

Legal Service Director
02 FEV, 2015
SJ-1058/14
D(2015)1986

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Note for the attention of Mr Claude MORAES,

Chair of the Committee on Civil Liberties, Justice and Home Affairs
(c/o Mr Antoine CAHEN, Head of Cabinet)

Re: Request for a legal opinion on the European Ombudsman's access to documents concerning Europol's activities under the TFTP Agreement

By letter dated 1 December 2014, received on 15 December 2014, the Chairman of the LIBE committee requested a legal opinion on several aspects of the Ombudsman's access to documents under the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (hereinafter: TFTP Agreement) in the course of an inquiry conducted by the Ombudsman at Europol.

In its opinion which you will find attached, the Legal Service has reached the following conclusion:

- a) The JSB inspection report is a JSB document. It falls under the Europol Decision to the extent that the JSB was created by the latter and -it refers to Europol's activities, but it cannot be considered as such a "Europol document" within the meaning of the definition provided for in the Europol Decision. The legal authority to decide on the granting or denying of public access to the inspection report is the chairman of the JSB on the basis of Article 7(5) of the JSB's Rules of Procedure. If the request is directed to Europol, it will be for Europol to decide according to the Decision of the Management Board of Europol, which lays down the rules concerning access to Europol documents.
- b) Without the consent of the originator, neither Europol nor the JSB can give (confidential) access to documents to the extent they contain information classified "EU secret" and originate from the USA.
- c) The "technical modalities" coordinated under Article 4(9) of the TFTP Agreement have not been concluded or approved under the procedure provided for in Article 218 TFEU. The legal status of the technical modalities is that of a non-binding, administrative arrangement.
- d) Therefore, the "technical modalities" cannot constitute as such an act which could legally justify denying to the European Ombudsman confidential access to documents.

e) The Ombudsman's competence to investigate complaints about public access to documents is part of the general competences of the Ombudsman. Under European law the Ombudsman does not have an absolute right of (confidential) access to documents. This may depend on the restrictions which are applicable to the institution or body subject to inquiry. In the present case, which relates to a JSB report entailing information from the USA classified as secret, Europol could not give access to the Ombudsman without the prior written approval of the USA in conformity with the Europol Decision (Article 46) and the Council Decision 2001/264/EC on the security rules for protecting EU classified information (Article 12).

The Legal Service remains of course at your disposal for any further information you may require.

By delegation of the Jurisconsult, absent:
Ricardo PAS SOS Director

Annex:

Copy: Claude MORAES the Chairman of the LIBE committee Antoine CAHEN, Head of Cabinet

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LEGAL OPINION

Re: The European Ombudsman's access to documents concerning Europol's activities under the TFTP Agreement

I. Introduction

1. On 15 December 2014, the Legal Service received a request from Mr Claude MORAES, Chairman of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), on several aspects of the Ombudsman's access to documents under the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (hereinafter: the "TFTP Agreement"). The request specifically relates to an inquiry conducted by the Ombudsman relating to Europol (by letter dated 1 December 2014 as annexed).

2. The background is a letter of 2 September 2014 from the Ombudsman, in which she explains that during an inquiry relating to Europol, she was denied (confidential) access to an inspection report adopted by the Joint Supervisory Body (JSB), a body

set up by Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (hereinafter: the "Europol Decision").¹

3. The inquiry was conducted following a complaint against a refusal by Europol to give public access to the inspection report.
OJ L 121, 15.5.2009, p. 37.

4. The Legal Service has been asked to answer the following five questions:

"1) What is the legal status of the second JSB inspection report, referred to in the letter? Is it legally speaking a Europol document that falls under the Europol Decision? Who has the legal authority to decide about the granting of public access to this report and on what grounds, taking into account also Regulation 1049/2001 on public access to documents?

2) Who is, from a legal perspective, the originator of the data or information used for this JSB inspection report? Is the originator's consent always required for granting (confidential) access or is it a case-by-case decision, and if so by whom and on what grounds.

3) What is the legal status of the "technical modalities" to the TFTP Agreement, as referred to in the letter of the Ombudsman?

4) Can these modalities be used as a legal base to deny public or confidential access to respectively citizens, the European Ombudsman and Members of the European Parliament?

