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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

Democratic Control over Europol

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1. INTRODUCTION

- 1.1 Article 29 of the Amsterdam Treaty (TEU) establishes as a new objective for the Union "...to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters..." It stipulates that this objective shall be achieved by preventing and combating crime, organised or otherwise. One of the means mentioned to combat crime is closer co-operation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol)¹

Article 30 contains the general statement that the Council promotes co-operation through Europol. In addition it mentions a number of activities which the Council should realise within a period of five years after the date of entry into force of the Treaty² The conclusions of the special European Council on Justice and Home Affairs of Tampere of October 1999 contain proposals to develop Europol further³.

- 1.2 Europol⁴ became fully operational only in July 1999, after having begun certain activities as the Europol Drugs Unit in 1993. The role and mandate of Europol in the European Union's approach to the fight against serious international crime is a subject of ongoing debate, including at the level of successive intergovernmental conferences. It has been brought into particularly sharp focus by the events of 11 September in New York and Washington and by the Union's response to them. As recently as 6 December 2001, the Council decided, on the basis of a proposal tabled in the second half of 2000 by Sweden and Belgium, to extend Europol's mandate to all forms of crime mentioned in the Annex to the Convention establishing Europol. The question of how best to implement the provisions of the Amsterdam Treaty and the Tampere European Council conclusions to extend further Europol's role into something more operative is under active discussion. Recently more fundamental ideas on Europol's future were raised, such as the possibility to give it real investigative powers.

¹ Art. 29 Treaty of the European Union (TEU)

² Art. 30 (2) TEU

³ Presidency Conclusions of the Tampere European Council on 15-16 October 1999 (Tampere Conclusions) No. 43 and 45

⁴ Europol Convention; OJ 1995/ C 316/ 01

- 1.3 Questions have also been raised, particularly in the Committee on Civil Liberties and Justice and Home Affairs of the European Parliament, about the appropriate means for democratic control of Europol.

Until recently, however, the subject of the democratic, or rather parliamentary, control over Europol has never been discussed in detail. This changed with the presentation by the Swedish Presidency of an overview of the existing legal provisions concerning democratic control over Europol on 14 May 2001.⁵ This initiative was followed by the organisation by the Dutch Parliament of the first inter-parliamentary European Union conference on Europol on 7-8 June 2001, which focused on the question of parliamentary control.

The subject of democratic control over Europol requires a careful examination of what existing control mechanisms exist, whether they are adequate or whether they should be developed further. That there is need for an adequate level of control over Europol is beyond doubt. In the discussion on whether parliamentary control over Europol's activities should be extended, one should have in mind that Europol is a police organisation which is working in the highly sensitive area of the fight against organised crime. The challenge is therefore to find the right balance between an appropriate level of parliamentary control on the one hand and the need for confidentiality and discretion of a police organisation in order to enable it to fight this dangerous form of crime effectively on the other. The recent events in the United States have further highlighted the importance of finding the right balance.

- 1.4 The Scoreboard of the European Commission calls for the examination of the possible need to revise the Europol Convention to cover the question of democratic control.⁶ The Scoreboard mentions the end of 2001 as a deadline for this examination. The relevance of the matter has become even clearer with the adoption by the European Council of Laeken of 14 and 15 December of its "Declaration on the future of the European Union." The Declaration mentions the need for European institutions to be less unwieldy and rigid and more efficient and open. It also refers to the expectations of Europe's citizens for a greater EU role in justice and security and action against cross-border crime. These issues, which are clearly relevant to the subject of this Communication, are now on the agenda of the Convention, which has been tasked with preparing the next Inter-governmental Conference on the future of the Union.

- 1.5 Two subjects related to democratic control are not dealt with in this Communication: judicial control and the financing of Europol through the Community budget. The Commission takes the view that, in view of Europol's current tasks and competences -which are much more limited than those of the Member States' police services as is explained below- it would be more appropriate to examine these subjects at a later point in time in the context of the possible attribution of investigative powers to Europol.

