JUDICIAL ASSISTANCE

Cooperation

Agreement between the
UNITED STATES OF AMERICA
and the EUROPEAN POLICE OFFICE

Signed at Brussels December 6, 2001

with

Annex

and

Supplemental Agreement

Signed at Copenhagen December 20, 2002

with

Exchange of Letters

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

". . .the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

EUROPEAN POLICE OFFICE

Judicial Assistance: Cooperation

Agreement signed at Brussels December 6, 2001;
Entered into force December 7, 2001.
With annex.
And supplemental agreement signed at
Copenhagen December 20, 2002;
Entered into force December 21, 2002.
With exchange of letters.

AGREEMENT

BETWEEN

THE UNITED STATES OF AMERICA

AND

THE EUROPEAN POLICE OFFICE

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN POLICE OFFICE

Preamble

The United States of America and the European Police Office (Europol):

considering that it is within their common interest to enhance their cooperation;

considering that the Council of the European Union has given Europol the authorization to enter into negotiations on a cooperation agreement and to agree to the following provisions with the United States of America;

Have agreed as follows:

Article 1

Purpose

The purpose of this Agreement is to enhance the cooperation of the Member States of the European Union, acting through Europol, and the United States of America in preventing, detecting, suppressing, and investigating serious forms of international crime in the areas mentioned in Article 3 of this Agreement, in particular through the exchange of strategic and technical information, as defined in Article 2. This Agreement does not authorise the transmission of data related to an identified individual or identifiable individuals.

Article 2

Definitions

1. "Strategic information" includes, but is not limited to:

    a. enforcement actions that might be useful to suppress offences and, in particular, special means of combating offences;
    b. new methods used in committing offences;
    c. trends and developments in the methods used to commit offences;
    d. observations and findings resulting from the successful application of new enforcement aids and techniques;
    e. routes and changes in routes used by smugglers or those involved in illicit trafficking offences covered by this agreement.
    f. prevention strategies and methods for management to select law enforcement priorities;
    g. threat assessments and crime situation reports.

2. "Technical information" includes, but is not limited to:

    a. means of strengthening administrative and enforcement structures in the fields covered by this agreement;
    b. forensic police methods and investigative procedures;
    c. methods of training the officials concerned;
    d. criminal intelligence analytical methods;
    e. identification of law enforcement expertise.

Article 3

Areas of criminality to which the Agreement applies

1. The co-operation as established in this Agreement shall relate to the following criminal activities impacting on the United States of America or the Member States of the European Union:

   a. unlawful drug trafficking;
   b. trafficking in nuclear and radioactive substances;
   c. illegal immigrant smuggling;
   d. trade in human beings;
   e. motor vehicle crime;
   f. crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property;
   g. forgery of money and means of payment;

   as well as to illegal money laundering activities in connection with these forms of crime or specific manifestations thereof and related criminal offences.

2. Related criminal offences shall be the criminal offences committed in order to procure the means for perpetrating the criminal acts mentioned in paragraph 1, criminal offences committed in order to facilitate or carry out such acts, and criminal offences to ensure the impunity of such acts.

3. Where Europol's mandate is changed to cover areas of crime in addition to those set forth in paragraph 1, Europol may, from the date when the change to Europol's mandate enters into force, submit to the United States of America in writing a proposal to extend the scope of application of this agreement in relation to the new mandate. In doing so, Europol shall inform the United States of America of all relevant issues related to the change of the mandate. This agreement shall apply in relation to the new mandate as of the_date on which Europol receives the written acceptance by the United States of America in accordance with its internal procedures.

4. Europol's definitions of the forms of criminality mentioned in paragraph 1 a) to e) and g) are included in Annex 1 to this Agreement. Whenever a change to Europol's mandate referred to in paragraph 3 entails the acceptance of a definition of another form of crime, such a definition will also be applicable for Europol where this form of criminality becomes part of this Agreement in accordance with paragraph 3. Europol shall inform the United States of America if and when the definition of an area of criminality is amplified, amended or supplemented.

