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EUROPOL 5

NOTE

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| from : | Presidency |
| to : | Europol Working Party |
| No. prev. doc. : | 51340/01 EUROPOL 1 JAI 1 |
| Subject : | Possible amendments to the Europol Convention and possible extensions of Europol's competence |

I Introduction

This note aims at presenting and clarifying draft proposals put forward by the Presidency to amend the Europol Convention. The proposals can be seen as representing two different tracks. The purpose of the first track is to ensure the proper implementation of the Treaty on European Union and the conclusions of the summit at Tampere. The purpose of the second track is to analyse the need for extensions of Europol's competence.

The proposals were presented to the Article 36 Committee on 18 January 2001 and the Committee was asked to take preliminary positions on the proposals. This note also aims at initiating work in the Working Group following those positions.

II The outcome of the Article 36 Committee meeting

In respect to possible amendments of the Europol Convention, the Article 36 Committee agreed to mandate the Europol Working Group to address the following two issues.

- a) The amendment of the Europol Convention in order to lay down rules in the Europol Convention formalising Europol support to and participation in joint investigation teams.
- b) A possible amendment of the Europol Convention introducing rules in the Convention regarding requests by Europol to the Member States to instigate specific investigations.

Furthermore the Article 36 Committee addressed the question whether an extension of the Europol mandate should be envisaged and if so, which way to proceed. Delegations generally agreed that – subject to scrutiny in capitals – the Europol Working Group should prepare (on the basis of Articles 2 and 43 of the Europol Convention) a Council Decision making Europol competent for all forms of crime listed in the Annex to the Europol Convention.

It was also agreed that the Europol Working Group should consider whether - while preparing an extension of Europol's mandate to all forms of crime listed in the aforementioned Annex - it would be needed to broaden the scope of Europol's mandate to cover international organised crime in general, without a reference to specific forms of crime.

As far as Europol's relation with Eurojust is concerned, the Article 36 Committee noted that at present it is premature to address this question in the Europol Working Group. It might however be necessary to address this issue as soon as it becomes clear that the cooperation between Europol and Eurojust can not be adequately based on the present Europol Convention. In this respect specific attention will have to be given to the coordination of activities between Europol and Eurojust. It should also be noted that the issue above under II b) might have a bearing on the coordination.

III Background

According to Article 30(2) of the Treaty on European Union, the Council shall promote cooperation through Europol in particular with regard to (i.a):

- a. specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity and
- b. measures allowing Europol to ask these authorities to conduct and coordinate their investigations in specific cases.

At Tampere the importance of these issues was underlined, and it was emphasised at that occasion that measures implementing this article should be set up without delay. These issues have been dealt with under the French Presidency, resulting in two Council Recommendation to Member States, both adopted last year. The one Recommendation deals with Europol's assistance to joint investigative teams, the other with requests from Europol to Member States to start investigations.¹

For these purposes the amendments to the Europol Convention put forward below could be considered. If amendments would be considered necessary this should be done through a Protocol amending the Convention.

IV Proposals

1. Europol officers in joint investigation teams

The Recommendation concerning Europol's assistance to joint investigative teams states explicitly that it should be seen as the first step, and stays within the boundaries of the existing Europol Convention. In order to create legal certainty and to enable support measures by Europol officers in joint teams to take place in a clear legal framework, it is necessary to consider an appropriate legally binding further step, underpinning the possibilities offered by the Recommendation.

To this end, it could be considered to add a new article to the Europol Convention laying down that Europol officers - within the limits of the Convention - may participate in a support capacity in joint investigation teams. Such an article could also include provisions regarding under which conditions they may participate and which types of activities they may perform. Also rules on the use of information from a work file set up in accordance with Article 10 of the Europol Convention, could be considered. Furthermore, it could be stipulated that the

¹ OJ C 357, 13.12.2000, p. 6 and OJ C 197, 12.7.2000, p. 1

basis for participation by Europol officers in joint investigation teams should be an arrangement to be set up between the Director of Europol and the competent authorities of the Member States participating in the team and that the arrangements should specify the modalities for such participation.