5) What is the legal status of the Ombudsman when it comes to investigation complaints about public access? Does the Ombudsman under European law always have the right of (confidential) access to documents in order to properly conduct its activities (including in assessing if public access has been denied correctly)?"

II. Legal analysis Preliminary remarks

5. Firstly, public access to documents, on the one hand, and (confidential) access by the Ombudsman in connection with her inquiries, on the other, are two distinct issues which are governed by two distinct sets of rules. The first question raised by LIBE concerns, in part, public access to documents whereas question five concerns the Ombudsman's access in connection with her inquiries.

6. Secondly, as regards public access to documents, Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents - as the title indicates - only applies to the Commission, Council and Parliament. Recital 8 of the Regulation stipulates that "In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation". Such application requires a specific legal basis, which has been adopted e.g. for the European Medicines Agency². However, Regulation 1049/2001 does not apply to Europol or to the JSB. They have adopted their own rules governing public access to their documents. These rules are described below.

2 Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, whose Article 73 provides: "Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents(22) shall apply to documents held by the Agency [...]".

7. Thirdly, the "inspection report" in question is a document adopted by the JSB. The Legal Service has only examined the "public version"³ available. It is useful to examine the character of the JSB in relation to Europol in order to address the legal status of the JSB documents.

Joint Supervisory Body

8. The JSB was set up by Article 34 of the Europol Decision.

9. According to this provision, the JSB is an independent body, with two main tasks:

a) to review, in accordance with the Europol Decision, the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and use of the data held by Europol;

b) to monitor the permissibility of the transmission of data originating from Europol.

The JSB serves an important role as an appeal body for decisions taken by Europol according to Article 30 ("Individual's right of access") and Article 31 ("Data subject's right to correction and deletion of data")⁴.

10. Moreover, the JSB is competent to examine questions relating to implementation and interpretation in connection with Europol's activities as regards the processing and use of personal data, to examine questions relating to checks carried out independently by the national supervisory bodies of the Member States or relating to the exercise of the right of access, and to draw up harmonised proposals for common solutions to existing problems (Article 34(3)).

11. The JSB has its own secretariat based in Brussels (whereas Europol is based in The Hague) but with a budget which is a part of Europol's budget. It does not enjoy a separate legal personality under the Europol Decisions.

12. The JSB has adopted its own Rules of Procedure, with specific provisions concerning access to the JSB's documents⁶.

13. The JSB is composed of a maximum of two data protection experts - assisted by alternates where appropriate - from each EU Member State's independent data protection authority. In the performance of their duties, members (and their alternates) of the JSB do not receive instructions from any other body⁷. They are appointed for 5 years.

3 <http://europoljsb.consilium.europa.eu/media/205081/ftp%20public%20statement%20-%20final%20-%20march%202012.pdf>.

4 Article 32 of the Europol Decision.

5 This is different to Europol which enjoys legal personality, cf. Article 2(1) of the Europol Decision.

6 <http://europoljsb.consilium.europa.eu/media/63193/1exuriserv.en.pdf>.

7 Article 32 of the JSB's Rules of Procedure.

8 See Article 4 of the JSB's Rules of Procedure.

14. In conclusion, it results from the Europol Decision that the JSB is conceived as an organ of control, independent from Europol.

First question: What is the legal status of the second JSB inspection report, referred to in the letter? Is it legally speaking a Europol document that falls under the Europol Decision? Who has the legal authority to decide about the granting of public access to this report and on what grounds, taking into account also Regulation 1049/2001 on public access to documents?

Legal status of the inspection report

15. The JSB inspection report can be considered as a JSB document because it has been prepared and adopted by this body, which is independent from Europol. In addition, it can also be considered that the document "falls under the Europol Decision", as the JSB was created by this Decision and as the report relates to Europol's activities. It is not clear though, whether it can be considered as a "Europol document" as such. Indeed, the Europol Decision does not define clearly what a "Europol document" is. According to Article 1(a) of the Decision of the Management Board of Europol laying down the rules concerning access to Europol documents, a "Europol document" or "document" shall mean any content whatever its medium [...] concerning a matter relating to Europol's activities, policies and decisions".

Article 3 of the same Decision states that "these rules shall apply to all documents held by Europol, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of Europol". In other words, the Management Decision does not contain a clear definition of a "Europol document" but states that the access regime applies to all documents held by Europol ("Europol documents" or "documents").

