



Proposal for a regulation on police cooperation to counter migrant smuggling and human trafficking

Targeted
substitute impact
assessment

STUDY



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Proposal for a regulation on police cooperation to counter migrant smuggling and human trafficking

Targeted substitute impact assessment

As part of a package to address migrant smuggling, on 28 November 2023 the European Commission proposed a regulation to strengthen police cooperation and Europol's role in the fight against migrant smuggling and trafficking in human beings (COM(2023) 754). The proposal was not supported by an impact assessment. Following a request by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), this study presents a targeted substitute impact assessment of the proposed regulation. It provides an analysis of the current legal and political framework, reviews the problem definition and drivers identified by the Commission and assesses the proposed measures. It concludes that, while the proposal seeks to address gaps in inter-agency cooperation and information sharing, it raises concerns about its alignment with existing frameworks, insufficient data protection safeguards, and risks of conflating criminal law with migration control. The study also examines the proportionality of the proposed measures and stresses the need for a more robust evaluation of fundamental rights impacts.

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Executive summary

On 28 November 2023, the European Commission proposed new draft legislation to modernise and strengthen the EU legal framework for combating migrant smuggling. The initiative was presented as part of a package consisting of a proposal for a revised Directive to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU ('Facilitation Directive'), and the proposal for a Regulation to enhance police cooperation and reinforce Europol's role in the fight against migrant smuggling and trafficking in human beings. Neither was supported by an impact assessment. In response to criticism regarding the lack of an impact assessment, in spring 2024 the Commission provided an analytical staff working document¹ for each of the two proposals with more detailed information on the facts and figures that underpin the initiatives' overall objectives.

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) is currently considering both proposals, with MEP Jeroen Lenaers (EPP, Netherlands) acting as rapporteur for the Regulation on enhancing police cooperation. Being of the view that an impact assessment is necessary to support the legislative work in the European Parliament, on 2 May 2024 the LIBE Committee requested the European Parliamentary Research Service (EPRS) to conduct a targeted substitute impact assessment.

The impact assessment is informed by desk research into primary and secondary sources related to the proposed regulation. This includes, but is not limited to, legal instruments, relevant policy documents from EU institutions, bodies and agencies, academic research, and case-law from the Court of Justice of the EU (CJEU). Moreover, the study has also been informed by 21 semi-structured interviews with representatives of key EU institutions, bodies and agencies, selected national authorities, civil society actors and academics.

The study provides a comprehensive mapping of the scope and interconnections between the proposed regulation and other relevant EU instruments forming the legal framework on migrant smuggling and trafficking in human beings, particularly with regard to police cooperation and Europol's role therein. The study also examines the problem definition and the underlying drivers, as identified by the Commission, and critically analyses the main elements of the proposal in accordance with the five policy objectives presented by the Commission:

1. strengthening inter-agency cooperation;
2. strengthening steering and coordination at EU level;
3. improving information sharing;
4. reinforcing Member States' resources; and
5. reinforcing Europol's operational support through operational task forces (OTFs) and Europol deployments for operational support.

Finally, the study addresses the fundamental rights implications of the proposal and discusses its interplay with the proposed directive as part of the package.

¹ European Commission, Analytical document accompanying the document Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, [SWD\(2024\) 94](#); European Commission, Analytical supporting document accompanying the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, [SWD\(2024\) 134](#).

Review of the proposal and key findings

Definition of the problem and drivers

According to the Commission, in the field of migrant smuggling and trafficking in human beings the most important problem that hinders effective cooperation is insufficient sharing of information with Europol. This is mainly attributed to the lack of a specific obligation on Member States to provide Europol with information held by its competent authorities relating to these criminal offences. Reluctance to share data with Europol remains a challenge, even if significant improvements have been made, with Member States increasingly supplying large datasets. Although the Commission's prioritisation of migrant smuggling and trafficking in human beings over other crimes is not justified in the proposal, stakeholders engaged in operational activities have emphasised the need to strengthen police cooperation in these areas. However, while the Commission's objective of enhancing information sharing appears understandable, this study finds that the issue is more complex and goes beyond the absence of a specific obligation for Member States.

Necessity, proportionality and subsidiarity of the proposal

Drawing on the EU's legal framework on police cooperation, the impact assessment addresses the proposal's necessity and its coherence with the existing legal landscape. In this respect, the study particularly highlights that the recently adopted EU Police Cooperation Code already mandates Member States to exchange data with Europol, which raises questions about the added value of the measures proposed under the new initiative. The study also questions the complementarity with the upcoming interoperability framework, as it is unclear how these systems will interact in the future to achieve the core objective of improving police cooperation and information sharing with regard to migrant smuggling and trafficking in human beings. Since some databases essential to the system have yet to be implemented, their impact remains hard to assess. The study therefore concludes that – in view of data interoperability – the Commission's proposal to reinforce police cooperation and Europol's role might be premature.

Main elements of the proposal

Strengthening inter-agency cooperation on migrant smuggling and trafficking in human beings

The proposal aims to increase Europol's cooperation with Eurojust and Frontex. This encompasses the presence of these agencies in the European Centre Against Migrant Smuggling² and enhanced operational cooperation and coordination. The study finds that, although strong (formal and informal) partnerships already exist between the above-mentioned agencies, there is a need to further clarify the roles and functions of each agency to ensure complementarity in their work and avoid potential overlaps.

Strengthening steering and coordination on countering migrant smuggling and trafficking in human beings at EU level

The proposal aims to establish the European Centre Against Migrant Smuggling in law, outlining its composition and providing a framework for the implementation of the Union's strategic and operational priorities. It also provides for €50 million of additional funds for Europol's budget, until 2027. The impact assessment concludes that greater transparency as to the functioning of Europol centres is welcome, but distilling their mission and tasks in detail into a legal framework might come at the cost of flexibility. Regarding resources, limited funds would be attributed to hiring additional staff, while no increase in resources is planned for supervisory authorities, even if Europol's tasks and operations ultimately increase.

² The Commission proposes to change the name of the European Migrant Smuggling Centre, which has operated since 2016 within Europol, to the European Centre Against Migrant Smuggling.

Improving information sharing

The proposal aims to enhance information sharing from Member States and third countries with Europol in the area of migrant smuggling and trafficking in human beings. It would introduce an obligation for Member States to share any relevant information on these crimes with Europol in a timely manner. The Commission also encourages information sharing with third countries, particularly through 'derogatory regimes', and the connection of immigration liaison officers (ILOs) in third countries to the Secure Information Exchange Network Application (SIENA) provided by Europol. The study concludes that this raises concerns in terms of effectiveness and coherence, and may have implications for the protection of fundamental rights. It cautions that derogatory regimes should not become the rule and recommends ensuring adequate safeguards.

Reinforcing Member States' resources

The proposal suggests designating specialised services at national level to combat migrant smuggling, which should be connected to Europol's SIENA platform, as well as setting up a reserve pool of experts. These measures raise questions of feasibility, proportionality and subsidiarity and would add a significant financial burden for the Member States.

Reinforcing Europol's support through OTFs and Europol deployments for operational support

The proposal would formalise and expand the concept of OTFs and set out a new tool in the form of Europol deployments for operational support, to provide coordination and analytical, operational, technical and forensic support to national authorities. The analysis finds that there is a need for a clearer definition of OTFs and Europol deployments, clearer rules on the division of tasks and responsibilities, and additional safeguards to protect individuals' rights.

Fundamental rights implications of the proposal

By strengthening Europol's tasks and powers, the proposal would impact fundamental rights, in particular the fundamental rights of (vulnerable) individuals. However, vulnerability is not addressed in the proposal. The proposal's focus is put essentially on the right to data protection and privacy. While those rights are central, there are other rights that would be affected by the proposal. In addition, the proposal lacks clarity and appropriate safeguards, particularly with regard to processing of biometric data.

The interplay of the proposal with the proposed Facilitation Directive (COM(2023) 755)

The interconnection of the proposed regulation and the proposed Facilitation Directive risks expanding EU criminal law into migration control, potentially criminalising humanitarian assistance and undermining migrants' rights. This is mainly due to the over-broad definition of the criminal offences regulated by the proposed Facilitation Directive, which extends to non-organised crime activities and does not provide explicit exemption for humanitarian assistance and migrants seeking international protection, potentially contravening international legal standards like the UN Smuggling Protocol. This may lead to Europol being involved in cases beyond its mandate and processing more data than is necessary to achieve its objectives, especially if Member States are not required to assess cases individually before sharing information with the agency.

Table of contents

1. Introduction	1
1.1. Background information	1
1.2. Objectives and scope of the study	3
1.3. Methodological approach	3
1.4. Limitations	4
1.5. Structure of the study	4
2. Current EU political and legal framework	6
2.1. EU policy on migrant smuggling and human trafficking	6
2.2. EU legal framework	7
2.2.1. Legal instruments addressing migrant smuggling and human trafficking	8
2.2.2. Legal framework on information sharing in police cooperation	9
2.3. The role of Europol	12
2.3.1. The European Migrant Smuggling Centre	13
2.3.2. Analytical support and exchange of information	13
2.3.3. Operational assistance	14
2.3.4. Strategic tasks	16
3. The Commission's proposal for a Regulation to enhance Europol's support for preventing and combating migrant smuggling and trafficking in human beings	18
3.1. The proposal as part of a legislative package	18
3.2. Overview of the proposed changes	18
3.3. State of play: Legislative process and impact assessment	19
3.4. Council position	20
3.5. Opinion of the European Data Protection Supervisor	21
3.6. Opinion of the European Economic and Social Committee	21
4. Definition of the problem and the underlying drivers	23
4.1. Problem definition as identified by the European Commission	23
4.1.1. Challenges in assessing migrant smuggling in the EU	23
4.1.2. Insufficient sharing of information with Europol	25
4.1.3. Other gaps related to insufficient sharing of information	27

4.2. Drivers	28
4.2.1. Difficulties encountered at national level	28
4.2.2. Trust and awareness	29
5. Review of the subsidiarity, proportionality and necessity of the proposal	31
5.1. Legal basis	31
5.2. Subsidiarity and proportionality of the proposal	31
5.3. Necessity and coherence of the proposal	33
5.3.1. Relationship with the interoperability framework	33
5.3.2. Relationship with the EU Police Cooperation Code	34
5.3.3. Relationship with the 2024 Anti-Trafficking Directive	35
6. Review of the objectives of the proposal	36
6.1. Strengthening inter-agency cooperation on migrant smuggling and trafficking in human beings	36
6.1.1. Increased cooperation with Eurojust	36
6.1.2. Increased cooperation with Frontex	38
6.2. Strengthening steering and coordination in migrant smuggling and trafficking in human beings by reshaping the institutional framework and capacities	43
6.2.1. Organisation and governance changes: Formalisation of the EMSC	43
6.2.2. Additional resources	45
6.3. Improving information sharing on migrant smuggling and trafficking in human beings	46
6.3.1. Enforcing binding rules on information sharing (including biometric data) for Member States	46
6.3.2. Beyond Member States: Enhancing information sharing with third countries	49
6.4. Reinforcing Member States' resources to prevent and combat migrant smuggling and trafficking in human beings	54
6.4.1. Designating specialised units and deploying experts	54
6.4.2. Current state of play	55
6.4.3. Limitations of the proposal	55
6.5. Reinforcing Europol's support through operational task forces and Europol deployments for operational support	56
6.5.1. The codification of OTFs and operational deployments	56
6.5.2. Current legal framework	58

6.5.3. Limitations of the proposal	59
7. Fundamental rights implications of the proposal	63
7.1. Fundamental rights impact of the processing of personal data	63
7.1.1. Data protection concerns and respect for private life	63
7.1.2. Fundamental rights concerns of vulnerable individuals	64
7.2. Fundamental rights implications of the processing of biometric data	66
7.2.1. Strengthening Europol's capabilities	66
7.2.2. Current legal framework on the processing of biometric data by Europol and law enforcement authorities	66
7.2.3. Lack of clarity and insufficient safeguards	68
8. Proposal's interplay with the proposed Facilitation Directive	71
8.1. The proposed directive and its complementarity with the proposed regulation	71
8.2. Critical contradictions, legal uncertainties and human rights implications	72
8.2.1. Exacerbating the conflation of criminal law and migration control	72
8.2.2. Over-broad definition of the criminal offence	73
8.2.3. Impact on humanitarian actors and people on the move	73
9. Key findings and recommendations	75
REFERENCES	80
Annex I – List of interviews	85
Annex II – The EU's interoperability framework	86

Table of tables

Table 1 – Europol's cooperation with third countries	51
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List of abbreviations

AP	Analysis Project
CJEU	Court of Justice of the European Union
DPF	Data Protection Function
DPO	Data Protection Officer
DSC	Data subject categorisation
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
EC3	European Cybercrime Centre
ECA	European Court of Auditors
ECRE	European Council on Refugees and Exiles
ECRIS	European Criminal Records Information System
ECTC	European Counter Terrorism Centre
EDPS	European Data Protection Supervisor
EDRi	European Digital Rights
EES	Entry/Exit System
EESC	European Economic and Social Committee
ELO	Europol Liaison Officers
EMPACT	European Multidisciplinary Platform Against Criminal Threats
EMSC	European Migrant Smuggling Centre
ENU	Europol's National Units
ESOCC	European Serious and Organised Crime Centre
ESP	European Search Portal
ETIAS	European Travel Information and Authorisation System
EUAA	European Union Asylum Agency
EUDPR	European Data Protection Regulation
Eurojust	EU Agency for Criminal Justice Cooperation
Europol	EU Agency for Law Enforcement Cooperation
Eu-LISA	European Union Agency for the Operational Management of Large-Scale IT systems in the Area of Freedom, Security and Justice
FRO	Fundamental Rights Officer
Frontex	European Border and Coast Guard Agency

GDPR	General Data Protection Regulation
GO	Guest Officer
ILO	Immigration Liaison Officer
JIT	Joint investigation team
LED	Law Enforcement Directive
LIBE	Committee on Civil Liberties, Justice and Home Affairs
LO	Liaison Officer
MLA	Mutual legal assistance
OSCE	Organization for Security and Co-operation in Europe
OTF	Operational task force
PICUM	Platform for International Cooperation on undocumented migrants
SIENA	Secure Information Exchange Network Application
SIS	Schengen Information System
SNE	Seconded National Expert
SWD	(Commission) Staff working document
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNTOC	UN Convention against Transnational Organized Crime
VIS	Visa Information System

1. Introduction

1.1. Background information

Since its establishment in 1995, the powers and role of Europol in the field of police cooperation have continuously increased. This is especially true for the past decade. Adopted in 2016, the Europol Regulation equipped the agency for fighting the rise in cross-border crimes.³ The regulation was amended in 2022, to expand Europol's mandate, in particular with regard to cooperation with private parties and the processing of personal data.⁴

Additionally, Europol's role was enhanced by various other legal instruments, in particular the amendment of the Schengen Information System (SIS) II in 2022,⁵ which made Europol a key actor in entering information alerts, notably to tackle the issue of foreign terrorist fighters.⁶ Europol also plays a strategic role in the EU's interoperability framework,⁷ and in addressing the dissemination of illegal content online,⁸ such as terrorist content and child sexual abuse material. While generally, this expansion of Europol's powers is in the interest of Europe's internal security, it has also been met with some scepticism, as it carries risks of lowering fundamental rights standards and particularly the right to data protection.⁹ Fundamental rights concerns were also voiced when in autumn 2023, the Commission put forward the present legislative proposal to further step up Europol's role (see section 7).

This new draft regulation is part of the 'migrant smuggling package' the European Commission presented on 28 November 2023 in an effort to modernise and strengthen the EU legal framework for combating migrant smuggling. The package contributes to the implementation of the EU's renewed action plan against migrant smuggling (2021–2025).¹⁰ It consists of a proposal for a Directive to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU ('Facilitation Directive')¹¹ and the present proposal for a Regulation to enhance police cooperation

³ [Regulation \(EU\) 2016/794](#) of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

⁴ [Regulation \(EU\) 2022/991](#) of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation.

⁵ [Regulation \(EU\) 2022/1190](#) of 6 July 2022 amending Regulation (EU) 2018/1862 as regards the entry of information alerts into the SIS on third-country nationals in the interest of the Union.

⁶ N. Vavoula, '[\(Covert\) surveillance of foreign terrorism fighters via the Schengen Information System \(SIS\): towards maximum operationalisation of alerts and an enhanced role for Europol](#)', *New Journal of European Criminal Law*, Vol. 14(2), 2023, pp. 206–230.

⁷ [Regulation \(EU\) 2019/818](#) of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulation (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

⁸ See for example, [Regulation \(EU\) 2021/784](#) of 29 April 2021 on addressing the dissemination of terrorist content online; [Regulation \(EU\) 2022/2065](#) of 19 October 2022 on a Single Market for digital services (DSA).

⁹ European Data Protection Supervisor (EDPS), [Amended Europol Regulation weakens data protection supervision, press release](#), 27 June 2022; Statewatch, [Empowering the police, removing protection: the new Europol Regulation, 2022](#); EDRI, [Europol's ever-increasing mandate: European Parliament failed to stand up for fundamental rights](#), 2022.

¹⁰ European Commission, [A renewed EU action plan against migrant smuggling \(2021–2025\)](#), [COM\(2021\) 591](#).