⁵ See Council document 8677/01 Europol 39

⁶ COM (2001) 628 final of 30 October 2001; page 43

2. VIEWS OF THE EUROPEAN PARLIAMENT

- 2.1. The European Parliament has raised the subject of democratic control several times. In April 1999 it adopted a Recommendation to the Council on the extension of the powers of Europol and the reinforcement of parliamentary control over it.⁷ In October 2000 it adopted a Report on the Portuguese initiative to extend Europol's competence to money laundering in general.⁸ More recently, in October 2001 it adopted a report on the joint Belgian-Swedish initiative to extend Europol's competence to all forms of crimes listed in the annex to the Europol Convention.⁹
- 2.2. In its 1999 Recommendation, which was approved before the entry into force of the Treaty of Amsterdam, the Parliament stated that existing parliamentary control arrangements were too cumbersome and, as a result of the intergovernmental nature of decision-making procedures in the police co-operation area, ineffective. It does not regard the way in which information on Europol's activities is given to the European Parliament as representing an adequate form of parliamentary control. However, the Parliament also argued that Europol's new powers, based on its support role in the co-ordination of police deployment made possible by the Amsterdam Treaty, did not fundamentally alter the system or imperatives of parliamentary control.¹⁰

In particular the Parliament ¹¹

- calls on the Council to incorporate into the Treaty provisions on full parliamentary and judicial scrutiny of Europol at the level of the European Union and not to give any operational powers to Europol without providing for adequate scrutiny by the European Parliament. The Parliament urges the Council to take account of the already established rights of the European parliament to be informed and consulted.
- proposes to incorporate Europol's budget in the Community budget.
- suggests that, in the event of Europol's evolving into a police organisation with cross-border operational powers, the Council should look into setting-up a European public prosecutor's office or some other judicial body. In this case Europol should be given a basis in Community law and should be placed under the responsibility of a member of the Commission.

⁷ European Parliament recommendation to the Council on Europol: reinforcing parliamentary controls and extending powers; A4-0064/1999 adopted on 13 April 1999 (Rapporteur: Hartmut Nassauer)

⁸ Report on the initiative from the Portuguese Republic with a view to the adoption of a Council Act on the drawing up on the basis of Article 43 (1) of the Europol Convention of a protocol amending Article 2 and the Annex to the Convention; A5-0312/2000 adopted on 14 November 2000 (Rapporteur: Anna Karamanou)

⁹ Report on the initiative of the Kingdom of Belgium and the Kingdom of Sweden with a view to adopting a Council decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention.; A5-0370/2001 Final of 24 October 2001 adopted on 13 November 2001 (Rapporteur: Maurizio Turco)

¹⁰ See consideration Q and S of the 1999 Recommendation

¹¹ Recommendations Nr. 1-3, 5, 6 and 16

- calls on the Parliaments of the Member States to take consistent account of their right and duty to supervise the actions of their national Council member responsible for Europol and the Member States' representatives appointed to the Europol Management Board. This should happen in close co-operation with the European Parliament.

2.3. On the occasion of its Report on the Portuguese initiative adopted on 14 November 2000 the Parliament repeats its earlier criticism and proposes additional ideas on how to enhance the democratic accountability of Europol (e.g. the appearance of the Europol Director before the competent Parliamentary Committee; the right of the Parliament to request an exchange of views on the special annual report; making the European Court of Justice competent to rule on any dispute or conflict between Member States regarding the interpretation or application of the Europol Convention).¹²

2.4 The suggestions made by the European Parliament on the occasion of the report on the joint Belgian-Swedish initiative to extend Europol's mandate to all serious forms of crime listed in the Annex to the Europol Convention adopted on 13 November 2001 also mainly aims at increasing the control of the European Parliament over Europol. Thus the Parliament requested for example that the Commission should present by the end of 2001 a proposal to revise the Europol Convention following best practices and methods of democratic control of police services in the Member States: "A proposal for the comprehensive reform of the instruments of police and judicial cooperation, including revision of the Europol Convention to bring it into line with higher standards and methods of democratic control of the police forces of the Member States is to be submitted by the Commission by the end of 2001; that comprehensive reform should aim gradually to communitise those instruments, to strengthen judicial control by the Court of Justice and to fund those instruments through the Community budget."¹³

At the time the Parliament put forward this request the Council had already made an inventory of the amendments to the Europol Convention that were considered necessary to make Europol function more effectively. Member States judged it useful to postpone a fundamental discussion on the question of democratic control over Europol until the Commission's Communication on the subject. The Communication can be considered as an important first step in the process of gradually improving democratic control over Europol: much of it is devoted to clarifying some basic questions concerning the exact tasks and functions of Europol as compared with those of the police services of the Member States as well as the currently existing types of control over the organisation.