16. As for the exact nature of inspection reports, they are not mentioned either in the Europol Decision, or in the Rules of Procedure of the JSB. These acts only refer to the "activity reports", which have to be drawn up by the JSB at regular intervals and then forwarded to the European Parliament and to the Council (Article 34(6) of the Europol Decision).

17. Judging from the "public version" of the second JSB inspection report on the implementation of the TFTP Agreement, the inspection report was used to make recommendations aimed at addressing certain shortcomings that have been identified in Europol's activities (in this particular case, its activity under Article 4 of the TFTP Agreement to check whether requests from the USA for SWIFT data comply with the terms of the Agreement).

18. The Europol Decision does not stipulate that such findings are binding on Europol. In fact, Article 34(2)(c) only imposes a specific legal obligation on Europol to implement the JSB's decisions on "appeals" (paragraph 9). There is no legal obligation for Europol to implement the recommendations that the JSB makes in its reports.

19. In conclusion, the JSB inspection report is a JSB document. It falls under the Europol Decision to the extent that the JSB was created by the Europol Decision and it refers to Europol's activities, but it cannot be considered as such as a "Europol document". It constitutes a non-binding document adopted by the JSB in the exercise of its reviewing activities.

Possible public access to the JSB inspection report

20. A request for access could in principle be made directly to the JSB. However, it cannot be excluded that it could be addressed to Europol, as in the present case.

A. The request is addressed to the JSB

21. If a request is addressed to the JSB, the rules governing public access to documents of the JSB are set out in Article 7 of the Rules of Procedure of the JSB, which reads as follows:

"1. Any natural or legal person has a right of access to documents of the Joint Supervisory Body, subject to the principles, conditions and limits defined in this Article.

4. The Joint Supervisory Body shall refuse access to a document where such refusal is necessary in order:

- (a) to protect security and public order in the Member States or to prevent crime;
- (b) to protect the rights and freedoms of third parties;
- (c) to enable Europol to fulfil its tasks properly;
- (d) to enable the Joint Supervisory Body to fulfil its tasks properly; considerations which cannot be overridden by the interests of the applicant.

5. Where the Joint Supervisory Body holds a document received from a third party, or which contains information on a third party, the Joint Supervisory Body shall consult that third party with a view to assessing whether an exception under paragraph 4 is applicable, unless it is clear that the document shall or shall not be disclosed. Access to documents received from Europol shall also be subject to the confidentiality rules referred to in Article 40(1) of the Europol Decision.

6. If exceptions apply only to parts of the requested document, the rest of the document shall be disclosed.

[...]

11. The Joint Supervisory Body shall promptly register an application for access to a document and shall send the applicant an acknowledgement. Within 20 working days from registration of the application, the chairman of the Joint Supervisory Body shall either grant access to the document requested and provide access in accordance with paragraph 14 within that period or, in a written reply, state the reasons for total or partial refusal and inform the applicant of his or her right to make a follow-up application in accordance with paragraph 13.

B. The request is addressed to Europol

22. If the request is addressed to Europol, public access will be decided according to these rules on public access to Europol documents. Article 45 of the Europol Decision stipulates that Europol shall adopt rules on public access to documents "taking into account the principles and limits set out in Regulation (EC) No 1049/2001". These rules have been adopted by the abovementioned Decision of the Management Board of Europol.

23. The Europol regime on public access to documents is broadly structured in the same manner as Regulation (EC) 1049/2001. According to Article 4(4) of the Decision of the Management Board:

As regards documents originating in whole or in part from Member States, third parties, EU bodies, private parties or private persons, Europol shall consult them with a view to assessing whether paragraphs 1, 2 or 3 are applicable. **If the document originates from a Member State, third party or EU body with which Europol has concluded a cooperation agreement, Europol will not disclose the document without their written consent".**

Comment [E1]: Vedi giurisprudenza della Corte !!!

24. This exception follows broadly the provisions in Article 4(4) and (5) of Regulation (EC) 1049/2001.

25. In conclusion, the legal authority to decide whether to grant or to deny public access to the inspection report is the chairman of the JSB on the basis of Article 7(5) of the JSB's Rules of Procedure. If the request is directed to Europol, it will be for

Europol to decide according to the Decision of the Management Board of Europol, which lays down the rules concerning access to Europol documents. In both situations, it will be for the relevant authority (the chairman of the JSB or Europol) to assess whether public access must be denied or not, due to the fact that the relevant document contains information from a third party.