Article 4

Point of contact

1. Each contracting party shall identify a point of contact to coordinate the application of this agreement.

2. These points of contact shall communicate directly with one another for the purposes of this agreement.

3. A Party may change the designated point of contact upon written notification thereof to the other Party.

4. The point of contact for the United States shall keep Europol advised, in writing, of the U.S. law enforcement authorities responsible for the areas of criminality to which this agreement applies, and functions that are to be carried out directly by such authorities.

Article 5

Exchange of Information and Confidentiality

1. Exchange of information specified in this agreement shall only take place in accordance with the terms of this agreement.

2. The exchange of information as specified in this agreement will take place between the points of contact designated under Article 4 and, as the points of contact consider appropriate, may include direct exchanges of information with the law enforcement agencies identified pursuant to Article 4, paragraph 4.

3. Information exchanged pursuant to this agreement shall be used for the purposes of this agreement and in the investigation, prosecution and prevention of criminal offences, and in proceedings related to criminal matters. Where one of the Parties requests the use of such information for other purposes, it shall ask for the prior written consent of the Party that furnished the information.

4. Unless already in the public domain, information exchanged under this agreement will be treated as law enforcement information and afforded protections in accordance with domestic law and applicable regulations. Information marked as “Europol 1” to “Europol 3” shall be protected as "United States law enforcement sensitive material” and handled in the same manner as information of a similar sensitivity held by the United States of America. Europol shall treat “United States law enforcement sensitive

material" transmitted by the United States of America as equivalent to "Europol 1" for purposes of security, unless otherwise requested pursuant to paragraph 5 of this Article. It is the responsibility of the transmitting Party to ensure all appropriate marks are fixed to the materials so transmitted.

5. The Party providing information may request that it be used subject to conditions. If the receiving Party cannot comply with such request it shall notify the providing Party, which shall then determine whether the information shall nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them, without prejudice to imperative constitutional requirements.

Article 6

Mutual Consultation

1. The points of contact designated by the United States and Europol shall consult each other regularly on policy issues and matters of common interest for the purpose of realizing their objectives and coordinating their respective activities.

2. When appropriate, consultation shall be arranged at the required level between representatives of the law enforcement authorities of the United States and Europol responsible for the areas of criminality to which this agreement applies, to agree upon the most effective way in which to organize their particular activities.

Article 7

Exchange of expertise

Representatives of the points of contact described in Article 4, or designated representatives of the law enforcement authorities responsible for the areas of criminality to which this agreement applies shall, as appropriate:

a. participate in seminars, training courses, and other meetings; and

b. facilitate visits of experts, law enforcement authorities, and administrators, in the areas of criminality covered by this agreement.

Article 8

Liaison officers

If required for a further enhancement of the co-operation as laid down in this Agreement, the United States of America and Europol may agree to the assignment of one or more Liaison Officers. The liaison officers' functions, tasks, and status will be the subject of consultations with a view to concluding a liaison agreement.

Article 9

Savings clause

Nothing in this agreement shall prejudice or otherwise affect or impact upon the provisions of any Mutual Legal Assistance Treaty, working law enforcement relationship, or any other agreement or arrangement for the exchange of information between the United States of America and any Member State of the European Union.

Article 10

Amendments to and termination of the Agreement

1. This Agreement may be amended by mutual consent between Europol and the United States of America at any time. Europol may only give its consent to amendments after completion of its applicable internal procedures.

2. The United States of America and Europol shall enter into consultations with respect to the amendment of or additions to this Agreement at the request of either of them. In particular, additional provisions relating to the exchange of personal data will be considered.

3. This Agreement may be terminated by each party with three months' written notice.

Article 11

Entry into force

This Agreement shall enter into force on the first day following its signature.

Done at Brussels on the sixth of December 2001, in duplicate, in the English language.