¹² Report of the European parliament; A5-0312/2000, p. 6-8

¹³ Report of the European Parliament; A5-0370/2001 final, p. 6

3. THE CURRENT FUNCTIONING OF EUROPOL.

An examination of the question of whether the existing provisions for democratic control over Europol are adequate has to begin with an examination of the tasks and powers of Europol itself.

3.1. Tasks and powers.

Article 2 (1) of the Europol Convention defines Europol's objective as "...to improve the effectiveness and co-operation of the competent law enforcement authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected..."

Article 3 (1) stipulates that Europol shall have the following principal tasks to achieve its objective:

- to facilitate the exchange of information between the Member States;
- to obtain, collate and analyse information and intelligence;
- to notify the competent authorities of the Member States without delay of information concerning them and of any connections identified between criminal offences;
- to aid investigations in the Member States by forwarding all relevant information to the national units;
- to maintain a computerised system of collected data.

In performing these tasks Europol could until recently only deal with the following forms of crime: drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings, motor vehicle crime, terrorism and money laundering.¹⁴ From 1 January 2002 Europol is able to deal with all the forms of crime listed in the Annex to the Europol Convention.¹⁵

The Europol Convention thus limits Europol's tasks basically to information exchange, crime analysis and co-ordination. This means that Europol's mandate is limited to a much narrower range of tasks than those which the national police forces of the Member States traditionally perform, such as assuring public order and security, the power to effect arrests and the right to use weapons. The only powers that Europol has on the basis of the Convention is to ask for, to give and to process information, including on line, on the basis of very stringent legal provisions. A major difference for example with a national police service is that Europol currently has no executive and investigative powers and carries no weapons: it has no power to conduct wire tapping, house searches or arrests or other police activities which affect

¹⁴ Art. 2 Europol Convention; Council Decision of 29 April 1999 extending Europol's mandate to forgery of money and means of payment.

¹⁵ Council Decision of 6 December 2001; OJ 2001/C 362/ 01

the fundamental rights of citizens (apart from the right to privacy, see 3.2.1 below) and which therefore – in addition to requiring an adequate legal basis- have to be under judicial control, e.g. under the control of a public prosecutor or another democratically accountable authority.

3.2. Existing controls.

In order to assess whether the provisions for control over Europol are adequate in relation to its existing powers, it is necessary to examine the Europol Convention. This document describes in detail what Europol is allowed to do and how it should operate in performing its functions.

As explained above, Europol's work mainly involves the processing of information, including (under strictly laid down rules) personal data. It gathers, processes, stores and disseminates information that it receives from Member States law enforcement services and its own intelligence work. Recently it signed co-operation agreements with Interpol, Norway, Iceland, as well as with the candidate countries Poland, Hungary, Estonia and Slovenia. These agreements include the possibility to exchange personal data. The co-operation agreement signed with the United States last December does not allow the exchange of such data. It continues to negotiate co-operation agreements with all other candidate countries. These agreements will provide additional sources of information.

3.2.1. Rules on data protection

The main fundamental right of citizens, which is affected by Europol's current work therefore, is the right to privacy.¹⁶ To address this issue, the Europol Convention contains a number of articles regarding the processing of personal data and data protection.¹⁷ Article 23 of the Convention stipulates that each Member State shall designate a national supervisory body (NSB). The NSBs have the task to monitor, in accordance with their respective national legislation, the permissibility of the input, retrieval and any communication to Europol of personal data. They must also examine if this violates the rights of the data subject. In addition, Article 24 stipulates that a Joint Supervisory Body (JSB) shall be established. The task of the JSB, an independent body, composed of representatives of each of the NSBs, is to assure that Europol respects the Convention's provisions on data protection. It also has to review, in accordance with the Convention, the activities of Europol in order to ensure that the rights of the individuals are not violated by the storage, processing and utilisation of the data held by Europol. The JSB shall furthermore monitor the permissibility of the transmission of data originating from Europol. Europol has an obligation to assist the JSB in carrying out its tasks successfully, in particular to allow its members free access to all its premises, to supply requested information, to give access to all data and to implement its decisions on appeals.¹⁸ Every individual has a right to request the JSB to ensure that the treatment of personal data by Europol is lawful and accurate.¹⁹ In accordance with Article 24 (6) of the Europol Convention