¹¹ European Commission, [Proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA](#), [COM\(2023\) 755](#). Hereafter cited as Proposed directive [COM\(2023\) 755](#).

and reinforce Europol's role in the fight against migrant smuggling and trafficking in human beings.¹² Neither proposal was supported by an impact assessment.

In response to criticism regarding the lack of an impact assessment, in spring 2024, the Commission provided an analytical staff working document for each of the two proposals with more detailed information on the facts and figures that underpin the overall objective of the proposals.¹³ This type of staff working document was introduced by the 2021 Better Regulation reform for 'cases where the Commission was unable to produce an impact assessment where one should have been prepared', in order to present 'the evidence behind the proposal and cost estimates'.¹⁴

According to the 2016 Interinstitutional Agreement on Better Law-Making¹⁵ and the Commission's own Better Regulation Guidelines¹⁶, the Commission is required to carry out impact assessments of initiatives that are expected to have significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options. In the proposed regulation's Explanatory Memorandum the Commission stated that the initiative 'is not supported by an impact assessment considering that the Commission had little or no choice available, notably due to the urgent operational needs to improve Europol's support to Member States on countering migrant smuggling'.¹⁷ The absence of a formal impact assessment exacerbates concerns regarding the possible long-term effects on fundamental rights (such as data protection and privacy), and the criminalisation of humanitarian aid and solidarity efforts, as will be analysed in this study (section 8).

The interviewees contacted for the purpose of this study were nearly unanimous in their criticism of the absence of an impact assessment prior to the proposal, which would have been an appropriate tool to thoroughly evaluate the necessity for EU action and the potential implications of the proposal. The Commission's justification regarding the urgency to act remains contentious, as discussed in section 4.1.1. Moreover, some of the objectives of the proposal, particularly regarding enhanced information sharing among Member States, may already be addressed by other recently adopted EU legal instruments (see section 5.3). A fully-fledged Commission impact assessment would have been particularly relevant, given that, as argued in section 7, the proposal could have significant repercussions for fundamental rights.

As stated above, Europol's mandate was revised in 2022.¹⁸ However, it has to date never been evaluated, despite the evaluate-first principle under the Better Regulation agenda and the legal obligation set out in Article 68 of the Europol Regulation requiring an evaluation to be carried out by May 2022 (and every five years thereafter). A further strengthening of Europol's mandate is already

¹² European Commission, Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, [COM\(2023\) 754](#). Hereafter cited as Proposed regulation [COM\(2023\) 754](#).

¹³ European Commission, Analytical document accompanying the document Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, [SWD\(2024\) 94](#); European Commission, Analytical supporting document accompanying the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, [SWD\(2024\) 134](#). To be noted, neither SWD was published on [EurLex](#) nor the [Register](#) of Commission Documents.

¹⁴ European Commission, Better Regulation Guidelines, [SWD\(2021\) 305](#), p. 30.

¹⁵ [Interinstitutional Agreement](#) of 13 April 2016 on Better Law-Making, point 13.

¹⁶ European Commission, Better Regulation Guidelines, [SWD\(2021\) 305](#), p. 30.

¹⁷ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, p. 8.

¹⁸ This initiative was underpinned by a Commission impact assessment: [SWD\(2020\) 543](#).

on the horizon. Following the announcement in President Von der Leyen's Political Guidelines for the new Commission (2024–2029),¹⁹ in his confirmation hearing at the European Parliament, Commissioner-designate Magnus Brunner affirmed the plans to further strengthen Europol. He emphasised that the future proposal would build on an evaluation of the current Europol regulation, an in-depth impact assessment and broad stakeholder consultations.²⁰

1.2. Objectives and scope of the study

The overall objective of this study is to provide a targeted substitute impact assessment on the proposed regulation to enhance police cooperation and Europol's mandate. Ideally, impact assessments should be carried out *ex ante* by the Commission, to inform the Commission's legislative proposal by considering various legislative options and their impacts before determining the path to take. However, in the present case, as noted above, the Commission did not base its proposal on an impact assessment. Therefore, the European Parliament's LIBE Committee requested a targeted substitute impact assessment to be carried out on basis of the Commission's proposal. As requested by the LIBE Committee, this study essentially deals with the original proposal presented by the Commission in November 2023. However, due to the significant changes to the proposal the Council made in its negotiating position adopted on 19 June 2024, the impact assessment also refers to that revised position at points.²¹ The present impact assessment study was carried out between August and December 2024. This limited timeframe did not allow for a fully-fledged impact assessment.

The LIBE Committee requested that the impact assessment be targeted, and focus specifically on the following aspects:

- to provide a comprehensive overview of the existing EU legal framework to combat migrant smuggling and trafficking in human beings, with a particular focus on police cooperation and Europol's role therein
- to undertake a thorough review of the objectives of the Commission's legislative proposal
- to provide a legal analysis of the main elements and scope of the proposal
- to assess the proposal's fundamental rights implications (particularly as regards the processing of biometric data)
- to analyse the interplay between the two legal instruments proposed under the migrant smuggling package.

The study thus aims to provide the European Parliament with background information on the current legal framework in place, as well as a legal analysis of the Commission proposal, by examining its objectives and key elements. This should support the European Parliament in its consideration of the proposal throughout the legislative process.

1.3. Methodological approach

The impact assessment is based on both desk research and interviews with stakeholders. The desk research encompasses the analysis of legislation, including international law, EU primary and secondary legislation, as well as national law. It also relies on case-law from the Court of Justice of the European Union, particularly in the area of data protection. Furthermore, the impact assessment reviews legal instruments and policy documents from EU institutions, bodies and agencies, as well

¹⁹ U. von der Leyen, [Europe's choice: Political Guidelines for the next European Commission 2024–2029](#), July 2024, p. 15.

²⁰ Confirmation hearing of Commissioner-designate Magnus Brunner, 5 November 2024, [written questions and answers](#).

²¹ Council of the EU, [Mandate for negotiations](#) with the European Parliament, agreed on 19 June 2024.

as academic sources. The main sources of information used are Europol documents, which are complemented by reports from other EU institutions, bodies and agencies (e.g. European Court of Auditors, Council, European Data Protection Supervisor, Frontex, Eurojust, Fundamental Rights Agency (FRA)).

In addition to desk research, the study was informed by targeted stakeholder consultation. The authors conducted a set of 21 semi-structured interviews (among which 12 individual interviews and 9 group interviews). Interviews were held with representatives of key EU actors (i.e. Europol, Frontex, Eurojust, the EDPS, the Fundamental Rights Agency and the EU Anti-Trafficking Coordinator), as well as with selected national authorities (Poland, Sweden, the Netherlands), civil society actors and an academic (see *Annex I* for a full list of the interviews). Furthermore, the study was supported by two written responses to a set of questions from France and Greece. The majority of interviews were conducted orally online, however, as mentioned above, two stakeholders preferred to share only written responses to the questions. Of eight EU countries that had been selected with a view to achieving a representative geographical balance and subsequently contacted, only the five listed above provided answers.

The aim of the interviews was to collect insights and views from a range of stakeholders on the key issues in the proposal, to better understand what is at stake, and to discuss the preliminary study findings with them. Where appropriate and necessary, explicit reference to stakeholder input is made.

1.4. Limitations

The major limitation of this targeted impact assessment is the short timeframe within which it had to be carried out. The time constraints implied that while interviews with key stakeholders were conducted, they had to be limited to what was strictly necessary to complement the desk research. It was not feasible to consult the national authorities of all EU Member States for the purpose of this study. Moreover, the authors filed some access to documents requests under Regulation (EC) No 1049/2001. While some EU institutions and bodies granted swift access to the requested documents, other requests were not answered in time to be considered for the study. The documents concerned could therefore not be taken into account for this study.

1.5. Structure of the study

The substitute impact assessment is structured as follows. Section 2 provides a mapping of the current legal framework on migrant smuggling and trafficking in human beings, focusing particularly on police cooperation and Europol's role therein. Section 3 briefly presents the Commission proposal and its main elements, as well as the state of play of the legislative procedure as per December 2024 and the negotiating position adopted by the Council. Section 4 draws on the legal framework and explores the definition of the problem and the underlying drivers, as identified by the Commission, and critically analyses them, contrasting them with other sources.²² Before diving into the analysis of the proposal, Section 5 addresses the proposal's compliance with the principles of subsidiarity, proportionality and necessity. Section 6 presents the core of the impact assessment, analysing the five objectives presented by the Commission, respectively, in terms of effectiveness, efficiency and coherence:

- (1) Strengthening inter-agency cooperation on migrant smuggling and trafficking in human beings;

²² Such as for example, European Court Auditors, [Special Report 19/2021](#), Europol support to fight migrant smuggling: a valued partner, but insufficient use of data sources and result measurement.

- (2) Strengthening steering and coordination on countering migrant smuggling and trafficking in human beings at EU level;
- (3) Improving information sharing;
- (4) Reinforcing Member States' resources;
- (5) Reinforcing Europol's support through operational task forces (OTFs) and Europol deployments for operational support.

Section 7 specifically examines the proposal's fundamental rights implications. It looks at the implications that the processing of personal data, and more specifically of biometric data, may have on individuals, thereby placing particular emphasis on safeguards. Finally, in Section 8, the impact assessment discusses the interplay with the proposed Facilitation Directive, which is also part of the overarching migrant smuggling package, before formulating specific findings and conclusions.

2. Current EU political and legal framework

The aim of this section is to provide a comprehensive overview of the existing EU legal framework to combat migrant smuggling and trafficking in human beings, in particular in the area of police cooperation and exchange of information. The purpose of the overview is to inform the analysis of the subsequent sections and in particular to serve as a basis to assess:

a) whether the Commission's proposal for a Regulation to enhance Europol's support for preventing and combating migrant smuggling and trafficking in human beings adequately addresses the main legal shortcomings identified in relation to the existing legislation on combating such crimes (see section 3 on problem definition and drivers);

b) whether the proposal addresses the challenges identified with respect to the principles of necessity and proportionality and with due regard to subsidiarity (see section 5 for a review of the subsidiarity, proportionality and necessity of the proposal).

2.1. EU policy on migrant smuggling and human trafficking

Addressing migrant smuggling and trafficking in human beings are core elements of the EU's migration policy. The centrality of the use of criminal law in migration policy is highlighted by several initiatives. Since the adoption of the European agenda on migration²³ in 2015, criminal investigations targeting the business models of smugglers, enhanced border controls, and cooperation with third countries have become an integral part of the EU's comprehensive approach to managing migration.

The EU strategy to tackle organised crime (2021–2025)²⁴ identifies migrant smuggling as a key activity of organised crime groups that endangers migrants and undermines the EU's migration management objectives. The strategy emphasises that its priorities and actions also apply to trafficking in human beings, a particularly abhorrent form of crime frequently perpetrated by organised crime groups.

A cornerstone of the EU's crime-centred migration management is the renewed action plan against migrant smuggling (2021–2025).²⁵ It builds on the previous EU action plan²⁶ and is central to the EU's efforts to disrupt criminal networks involved in migrant smuggling into or within the EU. Next to strengthening cooperation with partner countries and international organisations, and sanctioning and preventing the exploitation of smuggled migrants, the renewed EU action plan focuses on reinforcing operational cooperation and the exchange of information. Key actions include:

- Enhancing law enforcement operational cooperation to scale up the dismantling of organised crime structures through the support of Europol's European Migrant Smuggling Centre, the European Multidisciplinary Platform Against Criminal Threats (EMPACT), as well as Frontex.
- Enhancing cross-border judicial cooperation with the support of Eurojust and its Focus Group of Prosecutors dedicated to migrant smuggling established in 2020.
- Addressing the rise of digital smuggling, financial investigations, and document fraud. This involves strengthening the capacity of law enforcement and judicial authorities

²³ European Commission, A European agenda on migration, [COM\(2015\) 240](#).

²⁴ European Commission, EU strategy to tackle organised crime 2021–2025, [COM\(2021\) 170](#).

²⁵ European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#).

²⁶ European Commission, EU action plan against migrant smuggling (2015–2020), [COM\(2015\) 285](#).

to target the online activities of smuggling networks, as well as improving their ability to trace, identify, freeze, confiscate and recover criminal assets.

The EU has developed a separate strategy to tackle trafficking in human beings. The 2021 EU strategy on combatting trafficking in human beings²⁷ identifies the following key priorities:

- reducing the demand that fosters trafficking;
- breaking the criminal and digital business model of traffickers through effective operational means and tackling the culture of impunity by building capacity for a robust criminal justice response;
- protecting, supporting and empowering the victims, with a specific focus on women and children;
- promoting international cooperation.

Both the EU action plan against migrant smuggling and the EU strategy on combatting trafficking in human beings recognise the importance of improving information sharing, enhancing criminal intelligence, and fostering cross-border and international operational and judicial cooperation, with support from key EU agencies such as Europol and Eurojust. The new Pact on migration and asylum²⁸ adopted in May 2024 also puts preventing and countering migrant smuggling (inside and outside of the EU) at the centre of its comprehensive approach to migration.

Migrant smuggling and human trafficking

Migrant smuggling and trafficking in human beings are distinct crimes, though they may overlap in practice. In international law, migrant smuggling refers to the procurement of a person's illegal entry and/or stay in a country in which they are not a national or resident in order to obtain a financial or other material benefit (Article 3 of the UN Smuggling Protocol). It is usually considered a crime against the state for violating immigration laws, rather than directly targeting the individual migrant, although it can expose migrants to dangerous or inhumane conditions. It is a transnational crime in nature. The relationship between the migrant and the smuggler is based on consent.

In contrast, human trafficking involves the recruitment, transport, transfer, harbouring or receipt of individuals using force, coercion, fraud, deception or abuse of power or of a position of vulnerability for the purpose of exploitation (Article 3 of the UN Trafficking Protocol). Victims of trafficking do not give true consent, or if they do, it is often obtained through deception or coercion. Trafficking is considered a crime against individuals and can also take place without border crossing.

In the EU, the crimes of migrant smuggling and human trafficking are codified as *facilitation of unauthorised entry, transit, and residence* and *trafficking in human beings*. The EU has adapted the international standards by expanding the scope of both offences (see section 2.2.1. for the EU definitions of these crimes).

Source: Analysis resulting from the UN Smuggling Protocol and UN Trafficking Protocol

2.2. EU legal framework

In the EU, the fight against cross-border crimes and specifically against migrant smuggling and trafficking in human beings is ultimately a task for national authorities applying national criminal (procedural) law, although rules increasingly derive from EU, UN and international law. The aim of such rules is mainly to facilitate Member States' cooperation in these crime areas. The EU legislation,

²⁷ European Commission, EU strategy on combatting trafficking in human beings 2021-2025, [COM\(2021\) 171](#).

²⁸ European Commission, webpage [Pact on migration and asylum](#).

in particular, aims to lay down minimum rules on the definition of the crimes,²⁹ as well as to provide a capacity-building framework aimed at strengthening capabilities and promoting seamless and effective cross-border law enforcement cooperation.³⁰

Furthermore, EU Member States can rely on the work of key EU agencies, such as Europol, Eurojust (the EU Agency for Criminal Justice Cooperation) and Frontex (the European Border and Coast Guard Agency). While the legal framework of Europol will be discussed in depth in section 2.3., the role of Eurojust and Frontex and their cooperation with Europol will be analysed when discussing the key elements of the proposal in section 6.1.

2.2.1. Legal instruments addressing migrant smuggling and human trafficking

The current EU legal framework against migrant smuggling is composed of two instruments that were adopted simultaneously and are commonly referred to as the 'Facilitators Package'. The first instrument is Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence.³¹ This directive provides EU countries with a common definition of the crime of migrant smuggling, which consists of the facilitation of entry and stay of migrants in breach of the laws of the State concerned. The second instrument is Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence³² setting out minimum rules for penalties, liability of legal persons and jurisdiction in the EU. The Commission's 2017 REFIT evaluation of the Facilitators Package highlighted challenges with its broad definition of the crime of facilitation, which does not provide legal clarity about the distinction between criminal facilitation and humanitarian assistance.³³ The Facilitators Package is currently under revision as part of the proposed package to counter migrant smuggling (see section 8 on the interplay of the proposal with the Facilitation Directive).

Both the EU and EU Member States are parties to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air³⁴ (the UN Smuggling Protocol) supplementing the UN Convention against Transnational Organized Crime (UNTOC). While the Commission has affirmed that "the Protocol and the Facilitators Package remain coherent with each other",³⁵ the scope of the Smuggling Protocol is more protective than EU law. It criminalises exclusively the procurement of the illegal entry of a person into a State party to the protocol and related offences only when they are carried out for financial or other material benefit.³⁶

²⁹ Article 83 TFEU provides the Parliament and Council with the authority to adopt directives in specific areas of cross-border crime, including organised crime and trafficking in human beings, as well as when the approximation of criminal laws is essential to ensure the effective implementation of a Union policy in an area previously subject to harmonisation.

³⁰ M. L. Wade, 'Cross-border crimes' in K. Ambos and P. Rackow (eds), *The Cambridge companion to European criminal law*, Cambridge University Press, 2023, pp. 182-205, p. 194.

³¹ [Council Directive 2002/90/EC](#) of 28 November 2002 ('Facilitation Directive').

³² [Council framework Decision 2002/946/JHA](#) of 28 November 2002.