For the United States of America:

Rockwell A. Schnabel
Ambassador of the United States
of America to the European Union

For Europol:

Jürgen Storbeck
Director

ANNEX 1

DEFINITION OF THE FORMS OF CRIME MENTIONED IN ARTICLE 3 OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND EUROPOL

With regard to the forms of crime listed in Article 3 (1) a) to e) and g of this Agreement, Europol shall, for the purposes of this Agreement, use the following definitions:

- "unlawful drug trafficking" means the criminal offences listed in Article 3 (1) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the provisions amending or replacing that Convention;
- "crime connected with nuclear and radioactive substances" means the criminal offences listed in Article 7(1) of the Convention on the Physical Protection of Nuclear Material, signed at Vienna and New York on 3 March 1980, and relating to the nuclear and/or radioactive materials defined in Article 197 of the Euratom Treaty and Directive 80/836 Euratom of 15 July 1980;
- "illegal immigrant smuggling" means activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States of the European Union and the United States of America, contrary to the rules and conditions applicable in their territories;
- "traffic in human beings" means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue, especially with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children. These forms of exploitation also include the production, sale or distribution of child-pornography material;
- "motor vehicle crime" means the theft or misappropriation of motor vehicles, lorries, semi-trailers, the loads of lorries or semi-trailers, buses, motorcycles, caravans and agricultural vehicles, works vehicles, and the spare parts for such vehicles, and the receiving and concealing of such objects;
- "forgery of money and means of payment" means the acts defined in Article 3 of the Geneva Convention of 20 April 1929 on the Suppression of Counterfeiting Currency, which applies to both cash and other means of payments;
- "illegal money-laundering activities" means the criminal offences listed in Article 6 (1) to (3) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990.

SUPPLEMENTAL AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN POLICE OFFICE ON THE EXCHANGE OF PERSONAL DATA AND RELATED INFORMATION

The United States of America and the European Police Office (Europol) ("the Parties");

Considering that the Agreement of 6 December 2001 between the United States of America and Europol ("2001 Agreement") contemplates subsequent supplementation in order to address the exchange of personal data;

Considering that it is in their common interest to extend their cooperation to, inter alia, the exchange of personal data, with due regard to the rule of law and protection of individual rights and liberties;

Considering that the Council of the European Union has given Europol the authorization to enter into negotiations on a cooperation agreement including the exchange of personal data and to agree to the following provisions with the United States of America;

Considering the letters exchanged between the Parties, and the letter attached thereto, which amplify the meaning of this Agreement;

Have agreed as follows:

Article 1
Purpose

The purpose of this agreement is to enhance the cooperation of the Member States of the European Union, acting through Europol, and the United States of America, in preventing, detecting, suppressing, and investigating criminal offenses within the respective jurisdiction of the Parties, in particular by facilitating the reciprocal exchange of information, including personal data.

Article 2
Definitions

For purposes of this Agreement:

(a) "personal data" means any information relating to an identified or identifiable natural person;

(b) "identifiable natural person" means a natural person who can be identified, directly or indirectly, by reference to, in particular, an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(c) "processing of personal data" means any operation or set of operations which is performed upon such data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, combination, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

Article 3
Scope of assistance

1. The Parties may exchange information, including personal data, between themselves, in accordance with the provisions of this Agreement.

2. The exchange of strategic and technical information shall continue to be governed by the 2001 Agreement. Articles 4, 6 and 8 of the 2001 Agreement shall apply to this Agreement, *mutatis mutandis*.

3. This Agreement is intended solely for the purpose of cooperation between the Parties. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request, nor shall it derogate from any pre-existing right of a private party to do so.

4. Nothing in this Agreement may be interpreted in a manner that would prejudice or restrict the provisions of any Mutual Legal Assistance Treaty, working law enforcement relationship, or any other agreement or arrangement for the exchange of information between the United States of America and any Member States or institution of the European Union.

5. The Parties may carry out forms of cooperation other than the exchange of information to the extent and under the terms and conditions mutually agreed upon by them.

