ASYLUM POLICY

41. In July Statewatch published an analysis - "[Dismantling refugee protection](#)" (pdf) - of how the European Commission is developing the controversial UK plans to keep refugees outside the EU through so-called "protection in the region" and the cherry-picking of refugees through "resettlement programmes" (see [Commission Communication](#), COM (2004) 410, pdf). There is no clear legal basis for the scheme in the EU Treaty and pilot projects are proceeding without any consultation of national or European parliaments.

42. At the time of writing the Commission has just released its Communication on "[A single asylum procedure](#)" (pdf) and a further SEC document containing [Annexes to the Communication](#) (pdf) and also [Single asylum procedure study](#) (note: this pdf is 4MB).

43. The Commission has also produced a "study" on the "[link between legal and illegal migration](#)" (COM (2004) 412). It concludes that "There is a link between legal and illegal migration but the relationship is complex and certainly not a direct one". According to the Commission:

Overall employment projections point to labour shortages in the EU due to the ageing of the workforce and its contraction after 2010. Research also indicates that immigration flows are unlikely to decline for the foreseeable future.

The Commission also acknowledges that "immigration [will] be increasingly necessary in the coming years to meet the needs of the EU labour market" but then proceeds to dismiss any change to the current Fortress Europe model of immigration control out of hand by asserting that "it is generally acknowledged that immigration is not the solution to ageing population".

On the basis of its "fact-finding mission", the Commission advocates:

- legal migration for skilled workers (there is no mention of the EP resolutions calling for an end to the "brain drain" from developing countries);
- regularisation programmes for people in illegal situations and the transformation of "undeclared work into regular employment";
- the integration of legally resident third country nationals including measures to facilitate their mobility and the recognition of their qualifications;
- the development of a Community return programme;
- cooperation with countries of origin and transit;
- and visa policy measures, particularly "categories of persons who are potential overstayers".

It can be observed that most of these issues fall outside the European Commission's (or "Community") competence and are either intergovernmental or national policy matters. In this context one wonders how seriously the member states will take the Commission's laudable ambitions for the integration of third country nationals. It is also notable that "return policy" - "voluntary return, forced return and support for the return of irregular migrants in transit countries" - manages to find its way into just about every Communication on migration that the Commission produces.

44. The General Affairs Council of 12 July 2004 adopted "Conclusions" on [joint flights for removals](#). In contrast to international human rights law, which ostensibly prohibits group returns, and the European Parliament, which has described them as a "deplorable practise", the Council describes joint expulsion flights as "an effective and humane way to return persons". The Conclusions give effect to the Council [Decision on organising joint expulsion flights](#), adopted as 'A' point by the JHA Council on 29 April. The European Parliament voted to reject the measure.

See also the [draft Council Conclusions](#) on "elements for establishing preparatory actions for a financial instrument for return management in the area of migration" (9740/04, 25.5.04; pdf file).

45. The Asylum Working Party is discussing the EU "minimum common list" of "safe third countries", which is to be adopted as part of the [draft asylum procedures Directive](#). The countries proposed are Benin, Botswana, Cape Verde, Chile, Costa Rica, Ghana, Mali, Mauritius, Senegal, Uruguay (EU member states will be free to add other countries to their national lists). This document sets out the EU [criteria for designating countries as "safe"](#) (8772/04).

46. The EU Decision establishing the [Visa Information System](#) was adopted by the JHA Council on 8 June 2004 (OJ 2004 L 213/5). The European Parliament voted to reject the measure in April and a qualified majority vote applied after 1 May. The level of "democratic control" over this measure is therefore highly questionable since neither the European nor national parliaments could successfully oppose the measure (the EP was only "consulted" and an EU country with a parliamentary scrutiny reserve could simply be outvoted).

47. A Decision amending the [Common Border Manual](#) provisions on treatment of minors has been published in the Official Journal (OJ 2004 L 157/136).

48. The European Commission has proposed an EC Regulation on a [Border crossing code](#) (COM (2004) 391, 229pp). The code sets out the "rules governing the movement of persons across borders" and would supplement a revised Common Border Manual covering practical and operational issues for border guards:

The Commission also took the opportunity to consider the additional question of whether it might be worth extending the scope of the External Borders Code to cover internal borders too, thereby establishing a full Community code on the rules governing the movement of persons across borders, consisting of two parts - one on external borders, the other on internal borders.

The provisions on internal border controls cannot easily be reconciled with the supposed abolition of internal border controls under Schengen and the principle of free movement. The draft Code states that the "abolition of border checks at the internal borders shall not affect":

the exercise of police powers by the competent authorities under the legislation of each Member State, if the checks at the internal border, in a hinterland area adjacent to the border or in defined border areas are carried out under conditions and for purposes identical to those applying to the territory as a whole, particularly as regards their frequency and intensity.

Nor does the "abolition of border checks" affect "security checks on persons carried out at ports and airports". In addition, Article 2(2) of the Schengen Convention, which allows the exceptional reintroduction of internal border controls on national security or public policy grounds, is to be extended. Member States will be able to reintroduce border checks for up to 30 days in the event of "a serious threat to public policy, public health or internal security". It is notable that the most common reason for the member states' reintroducing their border controls under Article 2(2) over the past five years has been to combat demonstrations against the G8, EU and other international organisations.

49. The EU Borders Code would also be without prejudice to "the possibility for a Member State to provide by legislation for an obligation to hold or carry papers and documents", suggesting that the UK will opt-in to the Regulation. The UK is also attempting to "opt-in" to the [Borders Agency](#) Regulation (10658/04) and the proposal on the inclusion of [biometrics in passports](#) (which is proceeding on the questionable legal basis of the crossing of borders; 10649/04). Despite insisting on an "opt-out" of the Schengen and EC borders regime under the Amsterdam treaty, the UK is opting in to all the coercive measures.

50. The [readmission agreement between the EC & Macao](#) entered into force on 1 June 2004.

51. The Commission has proposed an extension of the [ARGO programme](#) which provides funding to the member states for the implementation of EU immigration and border control measures (COM (2004) 384).

52. Critical reports on the implementation of the Amsterdam Treaty and the development of the common EU immigration and asylum policy have been produced by [ECRE](#): "*Broken promises, forgotten principles*" (pdf file) and [Statewatch](#): "*Implementing the Amsterdam Treaty: Cementing Fortress Europe*".

53. See also the UNHCR's recently updated advocacy materials on EU refugee issues: vol. 1: "[EU Tool box](#)" (the "fundamentals") and vol. 2: "[The Instruments](#)" (Note: these are very large files).

CIVIL LAW

54. The European Commission has produced a [Green paper](#) on "Equality and non-discrimination in an enlarged European Union" (COM (2004) 379, pdf file).

55. Regulation 805/2004 on the [European Enforcement Order](#) has been published in the Official Journal (OJ 2004 L 143/15).

KEY RESOURCES on the SEMDOC website

- a. For all new material added to SEMDOC, see: [What's New](#)
- b. [Observatory on the draft EU Constitution](#)
- c. Key Texts, all the primary texts for reference: [Key Texts](#)
- d. Justice and Home Affairs acquis: 1993 - ongoing: [JHA Acquis](#)
- e. [Justice and Home Affairs Councils](#) (Agendas, Background Notes, Press Releases and minutes) are added as soon as they become available
- f. The main Legislative Observatory is listed on the SEMDOC home page: [Legislative Observatory](#)
- g. Back issues of the Statewatch European Monitor: [back issues](#)



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