

# Strengthening Europol's mandate<sup>1</sup>

## A legal assessment of the Commission's proposal to amend the Europol Regulation

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims to provide background information on the current legal framework of Europol and a legal assessment of the European Commission's proposal of 9 December 2020 to strengthen Europol's mandate, divided in thematic blocks. The legal assessment is accompanied by policy recommendations.

### Background

In the field of police cooperation, the European Union Agency for Law Enforcement Cooperation (Europol), the legal basis of which is Regulation (EU) 2016/794 (Europol Regulation), has a key role in supporting cooperation among the EU Member States in the area of cross-border law enforcement. On 9 December 2020, the Commission presented a proposal for a Regulation amending the Europol Regulation, aiming at enhancing Europol's mandate. The proposal encompasses a wide-ranging revision of Europol's tasks, which can be divided in nine themes as follows:

- (1) Enabling Europol to cooperate effectively with private parties;**
- (2) Enabling Europol to process large and complex datasets;**
- (3) Strengthening Europol's role on research and innovation;**
- (4) Enabling Europol to enter data into the Schengen Information System (SIS);**
- (5) Strengthening Europol's cooperation with third countries;**
- (6) Strengthening Europol's cooperation with the European Public Prosecutor's Office (EPPO);**
- (7) Enabling Europol to request the initiation of an investigation of a crime affecting a common interest covered by an EU policy;**
- (8) Strengthening the data protection framework applicable to Europol; and**
- (9) Other provisions, including enhancing political accountability and parliamentary scrutiny.**

### Aim

This study aims to provide the European Parliament with background information on Europol's legal framework, a legal analysis of the proposal to revise the Europol Regulation and policy recommendations so

<sup>1</sup> Full study in English: [http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694200/IPOL\\_STU\(2021\)694200\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694200/IPOL_STU(2021)694200_EN.pdf)



that the study can contribute to the preparation of a forthcoming legislative report of the LIBE Committee on the revision of Europol's mandate.

## Key findings

From the outset, the study stresses that the **proposal entails widespread reforms to Europol's mandate, which transform the nature of the agency and its relationship with the Member States**. The reforms have been proposed even though the Europol Regulation **has not been subject to an evaluation yet**. Scarce information is included in the Impact Assessment accompanying the proposal and some EU documentation, which cannot replace the lack of a proper evaluation. As a result, the effectiveness and impact of the agency cannot be fully and properly assessed.

**(1) Enabling Europol to cooperate effectively with private parties:** This reform concerns the enhancement of cooperation between Europol and private parties in countering criminal offences committed in abuse of the cross-border services of private parties. The proposal aims to establish the agency as a central point of contact in cases of multi-jurisdictional or non-attributable datasets. Europol will be enabled to: (a) receive personal data directly from private parties on a more regular basis; (b) inform such private parties of missing information; and (c) ask Member States to request private parties to share further information. Additionally, Europol can provide its infrastructure for the exchange of data between national authorities and private parties and support Member States in preventing large scale dissemination of terrorist content or violent extremism.

The study finds that these changes constitute a considerable paradigm shift for the agency, which is line with **the emergence of the trend in past years to establish direct channels of communication between law enforcement and private parties and foster a public/private partnership. Applying this approach to the case of Europol requires detailed rules on the duties of Europol, Member States and the private sector, e.g. when the private parties may refuse to cooperate, as well as provisions on independent authorisation of transfers and remedies for individuals**. The study points out that the concept of 'private parties' is open-ended and there are no limitations as to the nature of private parties. Whereas certain safeguards are included, e.g. the requirement for 'absolute' or 'strict' necessity, there are additional safeguards that are mentioned in the Impact Assessment, but not explicitly stated in the proposal. It is further argued that the **European Data Protection Supervisor (EDPS) could be involved before the agency makes such transfers**. In addition, whereas the proposal **proscribes systematic, massive or structural transfers** in cases where the private party is outside the EU, this is not extended to those private parties within the EU. Finally, it must be ensured that Europol's role in supporting Member States to prevent the dissemination of online content related to terrorism and violent extremism conforms with the Europol's role as foreseen in the recently approved Regulation on preventing the dissemination of terrorist content online.

**(2) Enabling Europol to process large and complex datasets:** This reform aims to address the so-called 'big data challenge' following the admonishment of the agency by the EDPS on 17 September 2020. The proposal aims to enable Europol to conduct 'pre-analyses' of large and complex datasets received and identify whether these concern individuals whose personal data may be processed by Europol in line with Annex II of the Europol Regulation. Another proposed provision aims to enable the pre-analysis in support of a criminal investigation following transmission of an investigative case file to Europol. The study notes that **it is welcome that the prior processing is limited to a maximum period of one year, which can be extended following authorisation by the EDPS**. One suggestion is to define the terms 'large datasets' and 'digital forensics' and explicitly delimit processing when there is **an objective necessity**, so as to ensure that the derogation of Article 18(5a) does not become the rule. Clear criteria to determine that it is justified to extend the maximum period of pre-analysis must be laid down and it could be useful to consider that **prior to each pre-analysis the EDPS must be at least informed and that the DPO must provide authorisation**. The relationship between the new rules and the existing derogation under Article 18(6) must also be clarified, as well as the relationship between the two new provisions foreseen. As these rules constitute an exception, their application must be strict and the existence of a link to an on-going investigation is crucial. In addition, the Regulation should lay down certain conditions and/or thresholds, such as scale, complexity, type or importance of investigations. Finally, the

involvement of the EDPS not only in cases where an investigative case file is submitted by a third country, but in general in supervising the processing of large and complex datasets should be maintained and enhanced.

