



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 November 2002

13696/02

LIMITE

EUROPOL 83

NOTE

from : Presidency

to : Article 36 Committee

No. prev. doc. : 13689/02 EUROPOL 82 + ADD 1

Subject : Informal explanatory note : Europol-US Supplementary Agreement

Delegations please find below the Informal explanatory note regarding Europol - US
Supplementary Agreement.

1. Introduction

At the Management Board meeting of 29-30 October 2002 in Copenhagen, Europol was requested to provide an explanatory note to the main provisions of the Supplemental Agreement negotiated with the US authorities and discussed at that Management Board. This note aims at addressing the issues raised at that meeting, as well as providing some background information on the way the negotiations have proceeded. It should not be read as a formal Explanatory Note in the normal sense of the word – its content has not been confirmed with the US authorities, and therefore only reflects Europol's perspective. As such, this paper is only intended to facilitate further discussions at the proposed informative meeting on the Europol-US Supplemental Agreement on 6 November.

2. General Remarks

2.1. General Preconditions

As already indicated at the Management Board meeting, the US authorities made it clear that they were negotiating the Supplemental Agreement under certain general conditions. These can be summarised as follows:

- the Agreement must not cause the US to change its national legal provisions;
- the Agreement must not lead to substantive changes to the existing infrastructure of the law enforcement authorities to which it would relate, in particular with respect to automated data processing systems,
- the Agreement would be an executive Agreement, which would not be subject to ratification in the House or Senate – this point links in with the first one, since provisions in the Agreement which would lead to changes to US legislation would entail an obligation on the US side to ratify the Agreement.
- Acceptance that Europol would not have to change the Convention and data protection regulations.

2.2. Exchange of Notes

During the negotiations it also became clear that in those cases where there was a difference of opinion on the meaning or usage of certain terminology, Parties would have recourse to an Exchange of Notes, which would be utilised to clarify the different positions of Parties. This Exchange of Notes was not intended to be formally a part of the Agreement, but to assist in the actual implementation. As such, the Exchange of Notes could therefore be only used as further explanation of certain provisions, and could be used in the process of coming to a final approval of the text both on the Europol and the US side. From our perspective therefore, the footnote in the Agreement was not intended to stay there once it was signed – it was only intended as an *aide memoire*.

2.3 Relationship with Mutual Legal Assistance treaties

Another general issue which was discussed at length during the negotiations was the relationship between this Agreement and the Mutual Legal Assistance Treaty that is in the process of being negotiated between the US and the EU. From the US side, there was a clear interest in trying to incorporate provisions related to this issue in the Agreement. The main concern from the US side appeared to be that there could be confusion on which text to apply in certain future scenarios – for example in the case of co-operation between US authorities, Europol and Eurojust in a Joint Investigation Team. Conceivably, such co-operation could be covered by three different legal instruments: the Agreement with Europol, a future Agreement with Eurojust, and the possible Mutual Legal Assistance Agreement with the EU.

In agreement with the Presidency and the General Secretariat it was decided not to link the two negotiations in order to avoid further confusion and delays.

From the Europol side, the position was quite clear: it was maintained that Europol did not have a mandate in any way or form to negotiate even elements of mutual legal assistance. It was also stressed that law enforcement co-operation is different in its legal nature to mutual legal assistance. Normally, law enforcement information would be provided under the condition that it should not be used as evidence in court cases, unless additional authorisation for such usage had been obtained. This was one of the reasons why the Europol side insisted that it should always remain possible for Member States (and Europol) to stipulate conditions on the usage of information provided under the Supplemental Agreement to the US. This principle was finally accepted by the US and incorporated in Article 5 (4).

