

Comments of the Commission on a closing decision from the European Ombudsman
- Complaint against the European Police Office (EUROPOL), ref. 1148/2013/TN

The Commission appreciates the European Ombudsman's continuous efforts to improve fairness, efficiency and accountability of the EU institutions and always cooperates with the Ombudsman's Office to achieve these goals in individual cases.

To the knowledge of the Commission's services, this inquiry did not involve seeking information from the Commission, which is responsible for reporting on the implementation of the TFTP Agreement. As it turns out, the Commission is an addressee of some of the European Ombudsman's recommendations, and, had it been approached during the inquiry, it would have been able to clarify certain facts affecting the conclusions.

The European Ombudsman's closing decision states that the US acquired from the technical modalities of the TFTP Agreement a right of veto on the sharing by Europol with third parties of any information provided by the US. The decision further states that these technical modalities, which were negotiated by the Commission and the US authorities, have not been submitted for approval to the EU legislature and that their legality is therefore questionable.

The Commission emphasises that obtaining the consent of the data originator before any classified information is further disseminated (mentioned in the decision as 'a right of veto') is one of the most important principles of data sharing embedded in the security frameworks of all EU institutions and bodies, including Europol¹ and of Member States. It is also a key principle of the Interinstitutional Agreement, concluded in March 2014, between the Council and the European Parliament on exchanging classified information². This principle, therefore, is not specific to the TFTP Agreement, the technical modalities of which simply reflect normal arrangements and are in no way to be regarded as a special case.

In this particular case the US, as an originator of data that was contained in the report classified by the Joint Supervisory Board (JSB), in line with the standard rules on handling classified information, did not agree to the disclosure of the report by Europol as this would, among other effects, reveal the operational functionalities of the TFTP. This is explained in the US letter, a part of which is quoted in point 6 of the decision.

¹ Article 46 of Council Decision 2009/371/JHA of 6 April 2009 establishing Europol states that Europol shall apply the security principles and minimum standards set out in Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information (which repealed and replaced Council Decision 2001/264/EC of 19 March 2001).

² Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, Official Journal of the European Union (OJEU), C95/1 – C95/7, 1 April 2014.

Regarding the comment about a lack of approval of technical modalities by the Council and the European Parliament, the Commission would like to underline that this comment does not take into account the nature and limits of this document, which remains at the technical implementation level and naturally respects the provisions of the TFTP Agreement as well as the existing EU security framework.

Finally the Commission notes the European Ombudsman's observation concerning examples where special arrangements have been put in place to assure democratic scrutiny of the executive in these policy areas. The Commission would be open to support any efforts to develop a dedicated system of institutional cooperation and democratic scrutiny which respects the existing EU security frameworks but makes it possible to share or access classified information.