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N O T E

from : the Presidency of the K 4 Committee

to : the Permanent Representatives Committee (Part 2)

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Subject: **Draft report on the current state of affairs regarding the draft Convention on the establishment of Europol**

The Presidency of the K.4 Committee submits the following draft report on the current state of work regarding the draft Convention on the establishment of Europol. The orientations contained in this report have been supported by all delegations, with the exception of the Spanish and French delegations [1].

I. Under German Presidency, the Working Party on Europol has spent 28 days discussing the draft Europol Convention. On the basis of the progress already made under previous Presidencies, agreement has been reached on the following articles and basic points :

- the general objective of Europol (Art. 2(1)) [2],
- forms of criminality on which Europol should initially act (Art. 2(2); but see II.1. below) [2],
- Europol's principal tasks (Art. 3(1) and (2)),

(1) The French and Spanish delegations entered a general reservation on this document.

(2) The Spanish delegation entered a reservation on these points.

- the description and tasks of the national units (Art. 4(1) to (4)),

- the involvement in Europol's activities of national liaison officers who are subject to national law and must comply with the internal operating rules of Europol (Art. 5),

- the principles of the system architecture (Art. 5.A), comprising the following :

  . an information system or central data bank to which all participants have on-line access (but see II.2. below),

  . work files for the purpose of analysis, available on line to only a limited number of people,

  . an index system, providing access via key words to the data stored in the work files,

- the need to establish entitlements to access to data and its correction and erasure (Art. 17, 18 and 20),

- the creation of a joint supervisory body for data processing at Europol and the tasks to be assigned to it (Art. 22(1) to (3) and (5) to (9)),

- the principles governing data security (Art. 23),

- legal capacity, contractual capacity and the procedure for concluding agreements with third parties (Arts 24, 10(4), 16 and 39),

- Europol bodies and their tasks (Arts 24a, 25, 26, 32(3), (7) and (8)),

- the principles governing staff (Art. 27),

- the principles for establishing specific secrecy (Art. 28),

- the principles governing the drawing-up of the budget (Art. 32, with the exception of the majorities needed for adoption of the budget),

- the basis for a Headquarters Agreement (Art. 34),

- the need to establish an effective and appropriate system of legal protection for individuals, in establishing which account must be taken of practical requirements and the closeness to the citizen,

- the rules for amendment and entry into force of the Convention and for accession to the Convention (Art. 40, 42 and 43).

II. Solutions must be found for the following major points :

1. It has not yet been possible to reach any agreement on the point in time at which Europol should become responsible for dealing with terrorism or aspects thereof. Although the article in question of the draft Convention assumes that a decision on the inclusion of terrorism is to be taken at a later date by a unanimous Council decision, Spain and Greece would like to see it included right from the start [1].

2. The Presidency draft in connection with the architecture of the system is supported by a large majority of States. Nonetheless, two questions remain :

a) The Presidency draft assumes that the data-processing system accessible to all national units as well as to liaison officers and Europol will contain only certain types of standardized data. The aim of this system will above all be to facilitate rapid insight into existing information in the Member States and within Europol.

Alternatively, the French delegation has proposed extending the system accessible to all national units, liaison officers and Europol, to include all data, even non-standardized data, necessary for Europol's analysis work. This includes sensitive data.

In attempting to resolve this issue, tension exists between the notion of the greatest degree of transparency possible, advocated by the French delegation on the basis of the concept of inter-governmentality, and the need for as much secrecy as possible in dealing with highly sensitive data in the field of organized crime, based on principles of effective policing and data-protection.

b) The Presidency draft limits on-line access to the analysis files to Europol and liaison officers who are directly involved in concrete analysis projects. This is in deference for the sensitive nature of such data.

The French proposals aim to open the analysis files also to liaison officers expressing an interest in knowledge of such data. Only the use of such data shall be subject to the consent of all parties involved in the analysis project.

On this issue too, a decision should be taken in the light of the considerations under (a). A distinction could be made between proactive and reactive analytical data.

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[1] The Spanish delegation entered a reservation on this point.

3. The Presidency draft provides for the subject to have a direct right to information from Europol concerning data on him/her held by Europol, but that right is considerably circumscribed in the interests of Europol and the Member States. Refusal to provide information can be challenged in the courts.

In contrast, a provision was suggested which distinguishes among data on the basis of their origin. Information on the data provided by the Member States is given exclusively by the Member State which has forwarded the data, in accordance with its national law. With regard to data provided by third parties or acquired through Europol's analysis activity, indirect information should be supplied by the joint supervisory body.

The following could be considered, separately or jointly, as an outline solution :

a) supply of information by Europol only with the consent of the Member State supplying the data;

b) direct supply of information by Europol only on data from Member States in which a direct right to information exists, and on data provided by Europol or by third parties; for data from the other Member States, restriction to indirect information only;

c) supply of information on all data held by Europol in each Member State in accordance with national law (comparable to the SIS, EIS and CIS models).

4. With regard to notification of the European Parliament the question arises whether a provision will be adopted in the Convention and if so, what its content will be.

While some Member States regard the provisions of Article K.6 TEU as sufficient, the other Member States consider it necessary to regulate the following points:

- annual report;
- guarantee of confidentiality;
- precise definition of the duty to consult referred to in the second paragraph of Article K.6 TEU;

- non-encroachment in particular on the rights of national Parliaments;

- support of the Council Presidency, as far as contacts with the European Parliament are concerned, by the Director of Europol.

Two proposals were made, neither of which, however, was supported by all the Member States.

5. Two models are under discussion for the auditing of Europol accounts. The large majority of Member States are in favour of making this the responsibility of the European Court of Auditors, while two Member States prefer the creation of an autonomous body made up of representatives of national courts of auditors. The texts of these proposals can be found in Article 33 of document 10324/94 EUROPOL 112 (page 110).

6. With regard to provision for recourse to the courts referred to in Article 37, it needs to be decided whether and in what circumstances the European Court of Justice (ECJ) is to be competent. The following cases must be distinguished:

a) With regard to the settlement of disputes between Member States or between Member States and Europol, the large majority were in favour of the ECJ, where unanimity can not be achieved in the Council. Alternatives discussed were final decision in the Council, if necessary by two-thirds majority, and the setting up of an arbitration tribunal (text of proposal in document 9842/94 CK4 77, p. 6).

b) There is agreement that the protection of the rights of individuals before national courts or possibly before comparable independent bodies in Member States should be dealt with according to their national procedural law. Since such a provision is dependent on the formulation of the rights of the individual, an agreed text can not yet be submitted on this question. There is agreement, however, that it should be based on principles relating to practical requirements and the needs of the citizen.

The large majority of Member States also thought that the ECJ should be competent to give preliminary rulings.

c) In regard to disputes between employees and Europol, a large majority was in favour of ECJ competence. As an alternative, it could be envisaged to refrain from having a provision thereon in the Convention and to take it up in the eventual staff regulation. A provision on the competence of the ECJ could thus be envisaged.

d) Subject to the establishment of rules on the requirement of permission to testify for organs or employees of Europol, the matter of legal recourse in case of refusal of such permission still has to be decided. Either the ECJ or the national courts could be considered.