Another important provision in this respect is Article 3 (4), which specifies the principle that nothing in the Agreement may be interpreted in a way that would prejudice or restrict the provisions of any Mutual Legal Assistance Treaty, working law enforcement relationship or any other agreement or arrangement for the exchange of information between the US and any Member States or institution of the European Union. Quite clearly this paragraph reflects the intention of both Parties not to harm or prejudice any existing relationship, including mutual legal assistance relationship between the Member States of the EU and the US. The stated aim was always to come to an Agreement which would provide for additional value, not deduct in any way from existing efforts or frameworks for co-operation.

Given these points, it is submitted that the Supplemental Agreement does not in any way or form prejudice either existing relationships or on-going negotiations with the US authorities on mutual legal assistance. It will be up to the Member States to determine which channel they want to use in the different possible co-operation scenarios – and which legal framework. In particular, those Member States which feel that the Agreement could jeopardise their efforts of including pre-conditions for mutual legal assistance would always retain the possibility to either refuse the exchange of certain information under this Agreement (guaranteed by Article 18 (4) of the Europol Convention) or to only allow the provision of the information under the restriction that it may not be used as evidence in judicial proceedings without further authorisation in accordance with the existing instruments for mutual legal assistance.

3. Further Explanations by Article

Article 1

The central provision which lays down the purpose of the Agreement is similar to, but not exactly the same as the same provision of the December 2001 Agreement. In particular, the newer text no longer makes reference to ‘serious forms of international crime’ as mentioned in further categories. Instead, the phrase ‘within the respective jurisdiction of the Parties’ is used. The reasons for this change are mainly related to the expansion of Europol’s mandate as of 1 January of this year, and the on-going discussion on possible changes to Europol’s mandate in the near future through respective changes to the Europol Convention. Against this background, it is submitted that the new terminology is more flexible with respect to future changes to Europol’s mandate, without going outside of the boundaries as established in Europol’s applicable legal framework. From a point of view of terminology one could argue that Europol as such does not have ‘jurisdiction’. The fact that this terminology is intended to refer to Europol’s mandate could thus be considered for inclusion in the Exchange of Notes.

Article 2

This Article is basically self-explanatory. From the Europol perspective, it is considered to be a positive result that the US side has shown to be willing to agree to these definitions, which are in line with the terminology normally used within European legal instruments on data protection, including the Europol legal framework. This will ensure that the European legal framework, and its interpretation by European Supervisory Authorities, will be central to future interpretations of the central definitions of the Agreement.

Article 3

This Article, which defines the scope of the Agreement, also lays down in more detail the relationship between this Agreement and the December 2001 Agreement. Although from the Europol side it would have been preferable to simply include additional provisions in this last Agreement to provide for the exchange of personal data, this caused a major problem to the US side. The main argument was that the provisions which were agreed earlier would have to be renegotiated. Given the fact that for the Europol side the final result appeared to be more important than the forum in which this result was to be presented, Europol agreed to proceed on that basis. For reasons of transparency, one could consider to provide one package document with further explanations on the relationship between the two texts, and have this agreed as a working document at Management Board level.

Paragraph 2 of this Article deals more specifically with this issue, and declares that the Articles 4, 6 and 8 of the 2001 Agreement are applicable *mutatis mutandis*. This means that the provisions on the point of contact are unaffected, as are the articles on mutual consultations and liaison officers. These were considered to be the only Articles which would be applicable for all forms of information exchange (both strategic and technical information and personal data) – for all other Articles the new text provides for a different regulation. In that sense the detail of the relationship is clearly defined – this should not cause any problems in practice.

The third paragraph was inserted at the request of the US side. They wanted to ascertain that the Agreement would not be interpreted as awarding more rights to individuals than those which they already have under currently applicable legal provisions, either on the Europol side or the US side. Since this provision does not affect in any way the rights of individuals under Europol's legal framework, the Europol side saw no problems with this.

The fourth paragraph was already dealt with above under point 2.3.

As to the fifth paragraph, as explained during the Management Board meeting, this provision is intended to provide for possible future forms of co-operation. In particular, the possibility of co-operation within Joint Investigation Teams was considered – obviously under the condition that this would take place in accordance with the then applicable legal framework.