Article 4
Communications between the Parties

1. Requests and responses to requests under this Agreement may be made in writing, by any other means capable of producing a written record, or orally with written confirmation to follow if required by the requested Party. Where feasible, a written request may be transmitted through fax, e-mail, or other means for expediting communications, providing, where necessary in a particular matter, appropriate security measures.

2. Requests and responses to requests shall be transmitted either directly between the points of contact designated pursuant to Article 4 of the 2001 Agreement, or, if the points of contact agree in writing, directly between Europol and designated U.S. federal, state or local authorities.

3. A request shall provide a concise statement identifying the authority making the request, the matter under consideration, the reason for the request, and the nature of the assistance sought.

4. A Party may, without prior request, forward to the other Party information when it considers that disclosure of such information might assist the receiving Party. A brief statement of the reasons for forwarding the information shall be provided to the extent feasible and necessary, or to the extent required by the applicable legal framework of the forwarding Party.

Article 5
General terms and conditions

1. (a) Transmission of information under this agreement to, and its further processing by, the receiving Party shall be for the purposes set forth in the request, which shall be deemed to include the prevention, detection, suppression, investigation and

prosecution of any specific criminal offenses, and any specific analytical purposes, to which such information relates. Where the receiving Party seeks the use of such information for other purposes, it shall ask for the prior consent of the Party that furnished the information.

(b) Notwithstanding subparagraph (a), nothing in this Agreement shall prevent the receiving Party from:

(i) disclosing in its proceedings, information or evidence that tends to exculpate an accused person. In this situation, the receiving Party shall notify the transmitting Party in advance of disclosure, or, in an exceptional case in which advance notice is not possible, without delay thereafter.

(ii) using without restriction information or evidence that has been made public as a normal result of having been provided.

2. The transmitting Party shall indicate the agency from which the information concerned originated.

3. Unless already in the public domain, information exchanged under this Agreement will be treated as law enforcement information and afforded protections, including all appropriate security measures, in accordance with domestic law and applicable regulations. In particular, information marked as "Europol 1" to "Europol 3" shall be protected as "law enforcement sensitive material" and handled in the same manner as information of a similar sensitivity held by the United States of America. Europol shall treat "law enforcement sensitive material" transmitted by the United States of America as equivalent to "Europol 1" for purposes of security, unless otherwise requested pursuant to paragraph 5 of this Article. It is the responsibility of the transmitting Party to ensure all appropriate marks are fixed to the materials so transmitted.

4. The Party to which a request for assistance under this Agreement has been made shall endeavor to limit the circumstances in which it refuses or postpones assistance to the greatest extent possible. Before refusing or postponing assistance, that Party shall, where appropriate after having consulted with the requesting Party, consider whether the request may be granted partially, or subject to conditions. If the receiving Party cannot comply with such conditions, it shall notify the providing Party, which shall then determine whether the information shall nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them. Where the need for such conditions becomes apparent following transmission due to changed circumstances, the Parties shall promptly discuss available remedies.

5. A request for assistance pursuant to this Agreement shall be executed in accordance with and subject to the limitations of the applicable laws and regulations of the Party receiving the request, and within the limits of its available resources.

Article 6
Transmission of special categories of personal data

Personal data revealing race, political opinions, or religious or other beliefs, or concerning health and sexual life, may be provided only upon the transmitting Party's determination that such data is particularly relevant to a purpose set forth in Article 5, paragraph 1.

Article 7
Authorities competent to receive information

1. (a) Information supplied by Europol under this Agreement shall be available to competent U.S. federal authorities for use in accordance with this Agreement.

   (b) Such information shall also be available for use by competent U.S. state or local authorities provided that they agree to observe the provisions of this Agreement, in particular Article 5, paragraph 1.

2. Europol shall ensure that information supplied by the United States under this Agreement will only be made available to the competent law enforcement authorities of the Member States of the European Union or for use within Europol.

3. Onward transmission of information to international institutions, or to third States, will only take place with the prior written consent of the Party that supplied the information, unless already in the public domain.