Second Question: Who is, from a legal perspective, the originator of the data or information used for this JSB inspection report? Is the originator's consent always required for granting (confidential) access or is it a case-by-case decision, and if so by whom and on what grounds.

26. As indicated before, the Legal Service has not read the JSB inspection report in question as only a redacted public version is available. On that basis, the origin of the information cannot be defined clearly, in particular, to what extent the JSB inspection report contains information received from the US authorities. According to the public statement issued by the JSB "[d]ue to Europol's classification of most TFTP-related information as EU SECRET, the .TSB's final report is classified as EU SECRET"⁹.

27. As regards the question of whether or not the originator's consent is required for granting (confidential) access to information, the specific legal instruments applicable to the institution or body and/or information in question should be examined

28. In this regard, it is necessary to distinguish between confidential access by the Ombudsman and public access.

29. According to Article 40(1) of the Europol Decision: "Europol and the Member States shall take appropriate measures to protect information subject to the requirement of confidentiality which is obtained by or exchanged with Europol pursuant to this Decision. **To that end the Council, acting by qualified majority after consulting the European Parliament, shall adopt appropriate rules on confidentiality prepared by the Management Board. Those rules shall include provisions concerning the cases in which Europol may exchange information subject to the requirement of confidentiality with third parties**".

30. The detailed rules on confidentiality referred to in Article 40(1) of the Europol Decision are set out in Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information¹⁰. This Council Decision sets out the security measures to be applied to all information which is processed by or through Europol (Article 2(1)). These rules are to be observed by all persons at Europol, as well as by any other person involved in Europol-related activities who is under a particular obligation of discretion or confidentiality (Article 9(1)).

31. Article 46 of the Europol Decision provides that in relation to "EU classified information Europol shall apply the security principles and minimum standards set out in Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations regarding EU classified information". This Council Decision has since been replaced by Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information. Article 12 of the latter Decision reads as follows: **"1. Where the Council determines that there is a need to exchange EUCI with a third State or international organisation, an appropriate framework shall be put**

in place to that effect. [...] 4. The decision to release EUCI originating in the Council to a third State or international organisation shall be taken by the Council on a case-by-case basis, according to the nature and content of such information, the recipient's need-to-know and the measure of advantage to the EU. If the originator of the classified information for which release is desired is not the Council, the GSC shall first seek the originator's written consent to release" [emphasis added].

32. On 23 April 2007, the Council adopted a decision 2007/274/JHA concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information".

The Agreement was signed and entered into force on 30 April 2007. This Agreement applies to the Council, High Representative and the Commission. The scope of the Agreement is broad and applies in general to "classified information provided or exchanged between the Parties" (Article 1(1)). It is not certain whether the Agreement also applies to bodies, offices and agencies of the Union, including Europol, since they are not explicitly mentioned.

In any case, what is important to emphasise in this context is that it establishes a general rule in its Article 4 (4), which states that "the recipient Party shall not further release or disclose classified information without the prior written approval of the releasing Party".

Paragraph 3 indicates that "the recipient Party shall not use or permit the use of classified information for any other purpose than that for which it was provided without the prior written approval of the releasing Party".

9 <http://e.uropo.lj>

10 OJ L 332, 17.12.2009, p. 17.

33. Finally, the Europol Decision stipulates that with regard to confidential access by EU institutions, information obtained from a Member State may only be transmitted to the Union institution or body, subsequent to the Member State's prior consent (Articles 22 and 24).

Article 24(2) further provides: "2. Europol shall be responsible for the legality of the transmission of data. Europol shall keep a record of all transmissions of data under this Article and of the grounds for such transmissions. Data shall be transmitted only if the recipient gives an undertaking that the data will be used only for the purpose for which they were transmitted".

34. As regards the JSB, public access to documents held by it is governed by Article 7(5) of its Rules of Procedure, where this matter is specifically mentioned. "[...] Access to documents received from Europol shall also be subject to the confidentiality rules referred to in Article 40(1) of the Europol Decision".

35. In conclusion, as regards information received from a third party, Europol is under the obligation to obtain written consent prior to release. The same applies to the JSB.

Third question: what is the legal status of the "technical modalities" to the TFTP Agreement, as referred to in the letter of the Ombudsman?