Article 4

This Article provides for the basic mechanisms for exchanging personal data under the Agreement. It is completely in line with Europol's legal framework in this respect, and provides for such details as that there must be a written record of the request, which will allow control and auditing. Also, details on possible security measures which should be applied in cases of communication of such data are dealt with in the first paragraph of the Article. Normally requests should be exchanged via the central points of contact, as is considered to be preferable under Europol's legal framework, but in exceptional cases direct contacts are possible to allow for the necessary operational flexibility.

Another important element is that requests must provide for a concise statement identifying the authority making the request, the matter under consideration, the reason for the request and the nature of the assistance sought. Without such provision, the purpose limitation principle would of course be devoid of meaning.

As a final point, this Article also regulates spontaneous providing of information, in its paragraph 4. This paragraph also provides that in those cases the purpose of the transmission must be indicated – again to ensure the application of the principle of purpose limitation.

Article 5

This Article is one of the most important provisions of the Agreement, since it regulates the use which may be made of information provided under the Agreement. It contains the main regulation on the important principle of purpose limitation – one of the main principles of data protection. The wording of this Article was only agreed upon in the final stage of the negotiations, and was the most difficult to negotiate. Paragraph 3 of the Article furthermore provides for a regulation of the handling of protectively marked information.

The first paragraph reflects the purpose limitation principle. As indicated during the MB meeting, the wording of this principle is somewhat wider than what we would normally see in European legal instruments, but the practicalities of the co-operation will be very close to European practice. In the wording of this paragraph, it was attempted to stay close to the recent work done in the context of the work of the Council of Europe, in particular the group involved in the evaluation of Recommendation R (87) 15. In this group, further interpretation of the principle of purpose limitation has focused on the notion of usage of law enforcement information in other cases, provided that there is a concrete link between the original purpose for which the information was collected and its further usage. With this interpretation of the principle, it also became acceptable to the US side, and wording which reflects this interpretation was consequently included in the Agreement, in paragraph 1 (a). During the negotiations, it was clarified that in cases where there was concern from the Europol side about a particular form of usage of the information, the US authorities would be obliged to indicate the relationship between the original purpose for which the information was provided and its subsequent use.

The US side did however insist that for certain forms of usage, this linkage between the original purpose and its further use was evident on beforehand, and could thus already be indicated at the time of the transmission. To take account of this point, it was agreed that such further usage could already be included in the Exchange of Notes. Text to this effect was therefore already included as a first point in this Exchange of Notes on Article 5.

It should be noted here that this Exchange of Notes can obviously not provide for any expansion to Europol's mandate or competence. With this in mind, it is clear that the reference to 'administrative immigration investigations and proceedings' only relates to usage by the US authorities, not to usage by Europol. In particular, the example was given of including the names of persons involved in terrorist activities in the list of persons who should not be admitted inside the US. If considered necessary, this point could be further clarified in the Exchange of Notes.

During the negotiations, Europol clarified that usage for other purposes than those indicated in this paragraph would not be in line with its current legal framework, and that it thus could not authorise such further usage. From the US side, however, authorisation for other usage could be achieved. In order to try to keep the text of the Agreement as balanced as possible, it was agreed that the text on this point would be worded as it has been, but that Europol would clarify its position in the Exchange of Notes.

The JSB representatives indicated that from their side it would be desirable to include in the Exchange of Notes also the reference to the general rule laid down in Article 18 (4) that Europol may not submit information received from the Member States without the prior authorisation of the Member State which provided the information. This was therefore also included in the Draft Exchange of Notes.