³³ European Commission, REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package, [SWD\(2017\) 117](#).

³⁴ [Protocol against the Smuggling of Migrants by Land, Sea and Air](#), supplementing the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, adopted by General Assembly resolution 55/25 of 15 Nov. 2000 (entry into force: 28 January 2004). Hereafter cited as UN Smuggling Protocol.

³⁵ European Commission, REFIT evaluation of the Facilitators Package, 2017, p. 31.

³⁶ [UN Smuggling Protocol](#), Article 6.

With regard to human trafficking, the EU's main legal instrument is Directive 2011/36/EU on preventing and combating trafficking in human beings ('EU Anti-Trafficking Directive').³⁷ This directive defines trafficking in persons as the recruitment, transportation, transfer, harbouring, or receipt of individuals, including the exchange or transfer of control over them, through means such as threats, force, coercion, abduction, fraud, deception, abuse of power, exploitation of vulnerability, or payments to gain the consent of a person controlling another. This is done for the purpose of exploitation.³⁸ Following the evaluation³⁹ of the implementation of the EU Anti-Trafficking Directive, this legal act was amended by Directive 2024/1712. The revised EU Anti-Trafficking Directive entered into force on 14 July 2024. Relevant shortcomings of Directive 2011/36/EU, as identified by the Commission, included the persistently high demand, impunity of perpetrators and the low number of prosecutions and convictions, as well as insufficient protection of victims.⁴⁰ The revised directive introduces stricter criminalisation and provides stronger tools for public authorities to investigate and prosecute new forms of exploitation, including those that take place online, and ensure better assistance and support to victims.

2.2.2. Legal framework on information sharing in police cooperation

Under Chapter V 'Police cooperation', Article 87 of the Treaty on the Functioning of the European Union (TFEU) specifically outlines the EU's competence in the area of police cooperation. This competence is defined by reference to three different substantive areas laid down in this Article:

- a) the collection, storage, processing, analysis and exchange of relevant information (Article 87(2)(a));
- b) support for the training of staff and cooperation on the exchange of staff, on equipment and on research into crime-detection (Article 87(2)(b)); and
- c) common investigative techniques in relation to the detection of serious forms of organised crime (Article 87(2)(c)).

The EU intervention in this area has aimed to facilitate, step up and refine police cooperation, as well as to enable and facilitate the exchange of information between Member States' law enforcement authorities. Police cooperation in the EU can take the form of bilateral cooperation (i.e. co-operation between two Member states) or multi-lateral cooperation (i.e. cooperation involving more than two Member states), which is usually facilitated at the EU level by Europol.⁴¹

Cooperation in operational activities

The Directive on Information Exchange

Council Framework Decision 2006/960⁴² regulates the exchange of information and intelligence between Member States' law enforcement authorities, creating an informal fast track channel of co-

³⁷ [Directive 2011/36/EU](#) of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA ('EU Anti-Trafficking Directive').

³⁸ Article 3 of the EU Anti-Trafficking Directive.

³⁹ European Commission, Evaluation of the proposal for a Directive amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, [SWD\(2022\) 427](#).

⁴⁰ European Commission, EU strategy on combatting trafficking in human beings 2021-2025, [COM\(2021\) 171](#), p. 4; European Commission, Summary of the evaluation of the EU Anti-Trafficking Directive, [SWD\(2022\) 428](#), p. 1.

⁴¹ A. Klip, *European criminal law: an integrative approach*, Intersentia, 2021, p. 581.

⁴² [Council Framework Decision 2006/960/JHA](#) of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

operation.⁴³ This framework decision has recently been repealed by Directive (EU) 2023/977⁴⁴ on the exchange of information between the law enforcement authorities of Member States⁴⁵ ('Directive on information exchange'), which Member States had to transpose into national law by 12 December 2024.

Joint investigation teams

Council Framework Decision 2002/465/JHA⁴⁶ establishes the basis for setting up Joint Investigation Teams (JITs), which comprise law enforcement and judicial authorities from two or more Member States. JITs are particularly effective in coordinating cross-border investigations, enabling real-time cooperation, sharing of evidence, and immediate action. They enable the direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance (MLA) or European Investigation Orders (EIOs). Furthermore, seconded members of the team (i.e. those originating from a state other than the one in which the JIT operates) are entitled to be present and to take part – within the limits provided for by national legislation and/or specified by the JIT leader – in investigative measures conducted outside their state of origin.

The Prüm framework

The Prüm framework represents one of the most important legal frameworks for operational police cooperation.⁴⁷ Regulated by the Prüm Decision of 2008,⁴⁸ the system allows countries to share key data such as DNA profiles, fingerprints, and vehicle registration information. This enables law enforcement agencies to quickly identify suspects across borders. Searches are performed via national contact points by comparing DNA profiles and dactyloscopic data, but only for individual cases and on a hit/no-hit procedure basis. The Prüm II Regulation⁴⁹ has recently amended the framework by adding facial images and police records to the data categories. The latter includes biographical data of suspects and convicted persons available in national databases established for the prevention, detection and investigation of criminal offences'.⁵⁰ It also lays down rules for the exchange of core data after a confirmed biometric data match. Other innovations include the establishment of the European Police Records Index System (EPRIS) to allow for the automated exchange of police records.

Cooperation in the form of automated computerised systems

Several key legal instruments have been established in the EU to enhance law enforcement cooperation and improve security through the effective use of information systems. These instruments are designed to assist in the prevention, detection, and investigation of serious criminal offences, including human trafficking and migrant smuggling. One significant measure is Council

⁴³ A. Klip, *European criminal law*, 2021, p. 526.

⁴⁴ [Directive \(EU\) 2023/977](#) of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA.

⁴⁵ See section 5.3. for an analysis of the interplay of the Proposal with the Directive on information exchange.

⁴⁶ [Council Framework Decision 2002/465/JHA](#) of 13 June 2002 on joint investigation teams.

⁴⁷ A. Jonsson Cornell, 'EU police cooperation post-Lisbon', in M. Bergström and A. Jonsson Cornell (eds), *European police and criminal law co-operation*, Hart Publishing, 2014, pp. 147-161.

⁴⁸ [Council Decision 2008/615/JHA](#) of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. The decision followed up on the treaty of Prüm signed in 2005 by Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. It has been transformed into a legal instrument binding all EU Member States.

⁴⁹ [Regulation \(EU\) 2024/982](#) of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818.

⁵⁰ Article 4(21) of the Prüm II Regulation.

Decision 2008/633/JHA⁵¹, which permits Member States' designated authorities and Europol to access the Visa Information System (VIS).⁵² This access improves the implementation of the EU's common visa policy while contributing to internal security and combating terrorism.

Another critical legal instrument is Directive (EU) 2016/681⁵³, which focuses on the use of Passenger Name Record (PNR) data. This directive mandates the utilisation of airline passenger data to identify and prevent trafficking and smuggling operations, thereby enhancing law enforcement's ability to monitor and address these criminal activities effectively. At the same time, Regulation (EU) 2018/1862⁵⁴ on the Schengen Information System (SIS) supports cross-border enforcement by providing real-time alerts on persons and objects, with Europol being granted access to ensure security within the EU's Area of Freedom, Security, and Justice.

Finally, Regulation (EU) No 603/2013⁵⁵ pertains to Eurodac, a biometric database in which Member States are required to enter the fingerprint data of applicants for international protection and irregular border-crossers in order to identify where they entered the European Union. It introduced the possibility for national police and Europol to access Eurodac data for the purposes of preventing, detecting and investigating serious crimes and terrorism. In May 2024, the Recast Eurodac Regulation⁵⁶ introduced inter alia a new obligation to store data on names, nationalities, place and date of birth, and travel document information. Additional categories of personal data, including facial images, copies of travel documents, and an assessment of whether the individual poses a threat to a country's internal security, were also mandated for storage.

The interoperability system

Regulation (EU) 2019/818⁵⁷ introduces a framework for interoperability between various EU information systems, including SIS II, VIS, Eurodac, the Entry/Exit System, and the European Travel Information and Authorisation System (ETIAS), as well as Interpol databases. This regulation establishes the European Search Portal (ESP), which facilitates fast and efficient access for Member State authorities and EU agencies to crucial personal data. The interoperability framework addresses the challenges posed by separate data storage in multiple IT systems, helping to prevent information gaps that could allow criminals with multiple or false identities to remain undetected.

Lastly, Regulation (EU) 2021/1134⁵⁸ reforms the Visa Information System, introducing a new IT architecture in the areas of migration, borders, and security. This reform aims to streamline

⁵¹ [Council Decision 2008/633/JHA](#) of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

⁵² The Visa Information System is an EU technology tool that enhances external border security by enabling Schengen States to exchange visa-related data. It connects consulates outside the EU and Schengen border points, handling data on short-stay visa applications and using biometrics, mainly fingerprints, for identification and verification. See European Commission, [Information note](#) on the Visa Information System (VIS).

⁵³ [Directive \(EU\) 2016/681](#) of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

⁵⁴ [Regulation \(EU\) 2018/1862](#) of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 and Commission Decision 2010/261/EU.

⁵⁵ [Regulation \(EU\) 2013/603](#) of 26 June 2013 on the establishment of 'Eurodac'.

⁵⁶ [Regulation \(EU\) 2024/1358](#) of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data.

⁵⁷ [Regulation \(EU\) 2019/818](#) of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

⁵⁸ [Regulation \(EU\) 2021/1134](#) of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 and

processes and enhance the effectiveness of the EU's efforts to manage migration and ensure security across its Member States. Europol's role in the interoperability framework is analysed in section 5.3.

Other forms of European cooperation

Instruments governing mutual legal assistance (MLA) play a critical role in the fight against migrant smuggling and human trafficking. One such key instrument is the 2000 Convention on mutual assistance in criminal matters between EU countries,⁵⁹ which regulates important mechanisms such as the spontaneous exchange of information.⁶⁰ Other important frameworks developed within the Council of Europe also substantially contribute to police cooperation in the area of migrant smuggling and human trafficking. Notably, the Council of Europe Convention on action against trafficking in human beings (2005)⁶¹ contains provisions that are highly relevant for both the prevention and suppression of migrant smuggling and trafficking in human beings.

2.3. The role of Europol

Established in 1995 through the Europol Convention,⁶² Europol represents the oldest form of European multilateral police cooperation (i.e. a form of cooperation involving multiple countries⁶³) and is today "the EU's most important actor in the field of police cooperation".⁶⁴ According to the Europol Regulation,⁶⁵ the agency was established with the aim of supporting and strengthening action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy (Article 3(1)). 'Immigrant smuggling' and 'trafficking in human beings' are explicitly listed in Annex I as forms of crime referred to in Article 3(1) of the Europol Regulation, and thus fall under Europol's remit.

Europol's principal tasks relate to the collection, storage, processing, analysis and exchange of information and intelligence.⁶⁶ Furthermore, Europol can organise and coordinate operational actions to support and strengthen the actions by Member States carried out jointly with another Member State or in the context of a JIT. Europol has established itself as the EU's criminal information hub and serves as a law enforcement 'service provider'. Like its 'sister agency' Eurojust, its involvement in criminal proceedings depends on the goodwill of national authorities.⁶⁷

repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System.

⁵⁹ [Convention](#) established by the Council in accordance with Article 34 TEU, on mutual assistance in criminal matters between the Member States of the European Union, OJ C 197, 12.7.2000.

⁶⁰ For an overview on the use of spontaneous information exchange mechanisms in Europe, see Council of Europe, "[Spontaneous information](#)" – Current practices of the use of Article 26, 25 November 2024.

⁶¹ Council of Europe, [Convention](#) on Action against Trafficking in Human Beings, 16 May 2005.

⁶² [Convention](#) based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention). Europol became fully operational in July 1999.

⁶³ A. Klip, *European criminal law*, 2021, pp. 581-582.

⁶⁴ K. Ligeti and F. Giuffrida, '[Europol](#),' in K. Ambos and P. Rackow (eds), *The Cambridge companion to European criminal law*, Cambridge University Press, 2023, pp. 361-386.

⁶⁵ [Regulation \(EU\) 2016/794](#) was adopted on the basis of Article 88 TFEU and entered into force on 1 May 2017. With this Regulation, Europol has been formally established as an 'agency' of the EU.

⁶⁶ Article 4 of the Europol Regulation.

⁶⁷ A. Weyemberg, I. Armada and C. Brière, [The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2014, p. 14.

This section will look into each specific task performed by Europol in the field of migrant smuggling and trafficking in human beings and, whenever possible, its relative results.

2.3.1. The European Migrant Smuggling Centre

The European Migrant Smuggling Centre (EMSC) is embedded in the European Serious and Organised Crime Centre (ESOCC) at Europol. It was established in 2016 by the Management Board of Europol with the aim of playing a central role in supporting EU Member States in the fight against migrant smuggling. Its creation was a key outcome of the first EU Action plan against migrant smuggling (2015–2020).⁶⁸ The EMSC focuses on targeting and dismantling organised crime networks involved in migrant smuggling activities, particularly in EU hotspots. The Centre's mandate also includes addressing secondary and tertiary movements of migrants within the EU, where organised criminal groups are developing their smuggling operations.⁶⁹ Within the EMSC, a specific team deals with trafficking in human beings, although the Centre does not focus on these cases to the same extent as migrant smuggling.⁷⁰ Between the Centre's inception in 2016 and the end of 2021, over 27 000 new cases were reported to the EMSC and it has supported over 800 priority investigations into criminal networks involved in migrant smuggling and trafficking in human beings.⁷¹ The Commission proposal on enhancing Europol's role in migrant smuggling and human trafficking aims to institutionalise this Centre into a permanent structure within Europol, codify it and change its name to European Centre Against Migrant Smuggling (see sub-section 6.2. on the proposed organisation and governance changes).

2.3.2. Analytical support and exchange of information

In conducting its operational analysis, Europol collects, stores, processes and assesses information with the aim of supporting criminal investigations. Personal data may only be processed within the Europol Analysis System (EAS) as part of specific analysis projects (APs).⁷² For migrant smuggling and trafficking in human beings, the dedicated APs are AP Migrant Smuggling and AP Phoenix, respectively.

Europol is responsible for the management of SIENA (Secure Information Exchange Network Application)⁷³, an online platform that facilitates the exchange of information among Member States, EU bodies, third countries and international organisations. Europol is increasingly evolving from merely collecting information to actively connecting it.⁷⁴ To achieve that, Europol's National Units (ENU) (i.e. liaison bodies between Europol and Member States⁷⁵) provide Europol with the information necessary to fulfil its objectives. National law enforcement authorities and Europol supply each other with information. Furthermore, national units are called to designate Europol Liaison Officers (ELO) to be posted at Europol. Their task is to assist the information exchange both between Europol and Member States and Member States and Liaison Officers (LOs) of other

⁶⁸ Council of Europe, Parliamentary Assembly, [Report](#), 6 September 2024, p. 10.

⁶⁹ Europol, [Programming document](#) 2022–2024.

⁷⁰ Interview with EU Anti-Trafficking Coordinator.

⁷¹ Europol, EMSC, 6th Annual [report](#), 2022.

⁷² Before the adoption of the Europol Regulation, personal data were processed within the framework of 'focal points' dedicated to specific crime areas. These focal points have since been replaced by APs, which now focus on designated crime areas under the new framework.

⁷³ Europol, [website](#) Secure Information Exchange Network Application (SIENA).

⁷⁴ Europol, Programming Document 2022–2024.

⁷⁵ Article 6 of the Europol Regulation.

Member States, third countries and international organisations.⁷⁶ This obligation was introduced to ensure a more efficient and effective cooperation between Europol and ENUs.⁷⁷

According to Europol reports, in 2023, the EMSC produced 999 operational reports on migrant smuggling and 232 on trafficking in human beings and accepted 14 738 contributions on migrant smuggling and 2 878 contributions on trafficking in human beings.⁷⁸ Within the AP Migrant Smuggling Europol also receives contributions on operations relating to document fraud.

2.3.3. Operational assistance

Europol supports Member States' cross-border information exchange activities, operations and investigations, as well JITs, by providing operational, technical and financial support.⁷⁹

Operational task forces

OTFs are temporary groups of representatives of Member States' competent authorities and Europol. Based on a multi-national and multi-disciplinary approach, they are formed to carry out a specific project, relating to the coordination of intelligence and investigative efforts with a focus on the criminal activities of one or more High Value Target(s) and members of their criminal network.⁸⁰ In recent years they have become a very effective tool in the fight against organised crime. Europol has conducted over 90 OTFs since its establishment, of which 12 % addressed migrant smuggling and 4 % trafficking in human beings.⁸¹ National authorities value OTFs for their flexibility and adaptability to the operational needs of cross-border investigations, enabling swift coordination and efficient resource allocation.⁸² Third countries and other Europol operational partners may be invited, if deemed legally possible and operationally necessary by the Member States. Specific regional OTFs were used in key migrant smuggling hubs to further concentrate law enforcement action and focus Europol's support on the countries directly affected.⁸³ Throughout 2023, AP Migrant Smuggling supported 8 OTFs, while AP Phoenix supported 3 OTFs.⁸⁴ Europol aims to expand the OTF concept for operational support and to step up support for migrant smuggling cases with partners for data collection outside the EU, with regional OTFs playing a key role.⁸⁵

According to the Commission, the present legislative proposal aims to formalise and expand the concept of OTFs.⁸⁶ However, according to stakeholders, the provision in the draft regulation is merely a definition of an operational tool that has been functioning effectively since its inception within Europol in 2018.⁸⁷ Consequently, the articles introduced by the proposal appear to merely codify an already existing tool.