In a possible amendment, also the Convention on Mutual Assistance in Criminal Matters between the Member states of the European Union, must be taken into account, in particular Article 13 thereof.¹

Amendments to the Europol Convention related to these issues could be inserted in a new article 6a.

Article 6a **Participation in joint investigation teams**

1. Officials of Europol may participate in a support capacity in joint investigation teams set up by two or more Member States, investigating criminal offences for which Europol is competent under Article 2, subject to the conditions set out in the paragraphs below.
2. When participating in joint investigation teams, officials of Europol may, in derogation of Article 4(2), liaise directly with the members of the joint investigation team. Where, in the course of such direct liaison, information from any of the components of the computerised system of collected information referred to in Article 6, is provided by the official of Europol participating in the joint investigation team to the members of that team, this will be recorded. The National Units of the Member States represented in the team as well as of Member States by which the information was provided shall be informed thereof by Europol.
3. Information from a work file set up pursuant to Article 10 with the aim of helping a criminal investigation carried out by a joint investigation team may be transmitted by a liaison officer associated with the analysis group to the participants of his Member State in that team.

² OJ C 289, 12.10.2000, p. 8

4. Participation of Europol officials in a joint investigation team shall be based on an arrangement to be concluded between the Director of Europol and the Member States participating in the joint investigation team. The arrangement shall specify the modalities of such participation. These modalities shall respect the provisions of the present Convention.

2. Requests from Europol to Member states to initiate investigations

The Recommendation concerning requests from Europol to Member States calls on the Member States to give consideration to requests from Europol to conduct investigations or to coordinate their investigations in specific areas. It could be considered whether the possibility for Europol to ask Member States to initiate investigations should be reflected, not only in the Treaty on European Union and in a recommendation, but also in specific provisions of the Europol Convention itself.

As noted above, the relationship between Europol and Eurojust shall not be addressed at this moment although it is clear to the Presidency that the question of coordination of requests between Europol and Eurojust eventually will have to be dealt with.

In such a provision it could be laid down that requests are to be made to the Member States through their national units. In addition, the elements of the Recommendation could be transformed into a new article 3b, with adjustments as to the wording in order to formalize the conduct. Initial texts reflecting this are included in the draft below.

Article 3b

Request to Member States to initiate investigations

1. Europol may, through the national units, ask the competent national authorities of the Member States concerned to initiate, conduct or coordinate investigations in specific cases falling within the remit of Europol.
2. Member States concerned shall give due consideration to requests originating from Europol and shall inform Europol whether an investigation is conducted. If a Member State decides not to conduct an investigation, Europol shall be informed of the reasons for this decision.
3. Europol shall be informed of the results of the investigation referred to in paragraph 1 by the Member State having conducted it.

3. Europol's competence

1) Extending Europol's competence to all forms of crime in the Annex

The second track mentioned above, relates specifically to Europol's competence. The widening of the scope of Europol's task related to money laundering was agreed by the Council recently and additional proposals have been tabled over the course of the last years to consider expanding Europol's mandate further with environmental crime, cyber crime and fraud.

As stated before, the Article 36 Committee instructed the Europol Working Group to prepare a Council Decision making Europol competent to deal with all forms of crime mentioned in the Annex to the Europol Convention. Several delegations and the representative of Europol however stressed that such a decision should have no automatic consequences on the Europol budget and its staffing level. Instead the Management Board should decide on the priorities within the work of Europol while also at political level (the Council) the priorities of Europol need to be addressed in order to assure a coherent European crime policy.

As already has been pointed out, this option does not require amendments to the Europol Convention, but a Council decision. This option raises however the question of definitions of the various forms of crime in the Annex to the Convention not yet defined.

The text of a Council Decision making Europol competent for all forms of crime listed in the Annex to the Europol Convention is legally fairly simple. The preparation of this text however requires two important issues to be addressed.