Article 8
Requests for supplemental information

A Party may seek information to supplement that previously received pursuant to this Agreement, including, where not ascertainable from the information previously provided, the transmitting Party's assessment of the accuracy of such information, and of the reliability of the source of such information.

Article 9
Maintaining the accuracy of information

1. Each Party shall maintain information provided pursuant to this Agreement under a system of record keeping that facilitates the ability of its law enforcement authorities to carry out their activities on the basis of accurate information.

2. Each Party shall maintain a system of database and document control that provides for the orderly disposal, at intervals to be provided for by domestic law or administrative regulation, of information that has been received.

3. Where a Party becomes aware that non-public information it has received from the other Party is not accurate, it shall take all appropriate measures to safeguard against erroneous reliance on such information by its law enforcement authorities, which may include supplementation, deletion or correction of such information.

4. Where a Party becomes aware that information it possesses causes significant doubt as to the accuracy of information received pursuant to this Agreement, or an assessment made by the other Party of the accuracy of information or the reliability of a source, it shall, where feasible, advise the other Party thereof.

Article 10
Access by private persons or entities

1. Where a private person or entity requests from a Party access to information received by that Party under this Agreement that is not already in the public domain, the transmitting Party shall be consulted.

2. Where the transmitting Party does not consent to the release of the information, the receiving Party shall not release it. Should a decision not to release information be challenged, whether administratively or through judicial proceedings, the receiving Party shall, by all legal means within its power, advise, assist, appear and represent the transmitting Party's interests in connection therewith. Should the receiving Party become subject to a final order requiring it to release information to which the transmitting party had not consented, the receiving Party shall notify the transmitting Party in advance of disclosure, or, in an exceptional case in which advance notice is not possible, without delay thereafter.

3. This Article is without prejudice to any rights an individual may have under the law of the transmitting Party to seek release of information from that Party, or other appropriate relief.

Article 11
Expenses

Neither Party shall make any pecuniary claim against the other Party for expenses arising out of the execution of this Agreement. Should expenses of an extraordinary nature arise out of the execution of this Agreement, the Parties may consult with a view to determining the manner in which they shall be addressed.

Article 12
Oversight of implementation

The execution and implementation of this Agreement by the Parties shall be subject to oversight in accordance with their applicable law and procedures. The Parties shall utilize their respective administrative, judicial or supervisory bodies that will ensure an appropriate level of independence of the oversight process.

Article 13
Consultation

The Parties may consult, as appropriate, to promote the most effective use of this Agreement.

Article 14
Evaluation, amendment, and termination of the Agreement

1. Within two years after the entry into force of this Agreement, its implementation will be jointly evaluated by the Parties.

2. This Agreement may be amended by mutual consent between Europol and the United States of America at any time, in accordance with their respective applicable internal procedures.

3. This Agreement may be terminated by either Party upon three months' written notice.

Article 15
Entry into force

This Agreement shall enter into force on the first day following its signature.

Done at COPENHAGEN on the 20 day of DECEMBER 2002, 200_, in duplicate, in the English language.

FOR UNITED STATES OF AMERICA:

Larry Mathieu Light
Chargé d'Affaires, a.i.

EUROPOL:

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

December 20, 2002

Dear Mr. Storbeck:

I refer to your letter which reads as follows:

"Exchange of Letters related to the Supplemental Agreement between the United States of America and Europol on the exchange of personal data and related information

With respect to the Supplemental Agreement between the United States of America and Europol on the exchange of personal data and related information, the Parties would like to amplify the following points:

1. Liaison Officers and Privileges and Immunities

Europol is committed to support the position that any United States officials posted as Liaison Officers to Europol will receive reciprocal treatment to Europol officials posted as Liaison Officers in the United States. The United States regards such reciprocity as a necessary basis for maintaining privileges and immunities for Europol Liaison Officers in the U.S. at their current level.

The Parties refer to a letter sent by the United States State Department, which amplifies the issue of immunity for Europol under U.S. legislation and case law. This letter is annexed to this exchange of letters and shall be considered to be an integral part of it.