⁷⁶ Article 8(3) and 8(4) of the Europol Regulation.

⁷⁷ K. Ligeti and F. Giuffrida, Europol, 2023, p. 365.

⁷⁸ Europol, EMSC, [Tackling threats, addressing challenges - Europol's response to migrant smuggling and trafficking in human beings in 2023 and onwards](#), 2024.

⁷⁹ Article 4(h) of the Europol Regulation.

⁸⁰ EMSC, [Tackling threats, addressing challenges](#), 2024.

⁸¹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 11.

⁸² Interview with Polish national authorities; Interview with Swedish national authorities; written reply by France.

⁸³ EMSC, [Tackling threats, addressing challenges](#), 2024.

⁸⁴ *ibid.*

⁸⁵ Europol, [Europol strategy - Delivering security in partnership](#), 2023.

⁸⁶ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 4.

⁸⁷ Interview with Polish national authorities; interview with Eurojust.

Joint investigation teams

According to Article 5 of the Europol Regulation, Europol staff may participate in JITs. Where Europol has reason to believe that setting up a joint investigation team would add value to an investigation, it may propose this to the Member States concerned and take measures to assist them in setting up the team. Within a JIT, Europol may assist in all activities and exchanges of information with all team members and provide them with necessary information processed by Europol for the purposes set out in Article 18(2).⁸⁸ Information obtained by Europol staff while part of the joint investigation team may, with the consent and under the responsibility of the Member State which provided the information, be processed by Europol for the purposes set out in Article 18(2).⁸⁹ However, the general obligation on Europol not to take part in coercive measures still applies.⁹⁰ This means that Europol cannot carry out measures restricting fundamental rights, although it should be noted that the notion of coercive measures is not uniform at the EU level.⁹¹

Operational task forces and Joint investigation teams

OTFs constitute an operational and strategic law enforcement tool focused on intelligence sharing and resource pooling to fight specific crime areas, such as drug trafficking or migrant smuggling. Conversely, JITs are an investigative tool with a strong legal framework that allow them to carry out criminal investigations in one or more Member States. While the two mechanisms can complement each other, they often function independently. Nevertheless, an OTF can lead to the setting-up of a JIT when the intelligence gathered by the task force indicates that a more structured investigative cooperation is necessary.

A successful example of a combination of these two tools is the *Sky ECC* case from 2021. In this case Europol provided operational support to the OTF LIMIT (initiated by Belgium, France and the Netherlands) to collect information on the criminal use of Sky ECC, a communication platform allowing users to send encrypted messages and make secure calls. In addition to the OTF, Eurojust supported a JIT between the same countries. The cooperation between Europol and Eurojust allowed the information to flow back to the OTF (upon consent of the JIT countries) and allow in turn other countries affected by the criminal phenomenon to receive relevant information that they could use to make official judicial requests such as a letter of request or European investigation orders in one of the JIT countries.

Source: interview with Eurojust; Europol, New major interventions to block encrypted communications of criminal networks, [press release](#), 10 March 2021.

In 2023, Europol participated in 3 JITs on migrant smuggling and 3 JITs on trafficking in human beings.⁹² While Europol's annual reports typically include some statistics and operational data, detailed figures on identified victims and arrested offenders within JITs and OTFs may not always be specified in a way that allows for a clear assessment of Europol's contribution. Furthermore,

⁸⁸ Article 5(3) of the Europol Regulation.

⁸⁹ Article 5(4) of the Europol Regulation.

⁹⁰ [Consolidated text of the model agreement on the establishment of a Joint Investigation Team](#), 2022/C 44/02.

⁹¹ L. Bachmaier Winter, 'Further mutual legal assistance' in K. Ambos and P. Rackow (eds), *The Cambridge companion to European criminal law*, Cambridge University Press, 2023, p. 283.

⁹² EMSC, [Tackling threats, addressing challenges](#), 2024.

Europol appears to have reorganised its approach to statistical reporting, now prioritising OTFs over operational meetings. This shift complicates efforts to conduct a clear evaluation over time.⁹³

Action days

Action days are cross-border operations in which Europol provides real-time support, coordination and intelligence sharing between law enforcement authorities across different countries. This form of cooperation allows law enforcement authorities to arrest suspects, seize illegal goods and dismantle criminal networks simultaneously in multiple jurisdictions. There are two types of action days:

- Joint Action Days (JADs): These operations target criminal networks impacting the EU, focusing on one or two strategic, horizontal, or geographic aspects of crime that span multiple priority crime areas, as defined in the EU Policy Cycle for organised and serious international crime.
- Common Action Days (CADs): Regular operational activities that involve several partners working on a specific cross-border case with Europol's support. They typically have a narrower focus (compared to the JADs), often centred on a specific investigation.

In 2023, the EMSC supported 45 action days related to migrant smuggling, the same number as in 2021, while 23 action days focused on trafficking in human beings, up from 10 in 2021.⁹⁴ In comparison, the EMSC supported 26 action days on migrant smuggling and 9 on trafficking in human beings in 2020.⁹⁵

Deployments for operational support

Europol's deployments involve sending specialised teams, mobile units, and experts in the field to directly assist national law enforcement authorities (at the request of the Member State). These deployments offer both operational and technical support, including analytical, forensic, and intelligence assistance, as well as secure communication capabilities within the formalised structure of an OTF, a JIT, or an Action Day. However, Europol deployments are versatile and can function independently from specific tools like OTFs, Action Days and JITs.⁹⁶

2.3.4. Strategic tasks

Europol provides strategic analysis and threat assessments to assist the Council of the EU and the European Commission in laying down strategies and operational priorities of the Union in fighting crime.⁹⁷ Strategic analysis includes methods and techniques by which information is collected, stored, processed and assessed with the aim of supporting and developing criminal policy. Europol's impact on EU policy has grown increasingly significant. More specifically, Europol plays a critical role in EMPACT, the European Multidisciplinary Platform Against Criminal Threats, an EU mechanism for structured cooperation between Member States, EU institutions, and agencies to combat organised and serious international crime. EMPACT operates in a four-year cycle consisting of the following steps:

⁹³ OTFs often provide a platform for continuous information sharing and operational support, which may reduce the frequency or complexity of individual meetings for day-to-day coordination.

⁹⁴ EMSC, [Tackling threats, addressing challenges](#), 2024; EMSC, [6th annual report](#), 2022.

⁹⁵ EMSC, [5th annual report](#), 2021. It appears that no comparable data is available for the year 2022.

⁹⁶ Examples of such less rigid forms of operational support are deployments of forensic or cybercrime specialists in national investigations, deployments to assist with threat assessment or help for local border authorities.

⁹⁷ Article 4(2) of the Europol Regulation.

- EU SOCTA (European Union Serious and Organised Crime Threat Assessment): The cycle starts with Europol preparing an assessment of crime trends and patterns in major crime threats.
- Multi-Annual Strategic Plan (MASP): Based on the EU SOCTA, the Council establishes priorities and develops a Multi-Annual Strategic Plan (MASP) to address these threats. The MASP defines the EU's crime priorities and serves as a framework for EMPACT's efforts over the subsequent four years.
- Operational Action Plans (OAPs): The third step involves the development, implementation and monitoring of OAPs. The OAPs contain operational actions to combat crime in specific areas corresponding to the EU's crime priorities for the specific policy cycle. EMPACT 2022–2025⁹⁸ sets out 10 crime priorities and 15 OAPs.⁹⁹ Both migrant smuggling and trafficking in human beings figure on this list.¹⁰⁰
- Evaluation and future policy development: At the end of the cycle, the activities are evaluated for their effectiveness to guide future policy decisions.

⁹⁸ Council [conclusions](#) setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022–2025, 9 March 2023.

⁹⁹ The current crime priorities are: high-risk criminal networks; cyber-attacks; trafficking in human beings; child sexual exploitation; migrant smuggling; drug trafficking; fraud, economic and financial crimes; organised property crime; environmental crime; firearms trafficking.

¹⁰⁰ In 2023, the OAP migrant smuggling has led to the arrest of 6 801 facilitators and the support of 4 690 international investigations, while the OAP trafficking in human beings has led to the arrest of 457 suspects and, the initiation of 1 775 investigations and the identification of 7 536 victims. See EMPACT, [2023 Results: factsheets on 15 OAPs](#).

3. The Commission's proposal for a Regulation to enhance Europol's support for preventing and combating migrant smuggling and trafficking in human beings

3.1. The proposal as part of a legislative package

In her 2023 State of the Union address, Commission President Ursula von der Leyen identified stronger EU measures against migrant smuggling as one of the priorities for the year ahead. More specifically, the President proposed an update to the Facilitators' Package and measures to strengthen law enforcement, prosecution and the role of the relevant EU agencies – Europol, Eurojust and Frontex.¹⁰¹ She also announced an 'international conference on fighting people smuggling'. At this conference, held soon after, in November 2023, in Brussels, the Commission launched a Call to Action for a Global Alliance to Counter Migrant Smuggling.¹⁰²

At the same conference, President von der Leyen also proposed a legislative package to fight migrant smuggling, consisting of two initiatives to be adopted under the ordinary legislative procedure. These are:

- a proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the EU (COM(2023) 755), updating the 20-year-old Facilitators' Package, and

- a proposal for a Regulation to enhance police cooperation and to reinforce Europol's, and particularly the EMSC's, role to fight migrant smuggling and human trafficking (COM(2023) 755).

The overall aim of the migrant smuggling package, which also featured in the 2024 Commission work programme,¹⁰³ is to introduce a new legal, operational and international cooperation framework against migrant smuggling for the years to come. As such, the initiative contributes to the implementation of the renewed EU action plan against migrant smuggling (2021-2025).¹⁰⁴

3.2. Overview of the proposed changes

The proposal consists of two key components: firstly, a new self-standing regulation and secondly, targeted amendments to the existing Europol Regulation. These amendments would modify existing articles (Articles 2 and 4) and introduce new provisions (Articles 5a and 5b). The proposal outlines significant updates to Europol's role in addressing migrant smuggling and trafficking in human beings, alongside broader enhancements to its operational capabilities:

- **Legal establishment and governance:** The proposal formalises the EMSC within Europol as a central hub with explicitly defined strategic and operational responsibilities. It also establishes a governance framework to ensure coordination with specialised services in Member States.

¹⁰¹ European Commission, [State of the Union 2023](#), website. The address was delivered on 13 September 2023 to the European Parliament.

¹⁰² European Commission, Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework, [press release](#), 28 November 2023.

¹⁰³ European Commission, [2024 Commission work programme](#), October 2023.

¹⁰⁴ European Commission, A renewed EU action plan against migrant smuggling (2021-2025), [COM\(2021\) 591](#).

- Liaison and coordination: The deployment of Eurojust and Frontex liaison officers to the EMSC is mandated, with EMPACT playing a role in this structure [Articles 4(1), (3), (4)].
- Enhanced Member State obligations: Member States are required to:
 - designate specialised services for combating smuggling and trafficking and connect these to SIENA;
 - share all relevant information on migrant smuggling and human trafficking with other Member States and Europol;
 - contribute experts to Europol's operational deployment pool.
- Operational Task Forces: The proposal establishes task forces led by Member States for coordinated investigations, with Europol providing support. Third countries may also participate in these task forces upon invitation.
- On-site and cross-border support: Europol officers may be deployed to Member States for non-coercive investigative assistance. The proposal creates a reserve pool of law enforcement experts for immediate deployment and clarifies the scope of Europol staff's operational support on the ground.
- Third-country cooperation: The proposal strengthens partnerships with third countries by:
 - authorising Europol to deploy officers to select third countries.
 - connecting Member States' immigration liaison officers to SIENA.
 - empowering the EMSC to identify cases of migrant smuggling and trafficking in human beings that may require cooperation with third countries, including by exchanging personal data.

3.3. State of play: Legislative process and impact assessment

Despite the political clout attached to the migrant smuggling package, neither the proposal for the directive nor for the regulation was accompanied by an impact assessment. To recall, the Better Regulation rules require an impact assessment to be carried out for initiatives that are expected to have significant economic, social or environmental impacts or major budgetary implications, and where the Commission has a choice of policy options.¹⁰⁵

In the case of the proposed Facilitation Directive, the proposal's Explanatory Memorandum merely states that 'the proposal is exceptionally presented without an accompanying impact assessment', without providing further justification. It indicates that it would draw on the 2017 REFIT evaluation of the Facilitators' Package,¹⁰⁶ which is, however, rather dated.

In the case of the proposed regulation, the Commission justified the absence of an impact assessment with the claim that 'the Commission had little or no choice available, notably due to the urgent operational needs to improve Europol's support to Member States on countering migrant smuggling'.¹⁰⁷ The Commission further states that the proposal 'builds on the evidence gathered by the European Court of Auditors special report in 2021 on Europol's support to fight migrant smuggling and the feedback received during the stakeholder consultations'. The Commission gathered input from targeted stakeholder consultations,¹⁰⁸ in particular through a questionnaire sent to the Member States to identify operational needs and gaps regarding Europol's support in preventing migrant smuggling. National experts were also consulted during a virtual workshop in

¹⁰⁵ See [Interinstitutional Agreement on Better Law-Making](#) of 13 April 2016, point 13, and the Commission's Better Regulation Guidelines, [SWD\(2021\) 305](#), p. 30.

¹⁰⁶ Proposed directive COM(2023) 755, explanatory memorandum, p. 10.

¹⁰⁷ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, p. 8.

¹⁰⁸ It appears that no open public consultation was held.

November 2023 – a mere two weeks before the proposal was released – and were said to be 'generally supportive of strengthening Europol's legal mandate in preventing and combating migrant smuggling and trafficking in human beings'.

In the European Parliament, both proposals were assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE). MEP Jeroen Lenaers (EPP, Netherlands) was appointed as rapporteur for the regulation (re-appointed in October 2024 in the new legislative term). On 23 January 2024, the Commission presented both proposals to the LIBE committee, which received them with reservations.¹⁰⁹

In response to the criticism raised by the co-legislators and stakeholders with regard to the lack of impact assessment, on 15 April 2024, the Commission presented an analytical staff working document providing more detailed information on the facts and figures that underpin the proposed regulation.¹¹⁰ The Commission explains why it is necessary and proportionate to adopt the Regulation and strengthen Europol powers in the area of migrant smuggling and trafficking in human beings.

3.4. Council position

The Council adopted its mandate for negotiations on 19 June 2024.¹¹¹ It opted for a cautious approach by suggesting specific, targeted amendments to the existing Europol Regulation (EU) 2016/794, while rejecting the part of the Commission proposal that would introduce a self-standing regulation. These Council amendments make minimal direct reference to migrant smuggling and trafficking in human beings. The main elements of the Council's negotiating position are:

- **Definitions:** Article 1(1) of the Council position proposes introducing to the Europol Regulation a definition of SIENA, OTFs and 'Europol deployment for operational support' (see section 6.5. on reinforcing Europol's operational support), as well as 'immigration liaison officers' (see section 6.3.2. on enhancing information sharing with third countries). The amendment also replaces the indent 'immigrant smuggling' in Annex I of the Europol Regulation (defining the crimes under Europol's competence) with 'migrant smuggling'.
- **Inter-agency cooperation:** The proposal includes an invitation for LOs from Frontex and Eurojust to participate as permanent representatives to the EMSC (see section 6.1. on strengthening inter-agency cooperation).
- **The European Migrant Smuggling Centre (EMSC):** The Council rejects the idea of codifying and thus regulating an internal unit of Europol directly within the Europol Regulation but maintains a reference to the EMSC in Article 4 alongside the European Cybercrime Centre, emphasising its importance within Europol's structure (see section 6.2 on strengthening steering and coordination by reshaping the institutional framework).
- **Operational support for EMPACT:** The Council proposes a new provision to be added to Article 4(2), specifying Europol's role in assisting the operational implementation of EU priorities, particularly by supporting Member States in strengthening the European Multidisciplinary Platform Against Criminal Threats (EMPACT) (see section

¹⁰⁹ K. Luyten, [Stronger role for Europol to fight migrant smuggling and human trafficking](#), EPRS, European Parliament, March 2024.

¹¹⁰ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#). A similar staff working document was prepared for the proposal on the revised Facilitation Directive ([SWD\(2024\) 134](#)).

¹¹¹ Council of the EU, [Mandate](#) for negotiations with the European Parliament, 19 June 2024.

6.2. on strengthening steering and coordination by reshaping the institutional framework).

- Information sharing: The Council opposes making information sharing mandatory. Article 7(6)(a) includes a reference to migrant smuggling and trafficking in human beings under the general obligation for Member States to share information with Europol (see section 6.3. on improving information sharing). However, Article 6(b) requires Member States to participate in OTFs to provide all relevant information without delay to Europol and other participating Member States via SIENA (see section 6.5. on reinforcing Europol's operational support).
- Reserve pool for operational support: The Council proposes a *voluntary* reserve pool of Member State experts for Europol deployments, in contrast to the *mandatory* pool initially proposed by the Commission (see section 6.4 on reinforcing Member States' resources).
- Processing of biometric data: The Council proposes to amend Article 4 of the Europol Regulation to explicitly authorise Europol to process biometric data as part of its mandate, enhancing its ability to effectively and efficiently support Member States (see Section 7 on fundamental rights implications).

