



## Statewatch analysis

### **Europol: The final step in the creation of an “Investigative and Operational” European Police Force**

by Professor Steve Peers, Human Rights Centre, University of Essex

At the end of 2006, the Commission proposed that the existing Europol Convention should be replaced by a Council Decision. This proposal, which is in line with Council conclusions adopted in December 2006, will not just alter the legal framework of Europol, but also significantly enhance the powers of Europol, [moving it further toward becoming a European police force].

#### **Current legal framework**

Europol was established by an international Convention signed by the first fifteen Member States in 1995. This Convention entered into force in 1998, and Europol began operations in 1999, after ratification of the Protocol to the Europol Convention, concerning the privileges and immunities of Europol staff. A further Protocol to the Convention, concerning the jurisdiction of the Court of Justice to receive references from national courts concerning the Europol Convention, was signed in 1996 and entered into force in 1998.

Amendments to the Europol Convention require the adoption of additional Protocols to the Convention, which must then be ratified by national parliaments.

Three such Protocols have been agreed. The First Protocol, signed in 2000, gives Europol competence over money laundering, regardless of whether Europol is competent over the underlying crime. It will enter into force on 29 March 2007.

The Second Protocol, signed in 2002, gives Europol the competence to participate in joint investigation teams in the Member States, and to ask Member States' law enforcement authorities to begin investigations. It will enter into force on 3 April 2007.

The Third Protocol, signed in 2003, makes a number of amendments to the Europol Convention, concerning issues such as:

- wider access to the personal data held in the Europol Information System and Europol work files;
- further cooperation with non-EU countries and bodies, the possible transfer of personal data in certain cases to non-EU countries and bodies that do *not* maintain 'an adequate level of data protection';
- simplified procedures to open data files and retrieve data from them;
- the removal of a three-year time limit for Europol to hold personal data on criminal suspects;
- a modest enhancement of the consultation and supervision powers of the European Parliament; and
- possible competence for Europol to deal with additional crimes other than those listed in the current Annex to the Convention.

The Third Protocol will enter into force on 18 April 2007.

The Convention and all the Protocols have been ratified by all of the first 25 EU Member States, but are not yet in force in Romania or Bulgaria.

### **Current Europol tasks and competence**

Europol was originally created with limited tasks and with the competence to apply those powers only to limited forms of crime. Its initial tasks essentially concerned the gathering, exchange and analysis of information and intelligence on criminal cases. To that end, it can establish specified systems and databases containing personal data on criminal suspects, persons convicted of crimes and persons who might commit crimes. These systems are the Europol Information System, work analysis files and an index system.

When the Second Protocol to the Convention enters into force this April, as noted above, Europol's powers will extend to requesting Member States to start investigations and participating in joint investigation teams.

As for the competence of Europol, the original Convention provided that Europol was initially competent over international organized crime concerning drug trafficking, nuclear and other radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime, along with related criminal offences and money-laundering offences connected with these forms of crime. But there was flexibility for the Council to extend Europol's competence, if Member States could agree unanimously. So the Council extended its competence to terrorism and currency counterfeiting in 1999, and then to all of the crimes possible (ie all of the crimes listed in an Annex to the Convention) from the end of 2001: this entailed competence over a further seventeen crimes, including 'racism and xenophobia', 'swindling and fraud' and 'racketeering and extortion'.

Although the Europol Convention defined the crimes which Europol was initially competent to deal with, none of the crimes over which Europol has subsequently gained competence have been defined.

As pointed out above, the First Protocol to the Europol Convention will extend its competence over all forms of money laundering from March, and the Third Protocol to the Convention will give the Council the power, acting unanimously, to give Europol even further competence as from April, without even consulting the European Parliament.

### **Current institutional framework**

Currently the Europol Convention provides for the adoption of a number of implementing measures by either the Council (the Member States' ministers of the interior) or by Europol's Management Board. The Council's powers to approve implementing measures are usually exercised unanimously, and in particular concern the adoption of rules concerning Europol's external relations (the approval of Europol treaties with non-EU states and bodies, and the rules on the exchange of personal data with non-EU states and bodies), analysis files, staff rules, and financial rules. The European Parliament has to be consulted when most of these measures are adopted.

The Management Board, which consists of one representative of each Member State, meets at least twice a year. It has powers to decide, usually unanimously, on issues such as the powers of Member States' liaison officers and on the index system for Europol analysis files.

The day-to-day running of Europol is in the hands of a Director, assisted by Deputy Directors, appointed by the Council, acting unanimously, for one or two four-year periods.

The EU's Court of Justice has jurisdiction to settle disputes between Member States relating to Europol, except that one Member State (the UK) has opted out of this jurisdiction. Most Member States have given the Court jurisdiction to receive references from national courts on the interpretation of the Europol Convention. The EU courts also have jurisdiction over disputes concerning Europol staff. Only the staff jurisdiction has actually led to any case law in practice.