The exceptions to the general regulation provided for under point 1 (a) of Article 5 are regulated in point 1 (b) i of that Article. The first point relates in particular to the so-called 'Brady-rule', which was laid down by the US Supreme Court in an interpretation of the US Constitution. This refers to the fact that information which is in the possession of the prosecuting authorities and which tends to exculpate an accused person must in all cases be made available to the accused. The reason for this is clear – this is one of the elements foreseen to ensure a fair trial for the accused. From the start of the negotiations, it was made clear by the US side that it was impossible for them to deviate from this principle, and that they wanted this to be recognised explicitly in the Agreement. In further discussions on this subject, it was agreed however that in principle, in cases where this rule should be applied to information supplied by Europol, Europol would be notified of this in advance.

This would give Europol, and in particular the Member State(s) concerned, the opportunity to consult on the situation. In the most extreme cases, the conceivable outcome would be that the prosecution in the US would have to be dropped. This principle applies both ways – which leads to the conclusion that in those cases where a similar rule is part of the legal system of one of the Member States, this principle would also be applicable.

Point 1 (b) ii further regulates the exception that further usage of the information for other purposes can not be prevented in those cases where the information has been made public as a normal result of having been provided. In practice, there are two scenarios where this would be applicable. Firstly, this could be the case if the information was disclosed in open court proceedings. Secondly, information could become public through the application of the procedures for granting access to information supplied under the Agreement. In both cases, the usage of such information would be outside the sphere of influence of the Party which received the information, and such usage could therefore be no longer guaranteed by that Party. It should be noted here that in both cases the limitation is that the information must have been made public ‘as a normal result of having been provided’. This clearly excludes cases where persons unrelated to the official authorities involved in the execution of the Agreement would make certain information public.

Paragraph 2 is a simple provision laying down the practical rule that the transmitting Party shall indicate the Agency from which the information concerned originated. From the Europol side, this means that the Member state which supplied the information will be indicated, if necessary with further details about the national agencies concerned – if such information is available.

As indicated above, paragraph 3 lays down a regulation on confidentiality of protectively marked information. The paragraph is in essence the same as the regulation included in Article 5 (3) of the 2001 Agreement, and should therefore not give rise to any further debate.

Paragraph 4 starts with the general principle that Parties will endeavour to limit the circumstance in which requests for assistance are refused or postponed – the starting position should be that the co-operation runs as smoothly as possible. If such unrestricted provision of assistance (information) is impossible for operational or legal reasons, Parties will consider whether the assistance can be provided partially or subject to conditions. A further consultation procedure is foreseen in such cases, which will give the receiving Party the opportunity to determine whether they can abide by the conditions imposed, or whether they would prefer not to receive the information under those conditions. However, in all cases where the information is provided subject to certain conditions, the receiving Party shall be bound by them. As indicated above under the general restrictions, this is the most important guarantee for the Member States that they can ensure a separation between the exchange of law enforcement information and providing mutual legal assistance. The paragraph closes with a regulation of the cases where the need for restrictions becomes apparent after the information was provided: in those cases Parties shall promptly discuss available remedies. The availability of such remedies will depend on what use has already been made of the information.

Within this context, the US side indicated that they would have major practical difficulties if too much information was to be provided under this Agreement subject to certain conditions. It was stated that it was possible for them to comply with restrictions imposed, but that this required separate procedures to the normal ways of handling information, and should thus be limited as much as possible. To ensure that the principle of co-operation without too many restrictions would be followed in practice, it was agreed to include some language on this issue in the Exchange of Notes, clarifying that paragraph 4 would not be used as a legal basis for generic restrictions, but only in specific cases where there was a real necessity.

The concluding fifth paragraph of the Article specifies explicitly the normal principle that the execution of requests for assistance will be executed in accordance with and within the limitations of the applicable laws and regulations of the receiving Party and within the limits of the available resources. The last part of this paragraph is especially important for Europol, since this clarifies that not all requests can be fulfilled in all circumstances.