3.5. Opinion of the European Data Protection Supervisor

In view of the proposal's 'impact on the protection of individuals' rights and freedoms with regard to the processing of personal data', the Commission was obliged to consult the European Data Protection Supervisor (EDPS) on the proposal.¹¹² The EDPS issued its opinion in January 2024.¹¹³ While the opinion recognised the importance to fight migrant smuggling and trafficking in human beings as a matter 'of general interest', it noted that the necessity and proportionality of the proposed measures would have to be 'carefully assessed'. In this respect, the EDPS found the lack of impact assessment 'deeply worrying given the nature of the personal data at stake (sensitive biometric data) and that vulnerable people may be involved (migrants)'. The EDPS made the following four recommendations relating to data protection:

- to establish mechanisms mitigating data protection risks that result from an enhanced processing of biometric data, including clear and binding rules for appropriate safeguards;
- to clearly delineate the role of Frontex in the fight against migrant smuggling and trafficking in human being;
- to modify Recital 8 of the proposal in order to avoid it being interpreted as promoting regular and systemic use of derogations for transfer of data to third countries; and
- to develop clear rules on the allocation of responsibilities with regard to the processing of personal data when Europol provides operational support to Member States in OTFs deployments (pursuant to the proposed new Articles 5a and 5b of the Europol Regulation).

3.6. Opinion of the European Economic and Social Committee

In May 2024 the European Economic and Social Committee (EESC) delivered its opinion on the proposed anti-smuggling package.¹¹⁴ While welcoming the focus on strengthening Europol's role and the establishment of the European Centre Against Migrant Smuggling within Europol, the EESC

¹¹² Article 42(1) of the data protection [Regulation \(EU\) 2018/1725](#) for EU institutions, bodies, offices and agencies.

¹¹³ EDPS [Opinion 4/2024](#) on the proposed regulation, 23 January 2024.

¹¹⁴ EESC, Anti-smuggling package, [Opinion](#), SOC/787, 31 May 2024.

cautioned that more attention should be given to protecting the fundamental rights of migrants. This responsibility should be embedded in the Centre's management, ensuring that staff are informed and aware of the fundamental rights aspects of their work.

4. Definition of the problem and the underlying drivers

4.1. Problem definition as identified by the European Commission

The Explanatory Memorandum to the proposed regulation describes the circumstances that led the Commission to adopt the proposal, in particular the sophistication of smuggling networks, increasing numbers of irregular migrants to the EU, which frequently make use of smugglers, as well as a high death toll on migrant routes. However, apart from outlining the overall objective of reinforcing Europol's role in the fight against migrant smuggling and trafficking in human beings, the proposal fails to clearly identify the specific problem it aims to tackle.

The analytical supporting document accompanying the proposal, issued after the adoption of the proposed regulation, in April 2024, provides additional information on 'the most important problem that hinders effective cooperation in preventing and combating migrant smuggling and trafficking in human beings i.e., the insufficient sharing of information relating to criminal offences of migrant smuggling and trafficking in human beings'.¹¹⁵ The document points out gaps in information sharing with Europol by Member States¹¹⁶, as well as 'other gaps related to insufficient sharing of information'.¹¹⁷ These latter include: gaps in information sharing between agencies; insufficient operational support through deployments and OTFs; insufficient sharing of information from third countries through ILOs; ineffective processing of biometric data by Europol.

According to the Commission, the proposal builds on the evidence gathered by the European Court of Auditors' (ECA) 2021 special report on Europol's support to fight migrant smuggling and the feedback received during the stakeholder consultations.¹¹⁸ While the outcome of the stakeholder consultations are only partly accessible to the public¹¹⁹ the ECA special report provides some insights into the shortcomings of the existing legal framework. According to the ECA report, while Europol plays a crucial role as an information exchange hub and is a valued partner for Member States in combating migrant smuggling, its effectiveness is hindered by challenges such as limited access to external information sources and the lack of systematic measurement of its support outcomes.¹²⁰ Furthermore, although information exchange with Member States and third parties has increased, challenges such as inconsistent data sharing, obstacles in negotiating international agreements, and limited access to private party data persist, impacting the completeness and effectiveness of Europol's information.¹²¹

This section aims to assess to what extent the problem identified by the Commission is adequately defined and substantiated in the Commission proposal.

4.1.1. Challenges in assessing migrant smuggling in the EU

Fighting and preventing migrant smuggling and trafficking in human beings are identified as priorities by the European Union and are considered key to addressing irregular migration comprehensively. The primary rationale for the proposed regulation is related to the link between

¹¹⁵ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 6.

¹¹⁶ *ibid.*, pp. 14-18.

¹¹⁷ *Ibid.*, pp. 18-27.

¹¹⁸ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, p. 8; Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 5.

¹¹⁹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 6.

¹²⁰ European Court of Auditors, [Special Report 19/2021](#): Europol support to fight migrant smuggling: a valued partner, but insufficient use of data sources and result measurement, p. 36.

¹²¹ *ibid.*

migrant smuggling and irregular migration, as well as the human rights violations associated with both migrant smuggling and trafficking in human beings.¹²² According to the Commission proposal, 'migrant smuggling drives the increase of irregular arrivals to the EU' and 'more than 90 % of the irregular migrants who reach the EU make use of smugglers, mostly organised criminal groups'.¹²³ These figures, however, have recently been contested by the Council of Europe. In a report published in September 2024, the Council of Europe stated that these figures are an estimate based on 1 500 debriefings of migrants collected by Frontex and EU Member States in 2015 which is 'methodologically insufficient to draw an analysis on all irregular arrivals in Europe'.¹²⁴ Furthermore, the Commission proposal holds that the increase in smuggling activities is 'evidenced by a new record with over 15 000 migrant smugglers reported to Frontex in 2022'.¹²⁵ However, this number actually refers to 'facilitators' of irregular migration reported by border guards to Frontex¹²⁶ and not necessarily to members of organised crime networks and/or professional smugglers. Thus, equating the increase in arrests of facilitators with the growth of organised smuggling activities is both inaccurate and misleading. Academics claim that estimates on irregular migration in the EU are outdated and imprecise and therefore not reliable.¹²⁷ Recent UN reports confirm that the majority of irregular migrants arriving in Europe rely on the assistance of smugglers.¹²⁸ However, there are also some indicators that many irregular immigrants have entered legally and subsequently overstayed their visa,¹²⁹ although EU migration statistics lack precise data on overstayers.¹³⁰ Furthermore, there are different forms of smuggling and different profiles of smugglers and/or facilitators of irregular migration. Migrant smugglers are usually portrayed as highly organised, mafia-like groups, motivated solely by profit and being indifferent to the wellbeing of the migrants. This assumption has been challenged by a more nuanced understanding of smuggling as a complex phenomenon that also occurs outside organised criminal organisations.¹³¹ Qualitative studies have shown that the facilitation of irregular migration is often driven by acts of solidarity with and among migrants, familial connections, and relationships of trust between smugglers and migrants.¹³²

¹²² Proposed regulation [COM\(2023\) 754](#), pp.1-2.

¹²³ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 14.

¹²⁴ Council of Europe, Parliamentary Assembly, [Report](#), 6 September 2024, p. 10.

¹²⁵ Proposed regulation [COM\(2023\) 754](#), p. 1.

¹²⁶ Interview with Frontex.

¹²⁷ M. Ambrosini and M. H. J. Hajer, [Irregular Migration](#), IMISCOE Research Series, Springer, 2023. For current projects aiming to address this gap, see [MirreM - Measuring Irregular Migration](#) (H2020 project). According to [data](#) of the Council of the EU, irregular arrivals to the EU through the Eastern, Central and Western route accounted to nearly 280 000 in 2023, compared to 180 000 in 2022. Similarly, the International Organization for Migration (IOM) [reports](#) that in 2023, nearly 300 000 arrivals were detected by land and sea, which is a steep increase compared to 2022 (190 000) and 2021 (151 000). These data broadly concur with the Frontex data referred to in the Commission's proposal.

¹²⁸ [UNODC Observatory on Smuggling of Migrants, The migrant smuggling market on the Central Mediterranean, October 2024; IOM World migration report 2024, p. 83.](#)

¹²⁹ See e.g. Ambrosini and Hajer, [Irregular Migration](#), 2023; F. Hansen and J. Pettersson, '[Contradictory migration management? Differentiated security approaches to visa overstay and irregular border crossings in the European Union](#)', *European security*, Vol. 31(1), 2022, pp. 117-134.

¹³⁰ Eurostat collects [data on short stay visa](#), but not on overstays. The EU's Exit-Entry System (EES) is meant to improve data relating to overstay.

¹³¹ I. van Liempt, [A critical insight into Europe's criminalisation of human smuggling](#), SIEPS Policy Paper, 2016.

¹³² See, for instance, G. Sanchez et al., [Beyond networks, militias and tribes: rethinking EU counter-smuggling policy and response](#), EuroMeSCo Policy Study, European Institute of the Mediterranean, 2021; D. Siegel, 'Crimes of solidarity in times of a 'migrant crisis'', in D. Siegel and V Nagy (eds), *The migration crisis? Criminalization, security and survival*, Eleven International Publishing, 2018, pp. 243-263.

4.1.2. Insufficient sharing of information with Europol

According to the Commission, in the field of migrant smuggling and trafficking in human beings 'the most important problem that hinders effective cooperation is the insufficient sharing of information with Europol both in quantity and quality.'¹³³ The Commission maintains that information sharing related to the criminal offences of migrant smuggling and trafficking in human beings has not increased sufficiently considering the gravity of the crime and the intensity of the phenomenon. It provides various statistics and evidence to support this claim, which are presented and analysed below.

The low number of SIENA messages exchanged on migrant smuggling with Europol (Europol in copy or as the main recipient)

According to the Commission, the number of SIENA messages exchanged on migrant smuggling with Europol is strikingly low, ranging from 10 % to 12 % of the overall number of SIENA messages exchanged (i.e. for all crimes) between 2019 and 2023.¹³⁴ However, this assessment can be nuanced. According to the ECA special report, which the proposed regulation builds on and heavily references,¹³⁵ Europol has generally seen a rise in the number of messages exchanged through SIENA, with a corresponding increase in new cases related to migrant smuggling.¹³⁶ Furthermore, effective data sharing with Europol in 2021 was mostly hampered by interoperability issues and insufficient use of external (non-Europol) data sources.¹³⁷ In other words, the ECA report suggests that the channels for information sharing are in place, but the primary issue lies in Europol's limited and ineffective access to these databases (see section 4.2. on drivers).

In 2023, SIENA saw a record-breaking 1.79 million messages exchanged, highlighting its status as the primary communication platform for European law enforcement. During the same year, more than 151 000 cases were launched through SIENA, with 'illegal immigration' ranking among the most frequently reported crime categories.¹³⁸ The interview with Europol representatives also confirmed an exponential increase over the last ten years in the number of investigations at Europol, including on migrant smuggling. The number of accepted contributions by the EMSC in 2023 was 14 738 for AP Migrant smuggling and 2 878 for AP Phoenix.¹³⁹

Bilateral exchanges between Member States on SIENA

The Commission observes a 'persistent trend of bilateral exchanges between Member States without involving Europol' which reportedly hampers Europol's ability to fulfil its role in providing an accurate intelligence picture.¹⁴⁰ However, it is important to recognise that bilateral and multilateral information exchanges between Member States and third parties can occur in parallel to communication with Europol. The Europol Regulation acknowledges such bilateral exchanges, allowing the use of Europol's infrastructure for bilateral exchanges between LOs of Member States, including in relation to crimes falling outside the scope of the objectives of Europol.¹⁴¹ Furthermore, in certain cases, Europol's involvement may not be desirable, as these exchanges may involve purely

¹³³ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 14.

¹³⁴ *ibid.*, p.15.

¹³⁵ ECA special report [19/2021](#).

¹³⁶ *Ibid.*, p. 15.

¹³⁷ *ibid.*, pp. 23-26.

¹³⁸ More than 3 000 law enforcement authorities from over 70 countries are now connected to Europol, see Europol [news](#), 2024.

¹³⁹ EMSC, [Tackling threats, addressing challenges](#), 2024.

¹⁴⁰ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 16.

¹⁴¹ Article 8 of the Europol Regulation.

organisational or administrative communication, or, more significantly, the inclusion of Europol could jeopardise the success of an ongoing investigation, national security interest, or even the safety of an individual.¹⁴² All these scenarios are acknowledged, by Article 7(7) of the Europol Regulation, as exceptions to the general rule that information is to be shared with Europol. As noted by Europol in its reply to the ECA report, 'the number of bilateral message exchanges in SIENA does not impact the qualitative and quantitative nature of the information exchanged with the agency'.¹⁴³

Low information sharing on trafficking in human beings

As evidence of the limited sharing of information on trafficking in human beings, the Commission notes a discrepancy between the number of victims reported by Eurostat and the number of victims Europol was informed about in 2022, especially in relation to child victims.¹⁴⁴ It is worthwhile recalling in this regard that a high percentage of trafficking victims actually relate to internal trafficking, thus cases that have no cross-border dimension. For instance, in the reporting period 2019-2020, 37 % of all registered victims in the EU were citizens of the country in which they were registered, according to a 2022 Commission report.¹⁴⁵ Nevertheless, interviews conducted in the context of the present study confirm a general decrease in information sharing in human trafficking cases and the need to foster cooperation with EU agencies in this area of crime.¹⁴⁶ This decrease however can be attributed to causes affecting the national police and judicial system, such as the increase in crimes with an online dimension, difficulties in detecting victims, as well as a lack of resources at national level.¹⁴⁷

Critical reflections on the problem

Law enforcement authorities are known to be reluctant to share their data with Europol, so much that several scholars identified this as the most problematic aspect of police cooperation.¹⁴⁸ However, while this reluctance was very strong in the past, it has significantly diminished in the last years, with Member States sending large datasets to Europol,¹⁴⁹ and with the Europol Regulation mandating that Member States 'shall supply Europol' with the information necessary to fulfil its objectives.¹⁵⁰

The question is therefore whether there are specific issues with migrant smuggling and trafficking in human beings that make the exchange of information more cumbersome than in other crime areas. Different interviewees agreed that there is a need for increased cooperation and information exchange on these crimes.¹⁵¹ However, some respondents also raised the question of why the

¹⁴² Article 7(7) of the Europol Regulation; ECA special report 19/2021, p. 17.

¹⁴³ Europol's [reply](#) to the ECA special report 19/2021.

¹⁴⁴ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 18.

¹⁴⁵ European Commission, Report on the progress made in the fight against trafficking in human beings (fourth report), [COM\(2022\) 736](#).

¹⁴⁶ Interview with EU Anti-Trafficking Coordinator; interview with Eurojust.

¹⁴⁷ Interview with Eurojust.

¹⁴⁸ V. Mitsilegas, *EU criminal law*, 2nd edition, Hart Publ., 2022, p. 389; see also C. Cocq and F. Galli, 'The evolving role of Europol in the fight against serious crime: current challenges and future prospects' in S. Hufnagel and C. McCartney (eds), *Trust in international police and justice cooperation*, Hart Publ., 2017, pp. 125-148.

¹⁴⁹ As has been witnessed in the EDPS investigation on the retention by Europol of datasets lacking Data Subject Categorisation ([Case 2019-0370 & 2021-0699](#)).

¹⁵⁰ Article 7(6)(a) of the Europol Regulation.

¹⁵¹ Interview with Polish national authorities; written reply by Greek authorities; interview with EU-Anti Trafficking Coordinator.

Commission decided to focus on the specific crimes of migrant smuggling and human trafficking and not on other crimes.¹⁵²

It is important to highlight that, although the proposal is presented as a measure to enhance police cooperation and strengthen Europol's role in addressing migrant smuggling and trafficking in human beings, it would, once adopted, introduce amendments to the Europol Regulation, such as the provisions on OTFs and the processing of biometric data. These provisions would therefore have a broad application across all crime areas within Europol's remit, and not be limited to the offences migrant smuggling and human trafficking. Finally, this legislative proposal – if adopted – has the potential to serve as a gateway for further regulatory changes in relation to other crime areas.¹⁵³

4.1.3. Other gaps related to insufficient sharing of information

Gaps in information sharing between agencies

The Commission identifies the need to strengthen inter-agency cooperation to facilitate investigation, prosecution and conviction of perpetrators involved in migrant smuggling. It notes that, despite different set-ups to facilitate information exchange between EU agencies and their overall cooperation (see section 6.1. on increasing inter-agency cooperation), this cooperation has not yet reached its full potential.¹⁵⁴ This concurs with the findings of the 2021 ECA special report, which recommended in this regard the implementation of a mutual data exchange with Frontex and an effective indirect database access with Eurojust.¹⁵⁵

While Europol provides support and coordination to national police officers and other law enforcement services, Eurojust supports and coordinates national investigating and prosecuting authorities.¹⁵⁶ The information flow and operational cooperation between Eurojust and Europol significantly increased in 2023,¹⁵⁷ including in cases of migrant smuggling. In 2023, Eurojust handled a record number of migrant smuggling cases and JITs in this field, marking the highest figures in the agency's history.¹⁵⁸ The Commission points out that Europol's participation in only 3 to 8 JITs per year suggests a need for better collaboration with Eurojust.¹⁵⁹ However, Europol's lack of formal involvement in JIT agreements does not preclude it from playing a crucial role. On the contrary, it provides essential operational support that significantly facilitates the establishment and effective implementation of these JITs.¹⁶⁰ Particularly in relation to migrant smuggling and trafficking in human beings, Eurojust reports a strong cooperation with Europol.¹⁶¹

While the information sharing between Frontex and Europol has faced some hurdles (see Section 6.1.2.), interviewees noted that both agencies continue to share data on migrant smuggling and trafficking in human beings at a sufficient level.¹⁶²

¹⁵² Interview with academic; interview with European Digital Rights (EDRI).