Comment [E2]: Al contrario. L'accordo prevede che ogni altra istituzione é un terzo

Legal framework

36. The TFTP Agreement was concluded by the Council's Decision of 13 July 2010¹² after receiving the consent of the European Parliament on 8 July 2010.

The Agreement entered into force on 1 August 2010. Article 4 of the Agreement establishes the mechanisms and conditions on how the U.S. Treasury Department may request the data from the Designated Provider (SWIFT) and how those requests shall be verified by , Europol and then provided by the Designated Provider to the U.S. Treasury Department. Article 4(9) of the Agreement holds: "The Parties shall jointly coordinate with regard to the technical modalities necessary to support the Europol verification process."

11 OJ L 115, 3.5.2007, p. 30.

12 OJ L 195, 27.7.2010, p. 3.

37. The information note entitled "Europol Activities in Relation to the TFTP Agreement, 1 August 2010 — 1 April 2011", dated 8 April 2011, was sent to the Parliament and published on Europol's website. According to this note, the technical modalities provided for by Article 4(9) of the Agreement were initially agreed between the European Commission and the USA (the exact authority of the USA is not specified) on 28 July 2010, that is to say three days before the Agreement entered into force. A revised version of the modalities which enhanced the security requirements for the handling of the US requests was agreed in March 2011. The text of the modalities was annexed to the note.

38. Part D of the modalities entitled 'Security and Confidentiality arrangements' reads: "In addition, no information transmitted by the U.S. Treasury Department, including information regarding types or categories of messages, is permitted to be shared either with EU Member States or with other parties without the express written authorization of the U.S. Treasury Department."

Preliminary remarks

39. It must be noted from the outset that, pursuant to the technical modalities, the prohibition to share the information transmitted by the U.S. Treasury Department without the latter's express written authorisation applies only when the information is to be "shared either with EU Member States or with other parties".

As under Article 4(9) of the Agreement, it is the Parties to the Agreement — the Union, on the one part, and the United States, on the other part — which coordinate with regard to the technical modalities, then the words "other parties" can be interpreted only as covering any third parties, such as third states or other international organisations.

40. It results that the technical modalities cannot be applied in principle as a basis for the refusal of access to the Union's own institutions and bodies, such as the European Ombudsman.

41. However, as in practice both Parties have favoured a different, wide interpretation of that modality, the Legal Service will hereby explain the possibilities for the Union to enter into binding international commitments in the present case and the scope and

nature of the administrative arrangements, such as technical modalities, which facilitate the implementation of international agreements.

International agreements with legal effect

42. As the Court of Justice has explained, the Treaty expression 'agreement' or 'international agreement' is used in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.¹³ Thus, if concluded pursuant to the procedures foreseen in the Treaties, a document entitled 'technical modalities' may also in principle be a legally binding international agreement.

43. Article 216(2) TFEU holds that "agreements concluded by the Union are binding upon the institutions of the Union and its Member States." Article 218(1) TFEU provides that "agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure." This procedure is established in the subsequent paragraphs of Article 218 TFEU and its implications will be examined in more detail below.

13 Opinion 1/75, ECLI:EU:C:1975:145.

44. In line with Article 216 TFEU, only the agreements which are binding on the Union have primacy over secondary legislation of the Union. Article 218 TFEU provides for the Union's internal decision-making procedure for concluding such international agreements. It must be emphasised that each institution, as well as the High Representative/Vice President has a particular role to play in that process.¹⁴

45. In line with the case-law of the Court of Justice, only the agreements concluded under that procedure (previously Article 228 TEC and Article 300 TEC, now Article 218 TFEU) are binding on the Union and may provide legal effects.