Article 6

It was at Europol's insistence that a particular Article related to sensitive data was included in the Agreement – from the US side it was indicated that this was the first time ever that such a provision had been accepted. In terms of the language used, the text included in the Europol regulations – transmission of such information can only take place in cases where this is 'absolutely necessary' – was not acceptable to the US side, since it became clear during the negotiations that they would interpret this differently than the Europol side would. It was therefore agreed that this difference of terminology would also be clarified in the Exchange of Notes.

Article 7

The issue of determining which US authorities would be competent to use information supplied under the Agreement was one of the more difficult ones. From the start, the US side made it clear that it was impossible for them to indicate with any degree of accuracy which authorities could be involved in using such information, given the fact that there are many different authorities which would qualify as being involved in preventing, investigating and prosecuting criminal offences. This was especially true given the many different State and local authorities responsible for such issues.

In the end, agreement could be reached on the approach now incorporated in Article 7 of the Agreement. The principle is that information can normally be made available for use in accordance with the Agreement to competent US federal authorities. For State and local authorities however, there is the additional requirement that such authorities would need to agree that they would observe the provisions of the Agreement. This should be seen as a major concession from the US side, since it will make it more difficult for them to involve these authorities in the exchange of information with Europol. From the Europol side, a provision such as this one was however indispensable to ensure observance of the Agreement by all authorities. The purpose limitation principle laid down in Article 5 (1) was mentioned explicitly in the text, only to indicate its importance as a central provision of the Agreement which should be respected by all authorities.

Some criticism was raised at the Management Board meeting with respect to the fact that the Article does not make explicit that this relates to US authorities which are involved in the prevention, investigation and prosecution of crime. Although from the Europol side this follows from the general limitations included in different Articles of the Agreement, if it turns out that Member States require further clarification of this issue, this could be considered for inclusion in the Exchange of Notes.

On the Europol side, the normal usage of information provided by the US authorities is limited to the competent law enforcement authorities of the Member States (paragraph 2).

The third paragraph is the important limitation that onward transmission of information provided would be subject to prior authorisation by the transmitting Party. On this point, the same line of reasoning was followed as the one explained above with respect to the further authorisation foreseen under Article 5 (1) (a). This means in practice that, although the text indicates that both Parties could give such further authorisation, in practice Europol can not provide such authorisation under its current legal framework. It was agreed that this limitation would be also included in the Exchange of Notes on this subject.

Article 8

This Article provides for a simple regulation on the issue of asking for supplementary information after a prior request. It also intends to regulate further information on the assessment of the accuracy of the information and the reliability of the source of the information. For Europol, such information would normally be provided using the 4x4 system. Since the US does not use this system, it was decided that in those cases where this was necessary for analytical purposes, such additional indications could be sought from the US authorities.

Article 9

This Article, dealing with maintaining the accuracy of information provided, represents the first time that US authorities agreed to inclusion of provisions on this subject in an international agreement. Negotiations on this subject also proved to be difficult, given the different approach to this subject under US law.

The main difficulty presented during the negotiations was the fact that US law – in contrast to EU regulations on the subject – in principle provides for the obligation to keep all information collected. This is based on the principle that formal record keeping should always be complete and accurate. Rather than correcting or deleting information which was shown to be no longer correct, under US law the correct information is added to the files, to ensure that it is also possible at a later stage to have a complete overview of what happened with the information at all stages of the processing of such information. In accordance with the general principle that the US side was not willing to change its law and practice in this area, this meant that a different approach needed to be found. This approach is now reflected in Article 9, which reflects the principle that both systems of maintaining accurate records are in principle comparable, since they aim at serving the same purpose: ensuring that accurate information is available to the competent authorities.