¹⁶ See also in this respect the Charter of Fundamental rights of the European Union; Article 8: Protection of personal data.

¹⁷ Title IV, Art. 13 – 25 Europol Convention

¹⁸ Art. 24 (2) and Art. 24 (7) Europol Convention

¹⁹ Art. 24 (4) Europol Convention

the JSB shall draw up reports on its activities at a regular basis to be submitted to the Council.

In addition to the above provisions on data protection, the Convention itself and several complementary Council Acts lay down rules on the use of data and the communication of data to third states and third bodies.²⁰

3.2.2. *The Management Board*

As regards the day-to-day work of Europol, the Management Board has the role of supervising and guiding the organisation. The Convention contains a long list of tasks, which the Management Board must perform. Some examples are:²¹

- Adopt the annual report on Europol's activities during the previous year;
- Adopt a report on Europol's future activities taking into account Member States' operational requirements and budgetary and staffing implications for Europol;
- Prepare the implementing rules for data files;
- Approve orders opening data files;
- Take part in the appointment and dismissal of the Director and Deputy Directors;
- Take part in the drawing up of the budget;
- Adopt the five-year financing plan;
- Appoint the financial controller and oversee the performance of his duties;
- Take part in any amendment to the Convention;
- Act in disputes between a Member States and Europol or between Member States on compensation for unauthorized or incorrect processing of data.

The Management Board is composed of one representative of each Member State. The European Commission has observer status. The Board has to meet at least twice per year, but in practice meets about six times per year. The performance of the above tasks enables it to monitor Europol's functioning in considerable detail. Through their representatives on the Board, Member States' competent Ministers are able to remain continuously and well informed about Europol's functioning.

It may thus be said that in the particular area of data protection and in the supervision exercised by the Management Board, the controls exercised over Europol are similar to, if not wider than controls that exist in the Member States for national police

²⁰ e.g. Council Act of 3 November 1998 laying down rules concerning the receipt of information by Europol from third parties (OJ 1999/ C 26/ 03); Council Act of 12 March 1999 on the rules governing the transmission of personal data by Europol to third states and third bodies (OJ 1999/ C 88/ 01).

²¹ Art. 28 Europol Convention

services, despite the fact that the latter's powers are much wider than the current ones of Europol.

3.2.3. *Parliamentary control*

- a) Responsibility for the guiding and supervising of Europol rests, therefore, with the Management Board, which is composed of representatives of the Member States. The Management Board reports to the Council. The Council members responsible for Europol, i.e. the Ministers competent for criminal police matters in each Member State, are subject to national parliamentary controls in accordance with the provisions of their respective constitutions. Each of them is responsible for providing adequate information on the functioning of Europol to his or her national Parliament where he or she can be held accountable on the Ministry's policy regarding Europol.

The Europol Convention itself also contains specific provisions on the European Parliament. Article 34 stipulates that the Presidency shall forward each year a special report on the work of Europol to the Parliament. Since Europol's becoming fully operational in July 1999, such reports have been submitted twice: for the years 1999 and 2000. These reports were (only very slightly) edited versions of the general annual Europol reports submitted to the Council. The question arises, therefore, of whether there is any compelling reason why the Parliament should not receive exactly the same report as the one sent to the Council. It could be an improvement to submit a single report to the European Parliament and the Council.²²

The Europol Convention also states that the European Parliament has to be consulted before any amendment to the Convention.

