

## STATEWATCH COMPLAINT AGAINST EUROPOL

### Background

1. The Europol Convention came into force in July 1999. The Regulation on public access to EU documents came into force in December 2001.

2. The UK House of Lords Select Committee on the European Union report on the Europol Convention (5<sup>th</sup> report, 2003) noted that a proposed new Article 32a would give the public right of access to EU documents "in accordance with the principles and conditions" of the Regulation 1049/2001. In written evidence (p51) Europol stated that it: *"is already by analogy applying these rules applicable to public access to EU Council documents."*

3. Article 32a amending the Europol Convention was duly agreed and on 29.3.2007 the *OJ* published: "Rules for access to Europol Documents" (C72/37, 29.3.2007), it came into force on 20 March 2007. Its opening Recital noted Article 32a which gave the Management Board the power to adopt rules:

*"taking account of the principles and limits stated in the regulation"*

The phraseology "taking account of the principles and limits" gave some scope for Europol to pick and choose what to include in its Rules. However, it did not allow Europol to diverge fundamentally from those principles and limits.

4. Among the variations from 1049/2001 were: 30 days for responding to initial and confirmatory applications; no mention of the right to appeal to the ECJ or the European Ombudsman; and no mention of Article 17 in the Regulation which requires an Annual Report on access to documents, including the number of cases in which the institution refused access to documents and the reasons for such refusals and the number of sensitive documents not recorded in the register.

It did include at Article 11.1:

*“Europol shall provide access to a register of publicly accessible documents and shall as far as possible make documents directly accessible in electronic form”*

This clearly did not follow the principle set out in Article 11 of 1049/2001 that: “References to documents shall be recorded in the register without delay” .

Further it says that its register will only list “publicly accessible documents” whereas Article 11 in 1049/2001 refers to principle of the listing of all documents held and produced.

5. The Europol Convention was replaced by a Council Decision on 6 April 2009 which in Article 45 repeats that its rules on access to documents should “take into account the principles and limits” of 1049/2001.

The Europol Management Board adopted a further Decision on “laying down the rules concerning access to Europol documents” on 8 July 2009. This Decision is still presented on the Europol website as representing its ongoing policy.

These 2009 Rules also deviate from the principles in 1049/2001 in a number of respects: a) Article 4.3 where access can be refused:

*“if disclosure of the document would undermine Europol’s decision-making process..”*

Article 4.3 of 1049/2001 says such refusal is only possible where release would “*seriously undermine..”*

b) The 30 day time limits for initial and confirmatory applications are kept from the 2007 version and like then there is no mention of any right of appeal to the ECJ or the European Ombudsman.

c) There is no mention of Article 17 in the Regulation which requires an Annual Report on access to documents, including the number of cases in which the institution refused access to documents and the reasons for such refusals and the number of sensitive documents not recorded in the register.

Article 11.1 of the 2007 Rules is the same:

*“Europol shall provide access to a register of publicly accessible documents and shall as far as possible make documents directly accessible in electronic form”*

This clearly did not follow the principle set out in Article 11 of 1049/2001 that: “References to documents shall be recorded in the register without delay” .

Further it says that its register will only list “publicly accessible documents” whereas Article 11 in 1049/2001 refers to principle of the listing of all documents held and produced.

Making available a public register of documents ensures that citizens and civil society can follow and understand what is being discussed and decided. And further by making available documents concerning implementation it ensures that the activities of Europol are subject to public and parliamentary accountability. Access to documents is the life-blood of a democratic system and a public register of documents is crucial to this process.

5. In general it is held that under the Lisbon Treaty it is stated in that the legal base for public access to documents is now Article 15(3) of the consolidated version of the Treaty on the Functioning of the European Union. This new provision extends the public right of access to documents to all the Union institutions, bodies, offices and agencies.<sup>1</sup>

The Lisbon Treaty commitment strengthens the provisions already contained in the Europol Decision and therefore Europol is subject to Regulation 1049/2001. In the alternative, Europol is in any event obliged to “take account” of the “principles and limits” in that Regulation. Under either interpretation, Europol is committing maladministration as regards access to documents.

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<sup>1</sup> In March 2011 the Commission put forward a proposal to effect this commitment, however, the European Parliament decided that this provision should be incorporated into its 1<sup>st</sup> Reading position (adopted in December 2011) on the Commission’s 2008 proposals to amend 1049/2001 and not treated this matter separately.

## Substance of the complaints

1. Since 19 April 2007 under the "Rules for access to Europol documents" was adopted Europol was obliged to provide a public register of documents. There is a similar commitment in the Decision of its Management Board of 8 July 2009. Moreover, Europol is now obliged under the Lisbon Treaty provisions to provide such a register. It has not done so.

2. There is a deviations from the principles of 1049/2001 in:

- the defined scope of a public register in the 8 July 2009 Decision namely that the public register would only contain "*publicly accessible documents*"
- setting the time limit for initial and confirmatory applications at 30 days (instead of 15 days)
- failing to provide for appeal to the ECJ and the European Ombudsman following a failed confirmatory application
- failing to include the principles of Article 17 of 1049/2001 in its Rules
- and thus failing to provide an Annual Report on access to documents, the number of cases where access is refused and the reasons for refusal and to give the number of sensitive documents not recorded in a register.<sup>2</sup>

In all these instances there has been maladministration.

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<sup>2</sup> In Europol Annual Reviews for 2007-2011 there is not reference at all to access to documents.