2. Article 1

The Parties note that for Europol the term "jurisdiction" in Article 1 refers to its mandate as laid down in the Europol Convention.

3. Article 3

The Parties note that information which is not strategic or technical information, as defined under the Agreement of 6 December 2001, will be covered by the Supplemental Agreement, in accordance with Article 3 (2) of the Supplemental Agreement.

The United States takes note that the other forms of co-operation foreseen under Article 3 (5) can only be contemplated by Europol as far as such co-operation is compatible with Europol's legal framework and any other applicable legal instrument which applies to such forms of co-operation.

4. Article 4

With respect to paragraph 4 the United States take note that under Europol's legal framework, it may only forward without prior request personal data under the Supplemental Agreement where it is necessary in individual cases for the prevention or combating of criminal offences for which Europol is competent. In the event that Europol shall find itself unable to directly forward such information to the United States it shall endeavour to obtain the consent of a Member State to transmit the information to U.S. authorities itself.

5. Article 5

The Parties agree that the phrase "prevention, detection, suppression, investigation and prosecution of any specific criminal offences and for any analytical purposes to which such information relates" as used in Article 5, paragraph 1 *sub* (a), includes, *inter alia*, exchange of information pertaining to immigration investigations and proceedings, and to those relating to *in rem* or *in personam* seizure or restraint and confiscation of assets that finance terrorism or form the instrumentalities or proceeds of crime, even where such seizure, restraint or confiscation is not based on a criminal conviction.

The United States takes note of the fact that under its legal framework, Europol may not presently authorise usage for other purposes than those included in paragraph 1.

The United States also takes note of the fact that under its legal framework, Europol may not presently transmit to the United States data that were transmitted to it by a Member State under this agreement without that Member State's prior consent.

Article 5, paragraph 4, of the Supplemental Agreement is to be understood not to permit the imposition of generic restrictions with respect to the sharing of personal

data, additional to the express requirements of the Agreement, as a precondition to be imposed by either Europol or one of its Member States.

6. Article 6

The Parties agree that for Europol the term "particularly relevant" as used in this Article shall be understood in the same sense as the term "absolutely necessary" under Europol's regulations connoting information with a significant degree of usefulness. The term "race" is interpreted by Europol to include racial origin, whereas for the U.S. it shall reflect the concept of ethnicity.

7. Article 7

With respect to paragraph 1, the Parties note that "competent authorities" shall mean those authorities who are responsible for functions relating to the prevention, detection, suppression, investigation and prosecution of criminal offences.

With respect to paragraph 3, the United States takes note of the fact that under its legal framework Europol is not allowed to provide authorisation for onward transmission beyond that reflected in this Agreement; conversely this Agreement shall not be relied upon as authority for Europol or its Member States to cause the onward transmission of data supplied by the U.S. except as authorised by this Agreement.

8. Article 12

The United States notes that under its laws and procedures, as well as those of Law Enforcement authorities at state and local levels, there are objective bodies and authorities authorised to oversee as appropriate the execution and implementation of the Supplemental Agreement. For example, various departments and agencies at the federal, state and local levels have established, by specific statutory provisions, regulations or administrative actions, offices of Inspectors-General, Internal Affairs divisions, or have designated senior officials or other components to oversee the general application of laws and procedures within the departments' or agencies' mandate or specific aspects thereof.

9. Article 14

With respect to Article 14, the Parties note that the joint evaluation foreseen in this Article will be aimed at determining if there is a need for further enhancement of the Agreement in all aspects, including the issues covered by this Exchange of letters."

I confirm that the foregoing proposal is acceptable and shall form an integral part of the Supplemental Agreement regarding the exchange of personal data and related information.