In case C-327/91, France v Commission, the Court of Justice established that the European Commission was not entitled to conclude, outside the procedure provided for in Article 228 EC Treaty (now Article 218 TFEU), administrative agreements with third states which provided legal effects for the Community and declared the respective Commission act void. The Court found in particular that the internal power of the Commission is not such as to alter the allocation of powers between the Community institutions with regard to the conclusion of international agreements:⁵

46. In another case, C-233/02, France v Commission, the Court again denied the Commission's power to conclude in a binding way administrative agreements. The Court argued that only binding international agreements concluded under the procedure foreseen in Article 300 TEC (now Article 218 TFEU) could give rise to liability at international level, but the Commission may conclude non-binding guidelines with a third country outside that procedure.¹⁶ Under those circumstances, the Court did not declare the Commission act void, as the "guidelines are merely an agreement for practical cooperation, devoid of binding legal effect".¹⁷

47. In conclusion, Article 218 TFEU applies whenever the Union wishes to conclude a binding international agreement. Furthermore, it has been argued that "the same

procedural requirements apply to amendments and to additional or implementing protocols concluded together with or on the basis of the agreement itself."¹⁸

Entry into legally binding international commitments

48. Article 218 TFEU includes three options for the Union to enter into legally binding international commitments which take primacy over the Union's secondary legislation.

¹⁴ See also Piet Eeckhout. *EU External Relations Law*. Oxford, 2011. Pages 193-207; and Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert De Baere and Thomas Ramopoulos. *The Law of EU External Relations*. Oxford, 2013, P.97.

¹⁵ C-327/91, ECLI:EU:C:1994:305, paragraphs 28 and 41.

¹⁶ C-233/02, ECLI:EU:C:2004:173, paragraphs 38 - 46.

¹⁷ C-233/02, ECLI:EU:C:2004:173, paragraph 37.

¹⁸ Koen Lenaerts, Piet Van Nuffel. *European Union Law*. London, 2011, P.1026.

49. Firstly, the Council is empowered to conclude an international agreement in line with the procedure provided in Article 218(6) TFEU, which in the present case would require the Parliament's consent. **This procedure was not used for coordinating the technical modalities in the present case. Had the prohibition to share the information transmitted by the U.S. Treasury Department without the latter's written authorisation been included as a provision in the TFTP Agreement instead of being coordinated as a mere technical modality, then it would have constituted a commitment, which is binding on the European Union.**

50. Secondly, Article 218(7) TFEU holds that the Council may, when concluding an agreement, authorise the negotiator (the Commission in the present case) to approve on the Union's behalf, modifications to the agreement adopted by a simplified procedure or by a body set up by the agreement. It is important to note that such authorisation must be included in the Council's ' decision on the conclusion of the agreement, thus being subject to the Parliament's consent.

In the present case, no such authorisation was requested or granted, neither does the TFTP Agreement provide for any simplified procedure or set up a body entitled to modify the Agreement.

51. Thirdly, under Article 218(9) TFEU, the Council is empowered to adopt a decision establishing the positions to be adopted on the Union's behalf in a body set up by an agreement when that body is called upon to adopt acts having legal effects. Indeed, it has been confirmed by established case-law that measures adopted by institutions, set up by such agreements become an integral part of the Union legal order when they enter into force.¹⁹ In the present case, again, no body with such powers was set up and accordingly there is also no Council decision establishing the Union positions in that regard.

52. It must be concluded that the technical modalities provided for in Article 4(9) of the TFTP Agreement have not been concluded or approved under the procedure in Article 218 TFEU. Consequently, these modalities do not constitute an act which is legally binding on the Union, nor could they take primacy over the Union's secondary legislation, including the Statute of the Ombudsman and the Europol Decision which are relevant in the present context.

Scope and status of implementing arrangements

53. That said, it is quite common for international agreements concluded by the Union to provide for further arrangements to be agreed between the parties at the executive level.

These arrangements are usually named 'implementing arrangements', 'administrative arrangements' or, as in the present case, 'technical modalities'.

Although the Treaty is silent on such forms of cooperation and the Court has established that no arrangements agreed by the Commission can have the status equivalent to legally binding international agreements concluded under Article 218 TFEU, such arrangements between the parties are in practice often necessary to facilitate the smooth application and uniform interpretation of the respective agreement and contribute to the achievement of the objectives of the agreement. However, these arrangements must meet several conditions coming from the Treaty framework and the hierarchy of norms of the Union legal order.

19 Opinion 1/91, ECLI:EU:C:1991:490, paragraph 37.

54. Firstly, in line with Articles 216 and 218 TFEU, as well as the established case-law, such arrangements may provide only non-binding guidelines to the parties.

55. Secondly, the arrangements must be made within their limited scope as determined by the provision of the agreement which forms their legal basis. The implementing arrangements may by no means cover policy areas to which the agreement itself does not relate.