The limited possibilities of control for the European Parliament laid down in Article 34 of the Europol Convention, which came into force in 1998, have now been indirectly extended by the Amsterdam treaty, where the relevant provision is Article 39 TEU. This lays down an obligation for the Council to consult the Parliament before the adoption of legally binding measures, such as framework decisions, decisions and conventions. This provision thus also applies to the adoption of any such instruments involving Europol. Several articles of the Europol Convention stipulate that the Council must take decisions in accordance with the procedures in Title VI of the TEU. This means that the obligation in Article 39 TEU to consult the Parliament applies. Thus it is assured that the European Parliament is consulted on important decisions concerning the development of Europol, e.g. any extension of its mandate, the appointment and dismissal of the Europol Director or the determination of rules governing the transmission of personal data.²³

Article 39 furthermore stipulates that the Council Presidency and the Commission shall regularly inform the Parliament of discussions in the area covered by Title VI. It also states that the European Parliament may ask questions to the Council or make recommendations to it and that shall hold a debate on the progress made in the Title VI area.

²² The European Parliament has not delivered any opinion on the Europol reports.

²³ The Swedish Presidency together with the Council Secretariat recently presented an overview on the legal provisions in place concerning democratic control over Europol. See Council Document 8677/01Europol 39

These provisions of the Amsterdam Treaty have enhanced the role of the European Parliament, which nevertheless still falls well short of its role under the Community Treaty. This situation is not specific to Europol, however. It applies to the whole area of third pillar co-operation.

- b) As regards other relevant Treaty provisions, Article 41 TEU provides that certain articles of the EC Treaty shall apply to the areas referred to in Title VI of the TEU. One of those is article 195 EC, which states that the Ombudsman, who is appointed by the European Parliament, is also competent for the activities of EU institutions and bodies in the third pillar area. Consequently he is empowered to receive complaints concerning possible instances of mal-administration in the activities of Europol.
- c) Parliamentary control over Europol, be it at national or European level, thus takes a somewhat indirect form. This is however also true of the control of police in most Member States. It is the responsible Minister, and in the final analysis the Government, which, being politically responsible for the functioning of the police, is accountable to the Parliament. Parliaments do normally not have a direct influence in the running of the police.²⁴

However, in addition to being indirect, the control is also “fragmented”, being shared between 15 national Parliaments and the European Parliament.

A first public step towards examining the adequacy of these control arrangements was taken with the 1st Inter-parliamentary Conference on Europol in The Hague on 7-8 June 2001, organised by the Dutch Parliament. It brought together members of national Parliaments and of the European Parliament who are responsible for police and justice affairs. The conference aimed both to enrich the level of Parliament's knowledge on Europol matters and to exchange views on democratic control in the field of police affairs. The Conference concluded that the national parliaments are not able to organise, individually, a sufficient parliamentary supervision of the decisions of the Council in police affairs and of Europol. A network should therefore be set up consisting of national parliamentarians and members of the European Parliament responsible for justice and home affairs.²⁵

4. THE FUTURE

As regards possible future tasks and powers of Europol, a discussion has started last year in the Union which is becoming increasingly clear and focused. Its relevance has been further highlighted by the events of 11 September.

The discussion has moved on to more fundamental ways to make Europol more effective in the fight against serious international crime. One of these has been the possible extension of Europol's mandate, so that it would be able to deal with many more types of crime than the seven mentioned in paragraph 3.1 above. This has led to an initiative of Sweden and Belgium

²⁴ One known exception is the situation in Belgium, where since the early 1990's the 'Comité P' is in existence, which oversees all police activities. It has five members, its chairman being a judge, and an investigation unit of thirty persons attached to it. The 'Comité P' reports directly to a special Committee of the Parliament.

²⁵ Preliminary draft resolution of the inter-parliamentary conference in The Hague on 7-8 June 2001

to extend Europol's competence to all forms of crimes listed in the Annex to the Europol Convention. On 6 December 2001 the Council of Justice and Home Affairs adopted a decision to this effect.²⁶

At the core of the debate are the provisions of Article 30 (2) TEU that makes clear that Europol should play a more operational role in the future. Within five years after its entry into force the Council should enable Europol to participate in joint teams and to enable it to ask Member States to start and co-ordinate investigations. The Tampere European Council of October 1999 stressed the urgency of realising these measures.