Sincerely,

Mark M. Richard
Counselor For Criminal Matters
United States Mission to the
European Union

EUROPOL

20 December 2002

File number: 3710-84

Mr. Mark M. Richard
Counselor For Criminal Matters
United States Mission
to the European Union

Dear Mr. Richard,

I refer to your letter which reads as follows:

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With respect to the Supplemental Agreement between the United States of America and Europol on the exchange of personal data and related information, the Parties would like to amplify the following points:

1. Liaison Officers and Privileges and Immunities

Europol is committed to support the position that any United States officials posted as Liaison Officers to Europol will receive reciprocal treatment to Europol officials posted as Liaison Officers in the United States. The United States regards such reciprocity as a necessary basis for maintaining privileges and immunities for Europol Liaison Officers in the U.S. at their current level.

The Parties refer to a letter sent by the United States State Department, which amplifies the issue of immunity for Europol under U.S. legislation and case law. This letter is annexed to this exchange of letters and shall be considered to be an integral part of it.

2. Article 1

The Parties note that for Europol the term "jurisdiction" in Article 1 refers to its mandate as laid down in the Europol Convention.

3. Article 3

The Parties note that information which is not strategic or technical information, as defined under the Agreement of 6 December 2001, will be covered by the Supplemental Agreement, in accordance with Article 3 (2) of the Supplemental Agreement.

The United States takes note that the other forms of co-operation foreseen under Article 3 (5) can only be contemplated by Europol as far as such co-operation is compatible with Europol's legal framework and any other applicable legal instrument which applies to such forms of co-operation.

4. Article 4

With respect to paragraph 4 the United States take note that under Europol's legal framework, it may only forward without prior request personal data under the Supplemental Agreement where it is necessary in individual cases for the prevention or combating of criminal offences for which Europol is competent. In the event that Europol shall find itself unable to directly forward such information to the United States it shall endeavour to obtain the consent of a Member State to transmit the information to U.S. authorities itself.

5. Article 5

The Parties agree that the phrase "prevention, detection, suppression, investigation and prosecution of any specific criminal offences and for any analytical purposes to which such information relates" as used in Article 5, paragraph 1 *sub* (a), includes, *inter alia*, exchange of information pertaining to immigration investigations and proceedings, and to those relating to *in rem* or *in personam* seizure or restraint and confiscation of assets that finance terrorism or form the instrumentalities or proceeds of crime, even where such seizure, restraint or confiscation is not based on a criminal conviction.

The United States takes note of the fact that under its legal framework, Europol may not presently authorise usage for other purposes than those included in paragraph 1.

The United States also takes note of the fact that under its legal framework, Europol may not presently transmit to the United States data that were transmitted to it by a Member State under this agreement without that Member State's prior consent.

Article 5, paragraph 4, of the Supplemental Agreement is to be understood not to permit the imposition of generic restrictions with respect to the sharing of personal data, additional to the express requirements of the Agreement, as a precondition to be imposed by either Europol or one of its Member States.

6. Article 6

The Parties agree that for Europol the term "particularly relevant" as used in this Article shall be understood in the same sense as the term "absolutely necessary" under Europol's regulations connoting information with a significant degree of usefulness. The term "race" is interpreted by Europol to include racial origin, whereas for the U.S. it shall reflect the concept of ethnicity.

7. Article 7

With respect to paragraph 1, the Parties note that "competent authorities" shall mean those authorities who are responsible for functions relating to the prevention, detection, suppression, investigation and prosecution of criminal offences.

With respect to paragraph 3, the United States takes note of the fact that under its legal framework Europol is not allowed to provide authorisation for onward transmission beyond that reflected in this Agreement; conversely this Agreement shall not be relied upon as authority for Europol or its Member States to cause the onward transmission of data supplied by the U.S. except as authorised by this Agreement.

8. Article 12

The United States notes that under its laws and procedures, as well as those of Law Enforcement authorities at state and local levels, there are objective bodies and authorities authorised to oversee as appropriate the execution and implementation of the Supplemental Agreement. For example, various departments and agencies at the federal, state and local levels have established, by specific statutory provisions, regulations or administrative actions, offices of Inspectors-General, Internal Affairs divisions, or have designated senior officials or other components to oversee the general application of laws and procedures within the departments' or agencies' mandate or specific aspects thereof.