### **The Commission's proposal: institutional aspects**

The Commission's proposal would first of all replace the Europol Convention with a Council Decision, which would have to be adopted unanimously by the Council. This would mean that the basic rules governing Europol would be amended in future by further Council Decisions, adopted unanimously. The fundamental change here is that the current framework requires changes to the basic rules governing Europol to be set out in Protocols amending the Europol Convention, which are then ratified according to national rules. The current process is slower than amending a Council Decision, but then it gives more power to national parliaments, because

they can block the ratification of a Protocol or influence its content in advance by threatening to block the ratification of a Protocol which is under negotiation.

In other words, replacing the Europol Convention by a Council Decision will reduce the power of national parliaments to control the development of Europol, and furthermore will accelerate the pace of the development of Europol's powers and competence.

Furthermore, the proposal will entail qualified majority in the Council and a 2/3 vote in the Management Board when adopting all implementing measures. So Member States will lose the veto that they currently hold over most implementing measures. The consequence is that even where national parliaments are able to influence or control their national governments as regards proposed implementing measures, those governments will simply be outvoted.

### **The Commission's proposal: substantive aspects**

The Commission has taken the opportunity to suggest a number of important changes of substance to the rules governing Europol. First of all, Europol will be competent to deal with further crimes: in total the 32 crimes which are subject to 'fast-tracking' under the EU's European Arrest Warrant. None of these crimes will be defined. This change is not referred to at all in the explanatory memorandum or the impact assessment.

Next, the competence of Europol will no longer be limited to organized crime. This change will further increase the competence of Europol significantly, given the number of crimes (such a murder, rape or grievous bodily injury) that are often committed outside an 'organized' context.

As for Europol's tasks, its intelligence tasks will be expanded, but the biggest expansion of its tasks is the provision providing for:

*The coordination, organization and implementation of investigative and operational action carried out jointly with Member States' competent authorities or in the context of joint investigation teams, where appropriate in liaison with European or third countries bodies...*

This compares with the current task, as inserted into the Convention by the Second Protocol, of 'participat[ing] in a support capacity in joint investigation teams'. The only limit on the 'investigative and operational action' of Europol is that it requires agreement of the Member State concerned, and that Member States are responsible for 'coercive measures' (which are not defined).

But there is more. Europol will have a role in controlling public order, in particular 'to provide intelligence and analytical support to a Member State in connection with a major international event with a public order policing

impact'. It will also be checking the Internet with a view to combating terrorism and child pornography.

Europol's participation in joint investigative teams will also extend to customs, and Europol will be able to suggest the taking of coercive measures by national authorities in joint investigative teams.

To bolster these new powers, Europol will have a general power to establish new information systems, governed only by rules to be adopted by the Council by a qualified majority vote. So it would be open to Europol, for instance, to create a database of supposed violent demonstrators, in order to exercise its public order tasks, or a database of alleged terrorists and child abusers, without any further veto by national governments or control by national parliaments. All the rules on access to and usage of the data, and time limits for storage and deletion of the data, will be included in these implementing rules.

National units will have enhanced access to the information in Europol's existing information system.

The Commission's explanatory memorandum also refers to the need to prepare Europol for involvement in implementation of the 'principle of availability', ie uncontrolled access by national police forces to all of the data in each others' databases. In fact, the Commission's proposal for a Framework Decision on the principle of availability would give Europol such uncontrolled access, alongside national police forces, and it might be expected that the Treaty of Prum will be modified to provide for this when, or soon after, it is integrated into the EU legal order as planned for the near future. Will Europol be using this information to set up new information systems, as well as adding the data to its existing information systems?

It should also be recalled that Europol has had the power to search much of the data on the Schengen Information System already since October 2006.

What new safeguards are proposed to ensure the accountability of these new 'operational and investigatory powers'? None. There is no reference to national parliaments, no enhancement of supervision by the European Parliament, and no strengthening of the data protection regime apart from the creation of a data protection officer within Europol. The Court of Justice is likely to have less jurisdiction over Europol in future, since some Member States which have conferred power to the Court in the context of the Protocol to the Europol Convention have not conferred power to the Court in the context of the general 'third pillar' rules. The controversial privileges and immunities of Europol are largely retained.

## **Conclusion**

The explanation for Europol's new powers and competences is barely explained or analysed in the Commission's impact assessment, which has been prepared without any evaluation of the existing status and reputation

of Europol, even though Europol is understood to be widely considered to be something of a 'white elephant' by national police forces. Instead, the impact assessment only examines the options of replacing the Europol Convention as compared to the status quo from an institutional and legal point of view, and downplays or fails to mention many of the wider competences and newer tasks which the Decision proposes.

With this proposal, Europol comes much closer to becoming a form of federal police force, and indeed Europol's development has consciously paralleled that of the German federal police agencies. But the development of Europol's *accountability* is not remotely comparable to that of a national police force - even assuming that a federal Europol force could compare to national police forces and regards its efficiency or legitimacy.

Steve Peers, January 2007

#### References:

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Protocol to Europol Convention regarding Court of Justice, 1996  
Protocol to Europol Convention on Privileges and Immunities, 1997  
First Protocol to Europol Convention, 2000  
Second Protocol to Europol Convention, 2002  
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