- a) Firstly the question of prioritisation in the work of Europol. The Article 36 Committee agreed that the Management Board of Europol should give guidance to the work of Europol and decide on the priorities to be given in its work. Equally delegations noted that the political level (the Council) should have a say. The Presidency is of the opinion that in this respect inspiration can be drawn from the Council Decision of 27 March 2000¹ authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU related bodies. In this decision the Council decided to allow Europol to start negotiations with a wide range of States and bodies, while instructing the Management Board to decide on the prioritisation to be given to the negotiations (Article 2(2) of the Council Decision). The Council Decision continues by instructing Europol to keep the Management Board permanently informed about the ongoing negotiations (Article 3(2)).

The Presidency proposes to add to the Council Decision making Europol competent for all forms of crime listed in the Annex, an Article stating that the Management Board decides on the prioritisation of the work of Europol and instructs Europol to keep the Management Board constantly informed about the ongoing activities of Europol. This way it can be assured that - while being competent for all forms of crime in the Annex - Europol concentrates its activities in those areas decided by the Management Board.

As far as involvement of the political level is concerned, the Presidency wants to recall that the Europol Convention in Article 28(1)(10) provides for two reports to be addressed to Council by the Management Board; the general report on Europol's activities during the previous year and the report on Europol's future activities. It is through these reports that the Council is informed about the future and past work of Europol and on the basis of these reports the Council can discuss and steer the activities of Europol. It is thus the opinion of the Presidency that in case it is assured that the future and past prioritisation of the activities of Europol are explicitly mentioned in the aforementioned reports, the Council has sufficient possibilities to influence and steer the work of Europol.

³ OJ C 106, 13.4.2000, p. 1

Therefore the Presidency proposes to add to the Council Decision making Europol competent for the forms of crime listed in the Annex, an Article underlining that the two reports mentioned in Article 28(1)(10) should reflect the decisions of the Management Board regarding the future prioritisations in the work of Europol, as well as the results of past prioritisation decisions in the actual activities of Europol.

- b) Secondly, apart from a Decision based on Article 2 of the Europol Convention, the question of definitions has to be addressed (Article 43(3)). All but one (forgery of money and means of payment) of the forms of crime listed in the Annex, for which Europol should be made competent, have until now not been defined. Article 43(3) allows the Council, acting unanimously, to add definitions to the Annex. The Presidency would like to discuss whether definitions are needed for all forms of crime listed in the Annex. The Presidency is of the opinion that not all forms need to be defined in a Council decision. In order to guide its work in preparing a draft Council Decision, the Presidency would like to raise the issue which forms of crime that need to be defined and which forms of crime that can be left without a definition.

II) Extending Europol's competence beyond the Annex

As mentioned above, the Article 36 Committee also agreed that the Europol Working Group should consider the need to go even further and broaden the scope of Europol's mandate to cover international organised crime in general. The Presidency is of the opinion that the considerations concerning prioritisation discussed above, are equally applicable on a solution where Europol retains its current competence, but no longer limited to specific forms of crime. Leaving out the reference to specific forms of crime might call for other measures for delimitation or need to define the meaning of organized crime or serious criminality. On the other hand it might be argued that Article 2(1) of the Europol Convention already is sufficiently clear when drawing up the limits of Europol's competence even without that reference.

If Europol were to retain its current competence, but no longer limited to specific forms of crime, the Presidency suggests that the present requirements before Europol can act – a serious crime, factual indications of an organized criminal structure and a cross-border element – remains in place.

In order to achieve this the Presidency suggests the following new wording of Article 2 of the Convention. Paragraphs 2 and 5 are deleted and paragraphs 3 and 4 remains unchanged but are renumbered¹. All reference to the Annex to the Convention are deleted from, the Convention.

Article 2

The objective of Europol shall be, within the framework or cooperation between the member States pursuant to Article (...) of the Treaty on European Union to improve, by means of the measures referred to in this Convention, the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating serious forms of international crime, where there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned.

¹ Please note that the Protocol drawn up by the Council on 30 November 2000 (OJ C 358 of 13.12.2000, p.1) amends Article 2, paragraph 3, of the Europol Convention.