56. Thirdly, such technical modalities must not affect the content or even contradict the Union acts adopted pursuant to the legislative procedures with the full powers of the co-legislators upheld. **As the Court has indicated, even when concluding non-binding guidelines with a third country, the Commission must take account of the division of powers and the institutional balance established by the Treaties.**^{2°}

57. While analysing the delegation provided for in Article 4(9) of the TFTP Agreement and the technical modalities coordinated on its basis, the Legal Service is of the opinion that when just empowering the Parties to jointly coordinate the technical modalities to support the Europol verification process in its Article 4(9), the TFTP Agreement does not reflect any intention of the parties to enter into legally binding commitments which could contradict existing legislation. Such commitments, if binding, would in any case require the amendment of the existing Union legislation and may thus be made only in agreements concluded by the Council after obtaining the consent of the Parliament. The technical modalities, coordinated on the basis of Article 4(9) of the Agreement, on the other hand, have to be of a purely technical nature and remain within the strict scope of the agreement itself. They must be limited to what is necessary to support the Europol verification process.

58. Indeed, in the present case, the majority of the modalities seem to fall within those limits. They are coordinated in a non-binding manner, using the notions 'should' and 'intends' throughout the text. The Court established in the abovementioned case C-233/02 that such notions indicate that the parties had no intention of entering into legally binding commitments.²¹ It is true that the specific restriction in part D on access

to information uses the stronger notion is permitted to', but even this part has to be interpreted in a non-binding way, which is the only interpretation compatible with the Treaty framework for technical modalities. Part D seems simply to reiterate the importance of the principle of the originator's consent.

59. In conclusion, the legal status of the technical modalities is that of a non-binding administrative arrangement, which cannot be used as a legal basis to deny to the Ombudsman confidential access to documents.

20 C-233/02, ECLI:EU:C:2004:173, paragraph 40.

21 C-233/02, ECLI:EU:C:2004:173, paragraph 43.

Fourth question: Can these modalities be used as a legal base to deny public or confidential access to respectively citizens, the European Ombudsman and Members of the European Parliament?

60. The answer is negative. In line with the analysis provided in the answer to the third question on the status and scope of the technical modalities concerned, these cannot be used as a legal basis to allow or deny access to citizens, the Ombudsman or Members of the European Parliament.

Fifth question: what is the legal status of the Ombudsman when it comes to investigation complaints about public access? Does the Ombudsman under European law always have the right of (confidential) access to documents in order to properly conduct its activities (including in assessing if public access has been denied correctly)?

61. The Ombudsman has a general competence to receive complaints concerning any kind of maladministration in the activities of the Union's institutions, bodies, offices or agencies, with a single exception, concerning the Court of Justice acting in its judicial role. Article 228(1) TFEU stipulates that the Ombudsman "shall examine such complaints and report on them". In the performance of his/her duties, the Ombudsman "shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints". Paragraph 3 states that the Ombudsman shall be completely independent".

62. Access to documents is certainly an important right of the citizens in the European Union. It is a right enshrined in Article 42 of the Charter of Fundamental Rights, as well as in Article 15(3) TFEU. This right has become a fundamental right of constitutional importance linked to the principles of democracy and openness. The competence of the Ombudsman to investigate complaints about public access to documents falls under the general competence of the Ombudsman. In fact, Regulation (EC) 1049/2001 on public access to documents of the Commission, Council and the European Parliament expressly obliges the institutions, in case of a negative decision, to inform the applicant of his right to complain to the Ombudsman²².

63. As to whether the Ombudsman always has the right of (confidential) access to documents in order to properly conduct his/her activities, it is necessary to recall that this right is not absolute. Indeed, the extent of the investigative powers of the Ombudsman is determined by the Statute of the Ombudsman, as laid down in its Article 3(2) which stipulates:

The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested from them and give him access to the files concerned. Access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, shall be subject to compliance with the rules on security of the Community institution or body concerned. The institutions or bodies supplying classified information or documents as mentioned in the previous subparagraph shall inform the Ombudsman of such classification.

For the implementation of the rules provided for in the first subparagraph, the Ombudsman shall have agreed in advance with the institution or body concerned the conditions for treatment of classified information or documents and other information covered by the obligation of professional secrecy

The institutions or bodies concerned shall give access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

They shall give access to other documents originating in a Member State after having informed the Member State concerned.