9. Article 14

With respect to Article 14, the Parties note that the joint evaluation foreseen in this Article will be aimed at determining if there is a need for further enhancement of the Agreement in all aspects, including the issues covered by this Exchange of letters."

I confirm that the foregoing proposal is acceptable and shall form an integral part of the Supplemental Agreement regarding the exchange of personal data and related information.

Sincerely,

Jürgen Storbeck,
Director

United States Department of State

Washington, D.C. 20520

November 26, 2002

Mr. Juergen Storbeck
Director
Europol
Raamweg 47, The Hague
The Netherlands

Re: Europol – Coverage under the Foreign Sovereign Immunities Act

Dear Director Storbeck:

I understand that as part of its process of review and approval of the Supplemental Agreement between the United States of America and Europol, the European Union has inquired regarding the extent to which Europol could be held liable for damages in U.S. courts based on its transmission of information to the U.S. under that Agreement. The U.S. legal framework relevant to this inquiry is set forth in the Foreign Sovereign Immunities Act ("FSIA"), Title 28, United States Code, Section 1602 et. seq.

There is an important preliminary point regarding the operation of the FSIA. A key objective in enacting the FSIA was to remove decisions over sovereign immunity from the Executive Branch and to place these decisions in the hands of the judiciary. Section 1602 (Findings and Declaration of Purpose) states that "determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States." Thus, while we are happy to discuss in general how our courts have addressed several issues which could be relevant to coverage of Europol under the FSIA, you should be aware that the courts are legally authorized to make these determinations and only they could make a binding decision regarding Europol.

That being said, with respect to pontential liability of a foreign state in a suit brought in a U.S. court, the FSIA provides a presumption of immunity for a foreign state from the jurisdiction of U.S. courts, 28 U.S.C. 1604, unless the conduct forming the basis of the suit falls within a specific exception set forth in that statute, 28 USC 1605-1607.

A threshold question is whether the FSIA protections apply to an organization like Europol, which was established by treaty between a group of foreign governments rather than by a single foreign government. In a similar factual scenario, a U.S. court held that another European treaty-based organization, whose officials perform functions typically performed by national governmental agencies, qualified as a "foreign state" under the terms of the statute. See

In re EAL Corp. v. European Organization for the Safety of Air Navigation, 1994 Lexis U.S. Dist. 20528 (D. Del. 1994). See also Gardiner Stone Hunter International v. Iberia Lineas Aereas de Espana, 896 F. Supp. 125, 131 (S.D.N.Y. 1995) (fn 6 and cases cited therein). The activities that Europol would engage in under the agreement - exchange of law enforcement information with the U.S. - are the type of governmental activity for which the FSIA provides protection. See e.g., Herbage v. Meese, 747 F.Supp. 60, 66-67 (D.D.C. 1990).

Another issue is whether immunity also extends to Europol officials carrying out duties under the Supplemental Agreement. Some U.S. courts have held that individuals acting as agents of the foreign sovereign in carrying out such governmental activities enjoy the same immunity as the sovereign itself. Id. at 66. Of course, the Europol liaison agents accredited to the United States already enjoy immunities in this country based upon their status as members of the EC Mission to the United States.

While Section 1605(a)(5) does provide an exception to foreign sovereign immunity for torts occurring in the United States, this exception would not appear applicable to the transmissions of information from Europol to U.S. law enforcement contemplated under the agreement. In Argentine Republic v. Amerada-Hess, 488 U.S. 228 (1988), the United States Supreme Court construed Section 1605(a)(5) to apply only where a tort has been committed within the territory of the United States, not where it was committed outside the U.S. even if it caused effects within the U.S. A reading of the FSIA reveals no other exception to immunity that would appear applicable to Europol activities under the Supplemental Agreement.

I hope this information is helpful in your consideration of the potential scope of liability in U.S. courts for cooperation between the U.S. and Europol under the Supplemental Agreement.

Sincerely,

Linda Jacobson

Linda Jacobson
Assistant Legal Adviser
Law Enforcement and Intelligence