¹⁵³ Interview with academic; interview with EDRI.

¹⁵⁴ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 19.

¹⁵⁵ ECA special report [19/2021](#), p. 38.

¹⁵⁶ [Regulation \(EU\) 2018/1727](#) of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust Regulation).

¹⁵⁷ Eurojust annual [report](#) 2023.

¹⁵⁸ *ibid*, p. 34. Eurojust supported 425 cases (172 new cases, 253 ongoing from previous years) and 18 JITs (8 new, 10 ongoing) on migrant smuggling.

¹⁵⁹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), pp. 19–20.

¹⁶⁰ Interview with Europol; interview with Eurojust.

¹⁶¹ Interview with Eurojust.

¹⁶² Interview with Europol; interview with Frontex.

Ineffective processing of biometric data by Europol

Europol's operational support in relation to biometric data would apply to all crime areas falling under Europol's remit,¹⁶³ beyond the fight against migrant smuggling and trafficking in human beings. As already pointed out above, the Commission's proposal draws on ECA's 2021 special report on migrant smuggling to justify the need to strengthen Europol's capabilities on biometrics.¹⁶⁴ However, it is worthwhile noting that the ECA report refers more generally to an 'insufficient use of external data sources' without specifically mentioning biometric data.¹⁶⁵

4.2. Drivers

The Commission's proposal does not address in a sufficiently detailed manner the underlying factors contributing to the problem of information sharing with Europol in the context of migrant smuggling and trafficking in human beings. The issue of information sharing – and, more broadly, cooperation with Europol – is complex and cannot be solely attributed to the absence of a specific obligation for Member States to share information. This challenge is shaped by several factors, such as difficulties encountered at the Member State level, the degree of trust Member States have in the agency, their awareness of its capabilities, and issues related to interoperability.

4.2.1. Difficulties encountered at national level

Possible reasons for the insufficient sharing of information with Europol may relate to data collection practices in Member States and the difficulties national authorities face in addressing the crimes in question. The need for sufficient information sharing between national authorities and Europol has to be examined in conjunction with the lack of robust cross-border investigations at the national level.¹⁶⁶ When it comes to migrant smuggling, one of the main difficulties relates to the inconsistencies in the definition of the crime across Member States (see section 8 on the interplay of the present proposal with the proposed Facilitation Directive COM(2023) 755).¹⁶⁷ As noted by the Council of Europe, transnational cooperation between national law enforcement and judicial authorities requires a harmonisation of standards and a common definition and understanding of what migrant smuggling is.¹⁶⁸ Furthermore, the broad definition of the crime adopted by several Member States leads *de facto* to fragmented information on individual or low-level suspects that, as recognised by the Commission, is not helpful in supporting Europol's role as it is too detached from organised crime groups and criminal networks.¹⁶⁹

Differences also exist regarding the procedural steps for sharing information within Member States' legal systems. While in some countries the information can be shared directly from authorities at the local level with Europol, in others (such as Poland) the sharing of information with Europol requires the approval of a judge or prosecutor.¹⁷⁰

¹⁶³ Annex I of the Europol Regulation.

¹⁶⁴ Proposed regulation [COM\(2023\) 754](#), p. 8.

¹⁶⁵ ECA [special report 19/21](#), pp. 33–39.

¹⁶⁶ Interview with Europol.

¹⁶⁷ For an overview of the different definitions of migrant smuggling within the EU, see Eurojust, [Legal definition of migrant smuggling and/or facilitation of irregular migration: an overview of EU legislation](#), 2024.

¹⁶⁸ Council of Europe, A shared European approach to address migrant smuggling, [Report](#), Doc. 16032, 6 September 2024.

¹⁶⁹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), pp. 16–17.

¹⁷⁰ Interview with Europol staff; Interview with Polish national authorities; Interview with Swedish national authorities.

Furthermore, it might be difficult for national authorities to assess whether information is relevant to Europol's mandate. Sometimes they may not have sufficiently looked into the involvement of organised crime groups behind the arrival of irregular migrants or lack the specialised knowledge.¹⁷¹ In such cases, the problem seems thus to be linked to insufficient collection of solid information by national authorities and/or their limited understanding of which information is valuable to collect and share, rather than an unwillingness to share information with Europol. Additionally, a broader issue affecting information sharing with EU agencies is the lack of time, incentives, and resources to embark upon complex investigations of transnational cases.¹⁷²

Similarly, also in human trafficking cases, the lack of detection of cross-border elements hinders assessment at the national level of whether the information must be shared with EU agencies or not.¹⁷³ In this respect, the Commission could have considered specific measures to address the lack of detection of cross-border elements at the national level and foster investigations into the organised crime dimension of migrant smuggling and trafficking in human beings. One of the main critical areas has been the difficulty of Member States to effectively implement the 'follow the money approach',¹⁷⁴ an issue that the proposal does not adequately address. For instance, the Hawala system,¹⁷⁵ an informal method of transferring money widely misused by organised crime groups involved in migrant smuggling, which presents specific challenges for criminal investigations,¹⁷⁶ is not taken into consideration in the Commission's proposal.¹⁷⁷ Moreover, the proposal falls short in addressing the online dimension of both migrant smuggling and trafficking in human beings, which has become a significant challenge for investigators.¹⁷⁸ Criminal groups are increasingly exploiting online platforms to recruit victims, forge identity documents and work permits, and facilitate the exploitation of individuals for purposes such as sexual exploitation, forced labour, forced criminality, and begging.¹⁷⁹

4.2.2. Trust and awareness

National criminal justice authorities do not always have a clear perception of the added value provided by EU agencies.¹⁸⁰ The involvement of Europol makes investigations lengthier and more complex.¹⁸¹ Therefore, investigators may prefer to 'keep the case local' if this is deemed to bring

¹⁷¹ Interview with Swedish national authorities.

¹⁷² See, for example, V. Mitsilegas and F. Giuffrida, 'The role of EU agencies in fighting transnational environmental crime: new challenges for Eurojust and Europol', *Brill research perspectives in transnational crime*, Vol. 1(1), 2017, pp. 1–150.

¹⁷³ Interview with EU Anti-Trafficking Coordinator; interview with Eurojust.

¹⁷⁴ According to the Council of Europe: 'stopping the business of migrant smugglers requires authorities to focus more efforts on tracing the money sent by migrants in order to identify and arrest the original instigators of such crimes. The low risk of detection is considered as one of the reasons why criminal networks keep making growing profit out of the smuggling of migrants.' See Doc. 16032 [Report](#), p. 17. On the importance of the approach on human trafficking investigations see OSCE, [Follow the money: How financial investigations aid in the fight against trafficking in human beings](#), 2020.

¹⁷⁵ For a description of the Hawala system see, for instance, H. Van de Bunt, 'The role of hawala bankers in the transfer of proceeds from organised crime' in D. Siegel and H. Nelen (eds), *Organized crime: culture, markets and policies*, Springer, 2008, pp. 113–126.

¹⁷⁶ UNODC, [The Hawala system: its operations and misuse by opiate traffickers and migrant smugglers](#), 2023.

¹⁷⁷ Written reply by France.

¹⁷⁸ European Commission, EU strategy to tackle organised crime 2021–2025, [COM\(2021\) 170](#).

¹⁷⁹ Interview with EU Anti-Trafficking Coordinator.

¹⁸⁰ Mitsilegas and Giuffrida, *The role of EU agencies in fighting transnational environmental crime*, 2017, pp. 82–83.

¹⁸¹ Interview with Dutch Liaison Officer at Europol.

more results in the short term.¹⁸² As a result, they may limit the information they share with Europol or refrain from sharing altogether. The Europol Regulation acknowledges this challenge by assigning ENUs the task of raising awareness about Europol's activities.¹⁸³ In this respect it has been noted that 'the more Europol becomes legitimate and trusted by the competent authorities, the more it will be effective'.¹⁸⁴ This conclusion was reconfirmed during the interview with Europol staff, who highlighted that such trust is cultivated through the investigative support the agency offers to national authorities and the tangible results it agency achieves.

4.2.3. Interoperability issues

According to ECA's 2021 special report, effective data sharing with Europol was mostly hampered by interoperability issues and insufficient use of external data sources.¹⁸⁵ It is worthwhile noting that ECA's findings preceded key advancements in Europol's efforts to improve interoperability. With Europol's inclusion to the Prüm framework in 2024, and the improved interoperability between Europol databases and the main EU databases (through the establishment of the European Search Portal (ESP)¹⁸⁶), there has been considerable progress in this area. However, not all relevant databases are fully operational yet (see table on interoperability framework in Annex II).

The implementation of the EU interoperability agenda and related activities will contribute to expanding the range of data sources available for Europol's day-to-day work. Europol has developed an EU interoperability plan¹⁸⁷ in order to implement its share of the EU interoperability agenda. The plan outlines the activities required by Europol including the timelines, responsibilities and interdependencies for the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN), the Schengen Information System (SIS), the Visa Information System (VIS), as well as Eurodac.¹⁸⁸ This plan also covers activities not specifically included in the interoperability agenda, such as access to the Prüm system and the European Police Records Index System.¹⁸⁹

¹⁸² Interview with Dutch Liaison Officer at Europol.

¹⁸³ Article 7(6)(c) of the Europol Regulation.

¹⁸⁴ Cocq and Galli, *The evolving role of Europol in the fight against terrorism at the EU level*, 2017, p. 148.

¹⁸⁵ ECA [special report 19/2021](#), p. 20 ss.

¹⁸⁶ Regulation (EU) [2019/817](#) of 20 May 2019 established the European search portal (ESP) managed by eu-LISA. The ESP was designed to streamline and enhance the access of Member State authorities and Union agencies to various EU information systems and databases. Specifically, it enables fast, seamless, and controlled access to systems such as the Entry/Exit System (EES), Visa Information System (VIS), European Travel Information and Authorisation System (ETIAS), Eurodac (the EU asylum fingerprint database), Schengen Information System (SIS), and the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN). Additionally, it allows access to Europol data and Interpol databases, facilitating efficient information retrieval aligned with each entity's access rights and the objectives of these systems. This integrated approach supports the efficient performance of Member States and agencies in tasks related to security, migration, and law enforcement.

¹⁸⁷ Europol's [reply](#) to the ECA special report 19/2021.

¹⁸⁸ These databases are explained in the next sub-sections.

¹⁸⁹ Europol, [Programming document](#) 2024–2026.

5. Review of the subsidiarity, proportionality and necessity of the proposal

Section 5 assesses whether the proposal respects the principles of subsidiarity and proportionality, as set out in the Better Regulation Guidelines and Toolbox.¹⁹⁰ It starts by analysing the choice of legal basis of the proposal, before diving into the principles of subsidiarity and proportionality. Furthermore, it evaluates how well the proposal aligns with the existing legislative framework, particularly in terms of coherence with other EU initiatives, while it also examines its necessity in light of the EU legal instruments already available or planned.

5.1. Legal basis

The legal basis suggested by the Commission for the proposed regulation combines Articles 85, 87 and 88 TFEU. Article 85 provides for judicial cooperation and regulates Eurojust. It defines Eurojust's mission as 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases', on the basis of information that it may obtain from Member States' authorities and Europol.

Article 87 TFEU confers upon the EU the competence to establish police cooperation involving Member States' competent authorities. It is related to Article 88 TFEU, which empowers the European Parliament and the Council to adopt regulations to determine Europol's structure, operation, field of action and tasks. The latter also mentions Europol's role in operational actions and JITs (if needed, alongside Eurojust).

It is interesting to note that up until now, the Europol Regulation was solely based on Article 88 TFEU.¹⁹¹ The proposal introduces for the first time an additional legal basis, namely regarding Eurojust. Other relevant legal acts, such as the regulations governing Frontex and Eurojust, solely use as legal basis the Treaty provision that concerns them directly, namely Articles 77(2)(b) and (d) and 79(2)(c) TFEU for Frontex,¹⁹² and Article 85 TFEU for Eurojust.¹⁹³ It is unclear why the Commission decided to add the Treaty provision on Eurojust as a legal basis, given that the present proposal does not amend the Eurojust Regulation.¹⁹⁴ This point was raised during the Council negotiations.

5.2. Subsidiarity and proportionality of the proposal

The principle of subsidiarity is laid down in Article 5(3) TEU. Under this principle, in areas which do not fall within its exclusive competence, action at EU level should be taken only when the objectives envisaged cannot be achieved sufficiently by Member States alone and may be better achieved at Union level. Subsidiarity first requires an explanation as to why actions at the national level are

¹⁹⁰ European Commission, Better regulation [toolbox](#), July 2023 edition, Tool #5; European Commission, Better Regulation Guidelines, [SWD\(2021\) 305](#).

¹⁹¹ Europol Regulation 2016/794 and the 2022 amendment; similarly, the previous [Council Decision](#) of 6 April 2009 establishing Europol was solely based on Treaty provisions relating to police cooperation (more specifically the previous Articles 30(1)(b), 30(2) and 34(2)(c) TEU).

¹⁹² [Regulation \(EU\) 2019/1896](#) of 13 November 2019 on the European Border and Coast Guard (EBCG), superseding [Regulation \(EU\) 2016/1624](#) of 14 September 2016 on the EBCG.

¹⁹³ [Regulation \(EU\) 2018/1727](#) of 14 November 2018 on Eurojust.

¹⁹⁴ Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024, Position of Latvia p. 15.

insufficient to achieve the objective of the proposal, and second, to assess whether there is an added value in EU actions.

The transnational nature of the crimes at stake (namely migrant smuggling and trafficking in human beings) makes it impossible to solely regulate them at the national level. Member States acknowledge this need for cross-border cooperation and for Europol's role to facilitate it.¹⁹⁵ The EU does indeed have the competence to act in this matter. However, a 'one-size-fits-all' approach proves problematic, with regard to certain provisions of the proposal. This concerns notably the requirement for Member States to designate national specialised services to cooperate with Europol (see section 6.4).¹⁹⁶ This may, for instance, affect national sovereignty,¹⁹⁷ particularly in Member States like Sweden, where law enforcement authorities are not governed at the national level, and the establishment of units falls within the internal competence of those authorities. The crimes in question require flexibility and Member States do not necessarily accept that organisational details should be regulated in law, let alone at the European level.¹⁹⁸

The proposal reflects a trend by European legislators in recent years to push for a greater centralisation of powers, thereby disrupting the balance between the Member States and the EU level.¹⁹⁹ This was notably apparent in the recent SIS proposal,²⁰⁰ where the Commission initially proposed for Europol to be able to enter alerts on persons directly into the system, without the involvement of Member States.²⁰¹ Eventually, the adopted regulation did not go as far as that, still leaving a significant role to the Member States.²⁰² The present proposal on enhancing police cooperation also attempts towards centralisation, for example, by imposing on Member States an obligation to share all information they have with regard to migrant smuggling and trafficking in human beings. This would foster centralisation in the sense that Europol (rather than the Member States, as is currently the case) would ultimately be competent to determine whether the information shared is relevant to its tasks. This would reverse the relationship and have Member States support Europol, instead of the other way around.

Turning to the principle of proportionality, this requires that the content and form of the EU action do not exceed what is necessary to achieve the objectives of the Treaties.²⁰³ The Commission's argument regarding compliance with the proportionality principle essentially relies on the effectiveness and efficiency of the EU-level support for Member States in tackling these issues.²⁰⁴ It does, however, not clearly address the question of necessity. In the supporting analytical document, the Commission further elaborates on the safeguards in place *vis-à-vis* the proposal, including the limited – yet still broad – scope of the mandatory sharing of information (limited to the fight against migrant smuggling and human trafficking), and the effective data protection supervision by the European Data Protection Supervisor (EDPS). While the former will be further discussed in Section

¹⁹⁵ As can be seen through all amendments to the Europol Regulation.

¹⁹⁶ Article 7 of the proposed regulation [COM\(2023\) 754](#).

¹⁹⁷ As argued by both Sweden and Germany in the Council negotiations, see Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024, Position of Germany and Sweden, pp. 8 and 27.

¹⁹⁸ Interview with Swedish national authorities.

¹⁹⁹ Interview with academic; Interview with EDRI.

²⁰⁰ Proposal for a Regulation amending Regulation (EU) 2018/1862 on the establishment, operation and use of the SIS in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol, [COM\(2020\) 791](#).

²⁰¹ *ibid*, Article 37a.

²⁰² [Regulation \(EU\) 2022/1190](#) of 6 July 2022 amending Regulation (EU) 2018/1862 as regards the entry of information alerts into the SIS on third-country nationals in the interest of the Union.