For the Europol side, the main importance of the provisions finally agreed lies in the fact that it is recognised that in order to maintain accurate records, also of information which was exchanged under the Agreement, Parties need to inform each other in those cases where it is determined that information is no longer correct, or should have been deleted. The Article reflects this principle, but leaves the details of the implementation of the principle to the Party which receives notification that information is no longer correct. In practice, this means on the US side that they will indicate such notification with the information originally provided, so as to ensure that in all cases it will be possible to identify that according to Europol's legal framework, the information should have been corrected or deleted. It seems to the Europol side that this was the best possible compromise that could be reached, given the difficulties outlined above.

Article 10

This Article provides for a regulation on the issue of exercising the right of access to information, and the obligation to consult with the Party which supplied the information before a decision on the subject is taken. It is somewhat more elaborate than what is normally included on this issue in Europol co-operation Agreements, at the request of the US side. The US authorities indicated that they wanted more assurances that in such cases the receiving Party would respect the wishes of the providing Party, and they maintained that such assurances would be crucial to ensure that the providing Party would have no hesitation in providing the most sensitive information. Since this does not in any way or form interfere with the exercise of the rights of access of individuals (explicitly recognised at Europol's request in the third paragraph), from the Europol side this regulation was thought to be acceptable.

Article 11

The Article on liability and expenses does not provide for much more than a declaratory statement that such issues will be dealt with in accordance with the applicable law in the jurisdiction where relief is sought. For Europol, this simply means that the system of assigning liability and the responsible court follows Article 38 of the Europol Convention – an indirect system of liability where the injured Party may seek relief through the national Court systems of the Member States.

From the US side, it was indicated that US law does not provide for the possibility to grant immunity from jurisdiction to international organisations which are not located within the US. It was therefore impossible to grant immunities to Europol. At the same time, two issues would be considered when contemplating possible risks following from this regulation.

In the first place, US authorities indicated during the negotiations that it is standing legal practice that information which was obtained by US authorities from abroad could not be challenged. In other words, the way in which the information was obtained abroad did not have any consequences for the legality of usage of such information by US authorities. Therefore, Court action directed against the manner of obtaining the information would be very unlikely.

Secondly, it should be considered that to the best of our knowledge, no provisions related to the issue of liability have been agreed between US authorities and the Member States of the EU. It would seem that it is also not EU practice to regulate this issue in detail in international agreement on the exchange of law enforcement information. Europol is also not aware of any court case in the US where damages were awarded against a third State for reasons related to the exchange of information.

In conclusion, it appeared to be impossible to provide for any regulation on this issue which would protect Europol against Court cases directed against it in the US. At the same time, the associated risks appear to be minimal, and regulations on the issue are not part of the normal international practice in this area. Europol would therefore submit that the current Article 11 was the best obtainable result under the circumstances.

On the issue of expenses the second paragraph of Article 11 provides for some protection for Europol against claims for expenses related to the execution of the Agreement by US authorities.

Article 12

Article 12 was one of the Articles which was of major importance for the JSB representatives participating in the negotiations as observers. It lays down the principle that there will be oversight of the execution of the Agreement by the administrative, judicial or supervisory bodies of the respective Parties, which will ensure an appropriate level of independence of the oversight process.

The US side indicated that although they do not have one independent supervisory authority for data protection issues, as is customary under EU legislation, they do have several different processes to ensure supervision of the execution and implementation of the Agreement. The US side also agreed that they would provide some further information on these authorities in the Exchange of Notes.

Article 13, 14 and 15

These Articles provide for standard issues of consultation, amendment and termination of the Agreement and its entry into force.

3. Conclusion

The overall conclusion on the Agreement from the Europol side is that it represents an important step forward in US-EU relationships, that it is generally in line with the major principles incorporated in Europol's legal framework, and reflects the idea that the US legal system, though different in many aspects, is recognised as offering a comparable level of assurances as to the appropriate usage of information, and adequate remedies for individuals. The negotiations have shown that the US authorities have been willing to explore new territories in trying to reach acceptable compromises in areas where they had not done so before. Through this, they have demonstrated that they attach growing importance to good co-operation with the Member States of the EU in the important area of combating international organised crime.