**(3) Strengthening Europol's role on research and innovation:** Europol will process personal data for research and innovation matters for the development of tools, including the use of AI for law enforcement. When developing new technologies **extensive processing of large quantities of personal data** may be required, for example to create and test algorithms or for encryption. Therefore, the potential impact of such processing for research and innovation purposes to the principle of non-discrimination and the rights to respect for private life and protection of personal data must be guaranteed. The processing of personal data for research and innovation should take place **only if needed in order to reach the objectives of the project**. Furthermore, the processing of **synthetic, anonymised or pseudo-anonymised personal data, as opposed to real operational data must be preferred, where possible, and the processing of special categories of personal data must be explicitly excluded or accompanied by additional safeguards. Moreover, principles of data protection law—in particular the principles of data minimisation, data quality and privacy by design and by default—must be taken into account.**

**(4) Enabling Europol to enter data into the Schengen Information System (SIS):** Currently, Europol has 'read-only' access to all types of alerts stored in SIS. The proposal creates a new alert category that Europol can use to enter alerts into SIS following consultation with the Member States and after authorisation by the Executive Director. A detailed process for the issuance of so-called 'information alerts' is foreseen in a separate proposal amending Regulation (EU) 2018/1862 (COM(2020) 791 final). This study doubts whether this power, which to an extent equates Europol with Member States, fits within Europol's mandate, as laid down in Article 88 TFEU. It is also questionable whether Europol will be able to conduct a proper quality check before issuing alerts in SIS. Importantly, the study questions the operational value of such alerts, as they provide significant discretion to national authorities to follow up and wide divergences may arise in practice. The impact on individuals whose personal data will be inserted in SIS is significant and potential liability issues may also arise if the quality of data contained in the alert is not high. The possibility to delimit these alerts to those concerning terrorism has been proposed as an alternative, but this study is concerned that this is only an intermediate step before further expanding Europol's powers to enter alerts in the system.

**(5) Strengthening Europol's cooperation with third countries:** The proposal foresees a (seemingly minor) change enabling the Executive Director to authorise not only transfers, but also categories of transfers of personal data to third countries or international organisations in specific situations and on a case-by-case basis. The study finds that it is not clear what exactly is meant by 'categories of transfers' and this reform may broaden the remit of such transfers from criminal investigations on specific suspects to surveillance activities in general, thus changing Europol's powers. However, the study also notes that Member States wish to further expand Europol's capabilities to exchange personal data with third countries by transplanting the wording of Directive (EU) 2016/680 (Law Enforcement Directive) and Regulation (EU) 2018/1727 (Eurojust Regulation) to the Europol legal framework, and thus creating a new legal ground for exchanges of personal data on the basis of appropriate safeguards outside the three already prescribed grounds. The study finds that this reform poses significant legal challenges as it bypasses existing institutional safeguards and undermines the importance of an adequacy decision **and the procedure for assessing the data protection framework of a third country as adequate**, in violation of the constitutional limits placed by the Court of Justice of the EU (CJEU) in *Schrems*.

**(6) Strengthening Europol's cooperation with the European Public Prosecutor's Office (EPPO):** This reform concerns the reinforcement of Europol's cooperation with the EPPO in the aftermath of the adoption of Regulation (EU) 2017/1939 (EPPO Regulation) on the establishment of the EPPO. The study considers that the proposal is not fully aligned with the rules of the EPPO Regulation and minor modifications to the text are necessary.

**(7) Enabling Europol to request the initiation of an investigation of a crime affecting a common interest covered by an EU policy:** The proposal aims to enable Europol to request competent authorities of a Member State to initiate, conduct or coordinate an investigation of a crime which affects a common interest covered by an EU policy regardless of the cross-border nature of the crime. However, the necessity of this reform has not

been substantiated and effectively removes control from judicial authorities over the opening of their investigations in cases affecting one Member State only.

**(8) Strengthening the data protection framework applicable to Europol:** The proposal enhances Europol's data protection framework by extending the reach of Article 3 and Chapter IX of Regulation (EU) 2018/1725 to the work of Europol and explicitly adding biometric data within special categories of personal data. The study welcomes this reform, but considers that further alignment is necessary, particularly by entrusting the EDPS with the general powers laid down in Article 58 of Regulation (EU) 2018/1725.

**(9) Other provisions, including enhancing political accountability and parliamentary scrutiny:** In addition to the other reforms further expanding and clarifying Europol's tasks, the proposal aims to enhance political accountability and parliamentary scrutiny by enabling the Joint Parliamentary Scrutiny Group (JPSG) to receive information regarding the matters falling under themes (1)-(4), as discussed above. However, the study points out that, despite the establishment of the JPSG and the proposed amendments, parliamentary scrutiny and oversight remain weak. Shortcomings concern the structure and work of the JPSG, including the weak powers of the Group in the participation to and appointment of Europol's Management Board. With the addition of new tasks to Europol, the need to ensure a better framework for parliamentary oversight and political scrutiny must be emphasised.

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