²⁰³ Article 5(4) TEU.

²⁰⁴ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, pp. 6-7.

6.3.1., the latter has been the object of criticism by civil society organisations,²⁰⁵ academics²⁰⁶ and the EDPS²⁰⁷ itself in the past.

5.3. Necessity and coherence of the proposal

The Explanatory Memorandum considers the proposal to be consistent with the EU legislative framework on counterterrorism and information exchange developed since 2015. However, the proposal does not clearly or comprehensively articulate its relationship with the baseline in this field, i.e. existing EU legislation as well as pending legislative proposals that might have an impact on the problem of information sharing in migrant smuggling and human trafficking cases.

Interviews conducted for this impact assessment reveal uncertainty regarding the interaction between the proposed regulation and relevant EU initiatives aimed at enhancing police cooperation in the EU, particularly the EU Police Cooperation Code and the interoperability framework established by Regulation (EU) 2019/818. This lack of clarity raises questions about the necessity of the proposal given the scope and potential effectiveness of these relatively new initiatives. Furthermore, this section will assess to what extent the proposed regulation streamlines and complements the newly adopted 2024 Directive on human trafficking²⁰⁸ and its governance mechanism.

5.3.1. Relationship with the interoperability framework

On 20 May 2019, two Interoperability Regulations²⁰⁹ were adopted to set up a framework for interoperability between existing and future EU information systems for police and judicial cooperation, asylum and migration. The new interoperability system should be operational by 2027. The Entry/Exit System (EES), which was supposed to start on 10 November 2024, has been postponed with no new date set, and is now proposed to be rolled out in a phased manner.²¹⁰ Moreover, ETIAS (the European Travel Information and Authorisation System) – a system that will check the security, migration and health risks posed by non-EU nationals who do not need a visa to enter the Schengen area – is due to become operational in the first half of 2025.

Although Europol is set to gain enhanced access to databases like ETIAS, EES and ECRIS-TCN, this access may be limited and must fall under Europol's mandate. Eurodac, for instance, requires that

²⁰⁵ EDRI [Letter to the European Parliament](#), Plenary vote on the revision of Europol's mandate, 28 April 2022; Fair Trials [Article](#), EU must reconsider the expansion of Europol's data processing powers, 1 February 2022.

²⁰⁶ D.B.C. Hoek and J. Stigter, '[Europol: an overwhelming stream of big data](#)', *Revue internationale de droit pénal*, Vol. 92(2), 2021, pp. 19-44; S. Tas, '[Europol's 'Big Data challenge](#)', *Digi-Con*, 2022.

²⁰⁷ EDPS, EDPS takes legal action as new Europol Regulation puts rule of law and EDPS independence under threat, [press release](#), 22 September 2022.

²⁰⁸ [Directive \(EU\) 2024/1712](#) of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

²⁰⁹ [Regulation \(EU\) 2019/818](#) of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816; [Regulation \(EU\) 2019/817](#) of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 and Council Decisions 2004/512/EC and 2008/633/JHA.

²¹⁰ Justice and Home Affairs Council (Home Affairs): [joint press conference](#) by Sándor Pintér and Ylva Johansson, 10 October 2024. Most recently, on 4 December 2024, the Commission published a proposal to roll out the EES in a phased manner, see European Commission, Proposal for a Regulation on a temporary derogation from certain provisions of Regulation (EU) 2017/2226 and Regulation (EU) 2016/399 as regards a progressive start of operations of the Entry/Exit System, [COM\(2024\) 567](#).

the search by Europol is necessary to support and strengthen action by Member States.²¹¹ The table in Annex II provides a summary of the legal basis, types of data, and Europol's access to various databases under the interoperability framework.

The present Commission proposal is not directly linked to accessing the above-mentioned databases but rather introduces an obligation on Member States to share information on migrant smuggling and trafficking in human beings with Europol. Consequently, the interoperability framework and the Commission proposal offer different means for Europol to fulfil its mandate. However, it remains unclear how an enhanced access to databases and the interoperability framework will address the proposal's core objective, namely to improve police cooperation and information sharing in migrant smuggling and human trafficking cases. Therefore, the inclusion of mandatory information-sharing provisions may appear premature.²¹² An intervention by the Commission could be left for future determination, following an evaluation of Europol's challenges in information exchange after the operationalisation of the new interoperability system.

5.3.2. Relationship with the EU Police Cooperation Code

The EU Police Cooperation Code is a comprehensive legislative package that the European Commission puts forward to streamline and improve police cooperation across the European Union. In force since 2023, it comprises the Prüm II Regulation²¹³ and the Directive on information exchange.²¹⁴ The Commission proposal does not sufficiently substantiate the reasons for providing Europol with additional powers, in light of the ones assigned by these recent legal acts. The Commission states that Directive on information exchange will effectively close the gap of information sharing among Member States although 'a major gap remains due to the insufficient sharing of information with Europol'.²¹⁵ However, this statement can be disputed, given that the aim of the cited directive is to ensure not only an adequate and rapid information flow between competent law enforcement authorities, but also with Europol.²¹⁶ More particularly, the directive determines SIENA as the mandatory channel for the exchange of criminal information by default²¹⁷ and introduces an obligation to put Europol in copy of every information exchange concerning crimes falling under its mandate.²¹⁸ With the transposition of the Directive due by 12 December 2024, Europol will undoubtedly experience an increase in information received by Member States in the medium to long term.²¹⁹ The Prüm II Regulation further integrates Europol to the framework, by establishing that where necessary to achieve its objectives the agency will have access to data stored by Member States in their national databases and police record indexes.²²⁰

²¹¹ Article 21(1) of the Eurodac Regulation.

²¹² Interview with academic.

²¹³ [Regulation \(EU\) 2024/982](#) of 13 March 2024 on the automated search and exchange of data for police cooperation.

²¹⁴ [Directive \(EU\) 2023/977](#) of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA.

²¹⁵ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 14.

²¹⁶ Recital 37 of [Directive \(EU\) 2023/977](#).

²¹⁷ *ibid.*, Article 13.

²¹⁸ *ibid.*, Article 12.

²¹⁹ Interview with Europol Data Protection Function (DPF).

²²⁰ [Regulation \(EU\) 2024/982](#) of 13 March 2024 on the automated search and exchange of data for police cooperation.

5.3.3. Relationship with the 2024 Anti-Trafficking Directive

Both the revised EU Anti-Trafficking Directive²²¹ and the proposed regulation on enhancing police cooperation aim to address the issue of impunity surrounding human trafficking, as well as the low rates of investigation, prosecution, and conviction within the EU. Despite these shared objectives, the two initiatives diverge in their identification of root causes of the problem and differ notably in scope. The revised directive connects these issues to several factors: the existence of specific forms of exploitation that were not explicitly covered in previous definitions of trafficking in human beings, the increasing use of sophisticated methods and technological means, challenges in proving trafficking offenses in national courts, and the inadequate accountability of legal entities involved in trafficking activities. In addition to the provisions with a particular focus on criminalisation, the directive emphasises the need for improved assistance, support, and protection for victims of trafficking.²²²

The proposed regulation, by contrast, does not include any specific references to victims of trafficking and their possible involvement in information exchange and data sharing with Europol. Furthermore, the primary focus of the proposal is on migrant smuggling, relegating trafficking in human beings to a secondary position. This appears problematic as human trafficking is a serious crime that abuses people's fundamental rights and dignity and deserves comprehensive legal attention.²²³ This approach introduces a risk of conflating human trafficking with migrant smuggling, which can hinder effective investigations by overlooking the unique aspects of human trafficking and failing to adequately address the needs of victims.²²⁴

Interviewees consider the enhanced role of the EMSC in human trafficking cases as a promising opportunity to recognise and address human trafficking as a distinct crime.²²⁵ This approach may help resolve issues where significant investigations with a cross-border dimension are confined to national jurisdictions, even when victims hold multiple nationalities and relevant information remains unknown to Europol and the affected countries.²²⁶ Instances have been observed where countries initially perceive certain cases as an independent phenomenon, only to later recognise a pattern of increased exploitation across specific nationalities. In such cases, task forces may be established, leading to operational meetings with Member States, where connections between these cases are ultimately identified based on common *modus operandi*. This level of analysis can only be achieved at the level of Europol.²²⁷ Furthermore, enhanced cooperation among Member States not only leads to an increased number of prosecutions but also improves the identification of victims, a clear objective of the 2024 EU Anti-Trafficking Directive. By facilitating the exchange of information in criminal cases, law enforcement authorities can begin to detect similar patterns of trafficking activity within their own jurisdictions.²²⁸

²²¹ [Directive \(EU\) 2024/1712](#) of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

²²² *ibid.*

²²³ Interview with European Council on Refugees and Exiles (ECRE).

²²⁴ One striking example of this approach is the infamous Essex lorry case in which 39 Vietnamese people, including children, lost their lives. While there were clear signs of exploitation of the people transported, investigation and prosecution of those responsible focused on smuggling charges. This happens as proving the elements of migrant smuggling in most jurisdictions is easier than those of trafficking in human beings, especially when no profit requirement is included in the definition of the smuggling offence.

²²⁵ Interview with EU Anti-Trafficking Coordinator.

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ *ibid.*

6. Review of the objectives of the proposal

6.1. Strengthening inter-agency cooperation on migrant smuggling and trafficking in human beings

This section deals with the first objective put forward by the European Commission, which aims to further strengthen the cooperation between Europol and Eurojust, as well as with Frontex. This section will assess the strengthening of their cooperation, examining thereby their complementarity and potential overlaps.

6.1.1. Increased cooperation with Eurojust

The Commission proposal aims to increase cooperation with Eurojust in two ways. Firstly, through Eurojust's presence in the Centre Against Migrant Smuggling – with the appointment of a representative in the strategic tasks of the Centre (Article 4.1) and of a LO (permanently represented at Europol) in the operational tasks of the Centre (Article 4.2). Secondly, by ensuring appropriate involvement of judicial authorities in criminal investigations on migrant smuggling and trafficking in human beings (Recital 11). The Commission pointed out the need to not only 'boost their cooperation' but also 'promote effective synergies'.²²⁹

Current cooperation

Under the current legal framework, Europol and Eurojust already cooperate in various ways, including through JITs and information sharing.²³⁰ Europol's operational cooperation within JITs covers among other things its participation in the teams, Europol's authority to propose the establishment of a JIT to Member States, and its role in information sharing with team members. Additionally, when Europol requests the initiation of a criminal investigation by a competent national authority, it should immediately inform Eurojust of both the request and the decision of the national authorities on it.²³¹

Eurojust has indirect access to data stored by Europol. Similarly, Europol may also conduct searches in the information provided to Eurojust through a hit/no hit system.²³² Under this system, one agency submits a request containing specific data to the other agency, enabling the cross-checking of information and facilitating the linkage of ongoing investigations. As information and intelligence are typically shared with Europol during the investigative phase, prior to the initiation of judicial cooperation facilitated by Eurojust, Europol often secures more 'hits' in practice.²³³ The two agencies are working together to improve the technical access for the hit/no hit system.²³⁴ It will be automated and fully computerised once the Eurojust case management system has been replaced (by September 2025).²³⁵

²²⁹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 31.

²³⁰ Articles 5 and 21 of the Europol Regulation.

²³¹ Article 6 of the Europol Regulation.

²³² Article 49 of the Eurojust Regulation.

²³³ Interview with Eurojust.

²³⁴ Eurojust's [reply](#) to the ECA special report, 2021. At the moment, when Europol wants to check for potential connections to information held by Eurojust, it submits a specific request with information that has to be logged manually.

²³⁵ Interview with Eurojust staff.

The cooperation is also established in a Working Arrangement, signed in 2010.²³⁶ The arrangement relates to the sharing of information between the two agencies, and their cooperation in JITs. It further stipulates that Eurojust may be associated to Europol's analysis work files (the current APs)²³⁷ and vice-versa – Europol may be involved in Eurojust's strategic and coordination meetings and may request to participate.²³⁸ To form effective synergies and enhance inter-agency cooperation, the agreement also provides for the possibility of temporarily agreeing on the deployment of representatives to the other agency's premises. In that context, Eurojust appointed a representative in 2022 in the European Counter-Terrorism Centre (ECTC) at Europol.²³⁹ The Working Arrangement is however outdated and has not been adapted to the new legislative frameworks of both agencies. While there have been recent discussions about a potential new cooperation agreement, Europol indicated that there is no need to reform the agreement for the time being.²⁴⁰

At the moment, two so-called 'bridge-makers' exist for counter-terrorism and cybercrime.²⁴¹ Their role is to bring the agencies closer together and ensure smoother cooperation, facilitating inter-agency communication.

In practice, Eurojust also has good cooperation with Europol with regard to migrant smuggling and trafficking in human beings.²⁴² This takes place through the participation of a contact point from Eurojust – usually someone from the national desks²⁴³ in the AP Migrant Smuggling and AP Phoenix. Eurojust also stepped up its cooperation with the EMSC in 2023 by holding regular bilateral meetings and participating in the Europol Joint Liaison Task Force on migrant smuggling and human trafficking.²⁴⁴ This task force brings together seconded LOs from Member States, third countries and Eurojust to Europol's headquarters, to accelerate cooperation in major investigations.²⁴⁵

A new pilot initiative aims to enhance coordination between Europol and Eurojust. This initiative will test a system whereby Europol, upon receiving Member State consent, will notify Eurojust's national desks about upcoming operational meetings.²⁴⁶ Eurojust can then ask national authorities if they are interested in attending the meeting(s) or initiate an investigation. This approach, however, is limited to Europol's operational meetings under analysis projects and excludes OTFs. In OTFs, the two agencies do not share information in a structured and systematic way, although Eurojust may informally receive information on specific crime areas, such as trafficking in human beings, through its contact points and meetings with members of the EMSC.

Presence of Eurojust in the European Centre Against Migrant Smuggling

The Commission proposal envisages a formalised role for a Eurojust representative at the European Centre Against Migrant Smuggling, although the practical aspects remain somewhat vague. According to interviews conducted with Europol staff members, a permanent Eurojust LO at the

²³⁶ [Agreement](#) between Eurojust and Europol.

²³⁷ *ibid*, Article 11.

²³⁸ *ibid*, Article 12.

²³⁹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 21.

²⁴⁰ Interview with Europol.

²⁴¹ Interview with Eurojust.

²⁴² *ibid*.

²⁴³ National Desks at Eurojust represent Member States and are the main contact points for prosecutors and investigative judges when they need assistance in a particular criminal investigation. Each desk is led by a seconded National Member.

²⁴⁴ Eurojust, Annual [Report](#) 2023, p. 34.

²⁴⁵ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 19.

²⁴⁶ Interview with Eurojust.

EMSC would not necessarily lead to participation in all Centre meetings.²⁴⁷ Eurojust's involvement would likely depend on whether the meetings are focused on matters of strategic or investigative cooperation. Eurojust representatives are generally in favour of this formalisation, seeing the LO's role as twofold: first, to relay strategic information on broader Europol projects to Eurojust's College,²⁴⁸ and second, to share specific, targeted information (e.g. regarding an OTF) exclusively with the national desk at Eurojust directly affected by the information. This delineated approach would allow Eurojust to support national authorities effectively while maintaining operational security.

Complementarity of the agencies' roles

The proposal as such does not address judicial follow-up, but merely mentions the involvement of judicial authorities in criminal investigations (Recital 11). More clarity is given by the Commission in its analytical supporting document, according to which it is key to ensure necessary judicial follow-up. This may be ensured by involving Eurojust at an early stage and informing them about existing OTFs.²⁴⁹ This might be achieved by the deployment of Eurojust LOs to Europol. However, not all OTFs require the setting up of JITs.²⁵⁰ In fact, some OTFs will ultimately result in judicial follow-up solely in one country.

Eurojust representatives support the codification of OTFs in the proposal but express concerns about the lack of explicit references to judicial follow-up in the text.²⁵¹ They suggest that Eurojust needs to be informed when Member States or Europol establish an OTF focused on specific criminal activities. Early involvement of Eurojust would be particularly beneficial in three scenarios: as soon as a national judicial authority is handling the case; whenever the OTF is working on potential action days or potential execution of investigative measures that require judicial authorisation; whenever there is a potential for a JIT to be set up alongside the OTF.²⁵² In all these cases, early involvement would enable Eurojust to provide timely support and coordination to national authorities, optimising the judicial use of police-level coordination. Conversely, the involvement of Eurojust would be unnecessary for those OTFs focused solely on intelligence sharing.²⁵³

6.1.2. Increased cooperation with Frontex

The proposed regulation also envisages strengthening the cooperation with Frontex. It suggests that a representative of Frontex be part of the European Centre Against Migrant Smuggling in its strategic tasks, and a LO be permanently appointed to Europol to be part of the Centre in its operational tasks (Article 4). This scheme would notably support the coordination, cooperation and exchange of information between the agencies. The Commission explained in its subsequent analytical supporting document that the objective of the proposal is to ensure effective information sharing and overcome obstacles in the existing legal framework and at operational level.²⁵⁴

²⁴⁷ Interview with Europol.

²⁴⁸ The Eurojust College is composed of the national members from each of EU Member States (except Denmark) and is responsible for the organisation and operation of the agency. The members include judges, prosecutors and other judicial professional with equivalent competence.