In both cases, in accordance with Article 4, the Ombudsman may not divulge the content of such documents."

22 Article 8(1) "[...] In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively".

64. The investigative powers of the Ombudsman remain subject to two reservations:

- a) "access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, shall be subject to compliance with the rules on security of the Community institution or body concerned".
- b) "documents originating in a Member State and classed as secret by law or regulation require its prior consent".

65. The question put by LIBE does not relate to the right of public access to Europol documents, but to the right of access of the Ombudsman to documents in the possession of Europol in order to determine whether a possible problem of maladministration exists in the way this body gives or denies public access to its documents. Concerning the position taken by Europol vis-à-vis the Ombudsman in this case, it is necessary to ascertain whether it is in conformity with, the Statute of the Ombudsman, the Europol Decision and other pertinent legally binding rules - namely security rules — or with international obligations taken by the Union.

66. Concerning the Statute of the Ombudsman, it states that "access to classified information or documents [...] shall be subject to compliance with the rules on security of the Community institution or body concerned". In other words, the Statute of the Ombudsman can be read as implying that certain restrictions in the investigative powers of the Ombudsman may follow from the "rules on security" of Europol.

67. As a matter of fact, if Europol were to give access to the document in question to the Ombudsman without the prior consent of the USA, it would act in infringement of its own rules on confidentiality and security as described in paragraphs 29-33 above. These rules provide that disclosure or transmission of confidential information is subject to the prior consent of the originator of the information. This results from Article

46 of the Europol Decision, which stipulates that Europol must apply Council Decision 2001/264/EC.

Article 12 of the latter establishes the obligation to "seek the originator's written consent" before releasing a document containing classified information from the originator.

67. This principle is explicitly enshrined in the abovementioned agreement between the EU and the USA on the security of classified information of 30 April 2007, stating that the recipient Party shall not further release or disclose classified information without the prior written approval of the releasing Party" (Article 4(4)).

It is true that Europol is not explicitly mentioned in this agreement, which leaves the question open whether it applies to Europol, but it remains true that the agreement establishes in the relations between the EU and the USA the principle of prior consent by the originator before information is released or used for other purposes.

68. In conclusion, the Ombudsman's competence to investigate complaints about public access to documents is part of his/her general competences. However, the Ombudsman's right of (confidential) access to documents is not absolute under EU law.

If the document in question originating in a Member State is classified as secret, the Member State has to give its prior consent; in the present case, which relates to a JSB report entailing information from the USA classified as secret, Europol could not give access to the Ombudsman without the prior written approval of the USA.

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III. Conclusions

69. In light of the foregoing, the Legal Service reaches the following conclusions:

a) The JSB inspection report is a JSB document. It falls under the Europol Decision to the extent that the JSB was created by the latter and it refers to Europol's activities, but it cannot be considered as such as a "Europol document" within the meaning of the definition provided for in the Europol Decision. The legal authority to decide on the granting or denying of public access to the inspection report is the chairman of the JSB on the basis of Article 7(5) of the JSB's Rules of Procedure. If the request is directed to Europol, it will be for Europol to decide according to the Decision of the Management Board of Europol, which lays down the rules concerning access to Europol documents.

b) Without the consent of the originator, neither Europol nor the JSB can give (confidential) access to documents to the extent they contain information classified "EU secret" and originate from the USA.

c) The "technical modalities" coordinated under Article 4(9) of the TFTP Agreement have not been concluded or approved under the procedure provided for in Article 218 TFEU. The legal status of the technical modalities is that of a non-binding, administrative arrangement.

Therefore, the "technical modalities" cannot constitute as such an act which could legally justify denying to the European Ombudsman confidential access to documents.

The Ombudsman's competence to investigate complaints about public access to documents is part, of the general competences of the Ombudsman. Under European law the Ombudsman does not have an absolute right of (confidential) access to documents. This may depend on the restrictions which are applicable to the institution or body subject to inquiry. In the present case, which relates to a JSB report entailing information from the USA classified as secret, Europol could not give access to the Ombudsman without the prior written approval of the USA in conformity with the Europol Decision (Article 46) and the Council Decision 2001/264/EC on the security rules thr protecting EU classified information (Article 12),

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Niels Bertil RASMUSSEN

Visa: By delegation of the Jullisconsuit,

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Ricardo PASSOS, Director

Mihkel ALLIK