On the basis of an initiative from the Belgian Presidency in 2001, the Council is currently examining an amendment to the Europol Convention to implement these provisions. In addition one of the ideas being discussed is to simplify the existing cumbersome procedure through which amendments to the Europol Convention have to be realised. The current procedure stipulates that each amendment has to be ratified by all Member States²⁷.

Such developments would contribute to change gradually the character of Europol from a purely support police office for Member States dealing mainly with information and intelligence to a more executive body. Finally, there are ideas on the future tasks and powers of Europol, which go further still, for example the possibility of Europol developing into an operative European Police Force with investigative powers.²⁸ These could include the possibility for Europol to interrogate suspects, to start investigations etc.

Once it becomes clear, at some point in the future, that such operational powers will be conferred on Europol, it will be necessary to examine very carefully what this implies for the then existing controls over the organisation and to take measures that go further.

²⁶ Council Decision of 6 December; OJ 2001/C 362/01

²⁷ Council Document 5455/02 Europol 5; It is interesting to compare this procedure with the solution found for Eurojust, which is to be established through a Council Decision.

²⁸ See in this context the recent report of the Max-Planck-Institute für ausländisches und internationales Strafrecht "Justizielle Einbindung und Kontrolle von Europol - Kurzvorstellung der Ergebnisse", p. 261

5. CONCLUSION AND RECOMMENDATIONS

The core question throughout this paper has been whether or not there is a need for more control by parliaments, at EU as well as national level, on the work and functioning of Europol, particularly in the light of its evolving role.

The above analysis of the existing controls over Europol indicates that the current system cannot be regarded as legally insufficient, given the limited nature of the powers attributed to Europol by comparison with those of national police forces. The existing controls (through the Parliaments, the National Supervisory Bodies, the Joint Supervisory Body and the Management Board) are, however, exercised in an indirect, fragmented and not easily understood manner. This gives rise to a general feeling - as widely expressed at the 7-8 June Conference in The Hague - that something clearer and more transparent is needed.

What is felt to be missing at the moment is first of all an institutionalised and regular information exchange between those responsible in national parliaments and the European Parliament. If all the provisions and procedures regarding parliamentary control existing at national or EU level were made known to all the other parliaments, the situation would already be improved considerably. In addition, there are no regular formal exchanges foreseen between the Parliament and Europol and there is also room for improving the information basis of the European Parliament.

In the Commission's view, such improvements would be achieved through a limited number of amendments to the Europol Convention itself, together with the establishment of a mechanism enabling national Parliaments and the European Parliament to examine and coordinate their respective roles.

However, if in the future Europol would be entrusted with investigative powers, farther-reaching measures would become necessary. In the meantime the Commission offers the following recommendations for consideration:

- (1) Establish a formal mechanism for information exchange and co-ordination between national Parliaments and the European Parliament. The current fragmented, and thereby less effective, control, would be gradually transformed into a structured and unified control at European Union level, based upon an enhanced co-operation between the Member States' parliaments and the European Parliament.

To this end a joint committee, consisting of members of both the Member States' and European Parliaments committees responsible for police matters could be established. This joint committee could meet twice a year to exchange information and experience and to discuss matters relating to Europol²⁹. It would maintain close contact with Europol through a special body of about five Members nominated by the joint committee and reporting to it.

²⁹ An example might be the conference of the Community and European Affairs Committees of the Parliaments of the European Union (COSAC). COSAC was established in 1989 to reinforce the role of national parliaments in the Community. The aim of this conference is to intensify the exchange of information between the various committees in national parliaments specialising in European affairs and to meet twice a year to discuss issues of common concern.

- (2) Amend Article 34 of the Europol Convention, so as to come to a single annual report on Europol's activities for information of both the European Parliament and the Council.
- (3) Amend Article 34 of the Europol Convention, so as to give the European Parliament the formal right to request an exchange of views on the Europol annual report with the Presidency.
- (4) Amend Article 34 of the Europol Convention, so as to give the European Parliament the formal right to request the Europol Director to appear before the competent committee.
- (5) Amend Article 24 (6) of the Europol Convention, so as to make it obligatory for the Joint Supervisory Board to draw up its activity report on an annual basis and to forward it to the European Parliament. It could be envisaged to include in these reports information on the controls carried out by the National Supervisory Bodies.