²⁴⁹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), 2024, p. 31.

²⁵⁰ Interview with Eurojust.

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 6.

Cooperation with Frontex under the current legal framework

Cooperation between Europol and Frontex is governed by a cooperation agreement concluded in 2015.²⁵⁵ However, since then several amendments were introduced to the regulations governing Frontex²⁵⁶ and Europol,²⁵⁷ further expanding their competences.

More specifically, the 2019 Regulation on the European Border and Coast Guard explicitly empowers Frontex to process operational personal data it collected 'while monitoring migratory flows, carrying out risk analyses or in the course of operations for the purposes of identifying suspects of cross-border crime' when there are reasonable grounds to suspect that the person is involved in cross-border crime.²⁵⁸ This may include any individual suspected of a crime (e.g. who committed the crime, covered up the crime or helped in committing the crime).²⁵⁹ The data can then be shared with Europol when *strictly* necessary for the performance of its mandate.²⁶⁰ These criteria have also been clarified in recent case-law of the Court of Justice of the European Union (CJEU),²⁶¹ and will be further analysed in section 7.2. (on the processing of biometric data). The Court case concerned sensitive data but clarified more broadly the concept of 'strict necessity' as entailing a control to ensure the observance of the principle of data minimisation.²⁶²

In light of these changes in the agencies' mandates and supervisory work conducted notably by the EDPS (which will be discussed in the subsequent paragraph), the agencies signed a joint statement in January 2024 outlining their willingness to further strengthen their cooperation, through better coordination and complementarity of their activities.²⁶³ The final step will be the conclusion of an updated Working Arrangement, which is currently under negotiation.²⁶⁴ Additionally, Frontex's Management Board adopted rules on the processing of operational personal data by Frontex, which clarify the legal framework for transmitting personal data to Europol (and Eurojust).²⁶⁵ Operational personal data should only be shared if strictly necessary, in compliance with the working arrangements, following the *need to know* and *right to know* principles,²⁶⁶ on a case-by-case basis, and with respect to the principles of necessity and proportionality. This significantly limits information-sharing practices.

²⁵⁵ [Agreement](#) on operational cooperation between Europol and Frontex, 4 December 2015. It supersedes a previous agreement signed in 2008.

²⁵⁶ [Regulation \(EU\) 2016/1624](#) of 14 September 2016 on the European Border and Coast Guard; [Regulation \(EU\) 2019/1896](#) of 13 November 2019 on the European Border and Coast Guard (2019) (EBCG Regulation).

²⁵⁷ Europol Regulation 2016/794, 2022 amendment.

²⁵⁸ Article 90(1) of the EBCG Regulation.

²⁵⁹ Interview with Frontex DPO.

²⁶⁰ Article 90(2) of the EBCG Regulation – 'with Europol, or Eurojust where they are strictly necessary for the performance of their respective mandates and in accordance with Article 68; or competent law enforcement authorities of the Member States where they are strictly necessary for those authorities for the purposes of preventing, detecting, investigating or prosecuting serious cross-border crime'.

²⁶¹ CJEU [Case C-205/21](#), *Ministerstvo no vatreshnite raboti*, judgment of 26 January 2023.

²⁶² *ibid*, paragraph 125. The principle of data minimisation requires the data controller to limit the data collection to what is strictly relevant and necessary to accomplish the purpose for which they are processed (see Article 5(c) GDPR).

²⁶³ Joint [statement](#) on cooperation and complementarity between Europol and Frontex, 31 January 2024.

²⁶⁴ Interview with EDPS; Interview with Frontex DPF; Interview with Europol DPF; Interview with Frontex.

²⁶⁵ Article 15 of Frontex Management Board Decision 5/2024 of 18 January 2024 adopting the general rules on the application of the Data Protection Regulation by the agency (accessible in Frontex's [Public Register of Documents](#)).

²⁶⁶ The *need to know* principle is established on a case-by-case basis and requires at least: either (1) direct or indirect links between the activity of a suspect and the Member State; or (2) likelihood that the national and/or public security of the Member State is affected by the criminal activities of a suspect or the organised crime group; or (3) submission of a justified written request for information by a Member State. The *right to know* principle is established on the basis of the handling codes used by the source transmission of operational personal data to the Agency.

Cooperation in practice

Until recently, there has been an active exchange of information occurring between Frontex and Europol. This cooperation occurred through two means.²⁶⁷ On the one hand, Frontex submitted information on its own account in compliance with Europol's mandate, and on the other hand, Europol could request information from Frontex. This practice was, however, slightly modified following an EDPS data protection audit report on Frontex in 2022.²⁶⁸ The EDPS audit assessed the agency's collection of personal data (e.g. through debriefing interviews) and their processing for the purposes of identifying suspects of cross-border crimes and carrying out risk analysis. As part of the audit, Frontex's exchange of operational personal data with Europol was also examined.

Information collected in debriefing interviews

Debriefing interviews are conducted in the framework of Joint Operations, on an *ad hoc* basis. The information collected includes biographical information on individual migrants, information on their journey, on reasons why individuals leave their home country, and other declarations they may want to make.

Source: EDPS, Audit report [Case 2022-0749](#) on Frontex (2022).

The EDPS noted several issues in relation to Frontex's internal data protection rules,²⁶⁹ among others, that Frontex automatically shared debriefing reports with Europol without assessing the 'strict necessity' requirement of their legal framework. The EDPS also raised doubts as to the compliance of the debriefing activities with the principle of fair processing,²⁷⁰ as well as purpose limitation (with regard to risk analysis), while it also observed issues of joint controllerships. On the data sharing with Europol, the EDPS decided to open a separate investigation.²⁷¹ For several years, data had been automatically shared with Europol when it fell under Europol's mandate,²⁷² without checking strict necessity. After the EDPS opinion, Frontex ended this practice.²⁷³ As a consequence, Frontex now merely replies to duly justified requests sent by Europol which are then assessed by Frontex's Analysis Unit to determine whether they meet the criterion of strict necessity.²⁷⁴ This may explain the decrease in Frontex's contribution to Europol mentioned by the Commission,²⁷⁵ as it may be more time-consuming for Europol to draft targeted requests than to get automatic transfers of data.

The two agencies adopted a joint concept note, to clarify the remits within which the transfer of operational personal data from Frontex to Europol can take place.²⁷⁶ Two types of requests can be made. Firstly, case-based requests, which are explicitly related to specific criminal investigations, and secondly, trend-based requests, which are more general and allow for an overview of the criminal intelligence picture within a specific area.

²⁶⁷ Interview with Frontex DPO.

²⁶⁸ EDPS, Audit report [Case 2022-0749](#) on Frontex, 5 and 6 October 2022.

²⁶⁹ *ibid.*, p. 5.

²⁷⁰ The principle of fair processing requires the processing to not be misleading for the data subject, or be a threat to their privacy.

²⁷¹ The findings of the investigation have not yet been published (information given in the interview with the EDPS).

²⁷² As noted by the EDPS in the '[Exchange of personal data between Frontex and Europol – Processing of Personal Data for Risk Analysis \(PeDRA\) project](#)' at the Hearing of the European Parliament's LIBE Committee, 8 November 2022, p. 4.

²⁷³ Interview with Frontex DPO.

²⁷⁴ Interview with Frontex.

²⁷⁵ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 20.

²⁷⁶ Interview with Europol DPF.

In view of decreased inter-agency information sharing, it could be argued that strengthened cooperation between Frontex and Europol may improve the fight against migrant smuggling and trafficking in human beings. However, that must be done in a data protection compliant manner.

Another issue relates to the anonymity of the data shared. In principle, Frontex should only share anonymous data with Europol. The EDPS found, however, that the operational data shared would ultimately allow for the identification of the interviewee.²⁷⁷

Presence of Frontex in the Centre

The Commission proposal envisages a formalised role for a Frontex representative and LO at the European Centre Against Migrant Smuggling, although the practical aspects remain somewhat ambiguous. Their role could perhaps help in the submission of targeted requests from Europol and facilitate transfers complying with the requirement of strict necessity.

Currently, a LO from Frontex is posted at Europol, and vice-versa.²⁷⁸ Interviews conducted for this study noted that this exchange can have an added value in raising awareness of the different working methods.²⁷⁹ Their function remains broad, as they cover all areas of crime. Additionally, currently some experts from Frontex are temporarily deployed to Europol to deal specifically with matters of migrant smuggling.²⁸⁰ It can be argued that the position does not need to be regulated in a legal framework, as in practice the setting seems to work well.²⁸¹ Notwithstanding, the role of these representatives and LOs must be clarified, as well as their function in both strategic and operational analysis (particularly since both Frontex and Europol may define these concepts differently²⁸²). The risk must be avoided for a member of Frontex to receive information that falls outside of their mandate.²⁸³

Limitations of the proposal

Blurring of competence

The interrelation between migration and law enforcement issues is visible in various domains, going beyond Europol and Frontex.²⁸⁴ Several interviewees raised concerns about a potential overlap between the two agencies' mandates.²⁸⁵

The potential risk of overlap originates in the core nature of the agencies, and their establishment by the Treaties. The Frontex Regulation is based on Article 77(2)(b), (d) and Article 79(2)(c) TFEU, giving the Union the competence to adopt measures on the crossing points at the external borders, on the integrated management system for external borders, and on illegal immigration and unauthorised residence (notably to combat illegal immigration and trafficking in human beings). Conversely, Europol's mission is defined specifically by Article 88 TFEU with a main task of preventing and combating serious crimes affecting several Member States, terrorism and forms of crime affecting the common interest of the EU. Accordingly, Frontex is set up as a border guard

²⁷⁷ EDPS, Audit report [Case 2022-0749](#) on Frontex, 5 and 6 October 2022, p. 3.

²⁷⁸ Interview with Europol staff members; Interview with Frontex.

²⁷⁹ Interview with Frontex DPO; Interview with Frontex; Interview with Europol.

²⁸⁰ Interview with Frontex.

²⁸¹ *ibid.*

²⁸² *ibid.*

²⁸³ Interview with Frontex DPO.

²⁸⁴ Interview with EDPS; we see it in many large-scale IT systems.

²⁸⁵ Interview with EDRI; Interview with Statewatch; Interview with Frontex FRO; Interview with Frontex DPO; Interview with EDPS.

agency with border management task,²⁸⁶ while Europol is set up as a law enforcement agency.²⁸⁷ However, Frontex is tasked to contribute to the 'detection, prevention and combating of cross-border crime at the external borders'.²⁸⁸ This wording overlaps with Europol's mandate which lies precisely in the prevention and combating of serious crime.²⁸⁹ Nonetheless, while Frontex should detect, prevent and combat, it does not intervene in prosecution and investigation.

The EDPS has on multiple occasions commented on the inter-agency cooperation between Frontex and Europol. More specifically, in its opinion on the proposed regulation, it emphasised the need to further delineate and clarify Frontex's role in the fight against migrant smuggling and trafficking in human beings, for it not be turned '*de facto* into a law enforcement agency'.²⁹⁰ In its conclusions of the Frontex audit, the EDPS also noted that Frontex should not systematically and proactively collect information on cross-border crimes. Instead, information gathering should be 'strictly limited to identified needs of Europol, Eurojust and Member States competent authorities' and concern solely persons (e.g. suspects of cross-border crimes) about whom these agencies may process personal data to perform their tasks.²⁹¹ The EDPS also emphasised that debriefing interviews are to be conducted for migration management tasks, and thus their objective should not be to gather operational personal data about suspects of cross-border crimes.²⁹² The European Ombudsman stated, however, that these debriefing interviews share similar characteristics to procedural aspects of criminal investigations, as they involve witnesses and/or victims of acts which may be subject to criminal proceedings.²⁹³ In sum, debriefing interviews seemed to aim at identifying suspects, and other involved individuals, rather than managing migration, which may be problematic from a criminal law perspective, as potential *witness* testimonies are collected by proxy, without clear safeguards.²⁹⁴ The risk of interrelated and quasi overlapping tasks also became visible through their close connection in the field. An incident was reported in Greece, in which Europol's Guest Officers (illegally) joined the debriefing interviews to ask questions to the migrants.²⁹⁵ This has been condemned by Frontex's and Europol's FRO but testifies to this blurring of competences.

In addition to the unclear distinction between the different competences, there is also a potential risk of data duplication inherent to Frontex's practice of debriefing interviews. In particular, Frontex may collect an amount of personal data, including information related to operational data on a potential migrant smuggler disclosed by a migrant. As a next step, Frontex shares the template with the national authorities to validate it and decide whether it can subsequently be sent to Europol. Interestingly, information may in some cases be shared on two levels: (a) from national authorities directly to Europol; and (b) from Frontex to Europol through validation by the competent national authority. Duplicates may thus exist in Europol's database, however, sometimes information from Frontex offers more context, as they share the entirety of the debriefing note.²⁹⁶ Technically, information could however be sent directly from Member States to Europol. From a data protection

²⁸⁶ Article 1 of the EBCG Regulation.

²⁸⁷ Article 1 of the Europol Regulation.

²⁸⁸ Article 1 of the EBCG Regulation.

²⁸⁹ Article 3 of the Europol Regulation.

²⁹⁰ EDPS [Opinion 4/2024](#), p. 10.

²⁹¹ EDPS, Audit report [Case 2022-0749](#) on Frontex, 5 and 6 October 2022, p. 5.

²⁹² *ibid.*

²⁹³ European Ombudsman, [Case 145/2022/MHZ](#), Decision on how Frontex ensures respect of the rights of migrants in 'debriefing' interviews, 3 July 2023.

²⁹⁴ The notion of witness testimony by *proxy* has been taken from the interview with Frontex FRO.

²⁹⁵ Interview with Frontex FRO.

²⁹⁶ Interview with Frontex DPO.

perspective, this would also allow for stronger data protection since the more actors involved, the higher the risk of potential data protection infringements at the various steps.

Overlaps may also occur when both agencies work in the field, since the Commission proposal is not sufficiently clear about the deployment of Europol on the ground.²⁹⁷ According to the EBCG Regulation, Europol may participate in a Joint Operation of Frontex.²⁹⁸ In such a scenario, both Europol and Frontex staff may check the same object in practice (e.g. a car, travel document),²⁹⁹ although at different times. This would result in a duplication of work, which may also occur if there is both a joint operation and an OTF taking place. Such case may imply two agencies, two legal frameworks, two monitoring frameworks and two chains of command. Therefore, it is essential to clearly delineate the agencies' tasks and provide for coordination, to avoid duplication and accountability issues.

Finally, with regard to Frontex's cooperation with third countries, it is interesting to note that the agency works with countries that have cooperation agreements with Europol (e.g. Albania, Moldova, Türkiye), but also with countries with which Europol did not conclude a cooperation agreement (e.g. Niger, Senegal, Azerbaijan).³⁰⁰ Strengthening the inter-agency cooperation between Europol and Frontex could result in a duplication of information received by both agencies, particularly if ILOs in third countries are also to be directly connected to SIENA (as will be developed in section 6.3.2.). It could also allow for the sharing of information obtained in or from a third country with which Frontex can cooperate, but not Europol (and vice-versa). This could entail for example analytical findings from Frontex.³⁰¹ Working arrangements of Frontex usually cover data collection on migration routes, which are in principle relevant to Europol's fight against migrant smuggling and trafficking in human beings.³⁰² External relations of Frontex have been the object of criticism in the past with regard to data protection safeguards,³⁰³ which may then further accentuate if the data is shared with Europol.

6.2. Strengthening steering and coordination in migrant smuggling and trafficking in human beings by reshaping the institutional framework and capacities

This section evaluates the second objective of the Commission's proposal, which aims to expand the coordination and steering at EU level. This particularly refers to the codification of the EMSC but it also relates to the increase in Europol's resources and staff, further substantiated in the legislative financial statement attached to the proposal.³⁰⁴

6.2.1. Organisation and governance changes: Formalisation of the EMSC

The proposal aims to establish the European Centre Against Migrant Smuggling in law and outlines its specific responsibilities. Chapter II of the proposal details the governance framework of the Centre. It starts by outlining the composition of the Centre with its different configurations depending on whether the Centre is carrying out its strategic or operational tasks (Article 4). To fulfil

²⁹⁷ Interview with Frontex.

²⁹⁸ Article 38(3)(k) of the EBCG Regulation.

²⁹⁹ Interview with Frontex FRO.

³⁰⁰ Frontex, Third countries, [Information note](#); J. Santos Vara, 'The activities of Frontex on the territory of third countries: outsourcing border controls without human rights limits?', *European Papers*, Vol. 8(2), 2023, pp. 985-1011, p. 994.

³⁰¹ Interview with Frontex.

³⁰² L. Marin, 'The cooperation between Frontex and third countries in information sharing: practices, law and challenges in externalizing border control functions', *European Public Law*, Vol. 26(1), 2020, pp. 157-180, p. 165.

³⁰³ *ibid*, pp. 176-177.

³⁰⁴ Legislative Financial Statement 'Agencies' attached to the proposed regulation [COM\(2023\) 754](#), pp. 3-28.

its strategic tasks, the Centre should be composed of a representative of each Member State, a representative of Eurojust and Frontex, and – at Europol's discretion and after consultation of the Member States – representatives involved in the operational implementation of the EU's strategic and operational priorities (notably in EMPACT). When the Centre performs its operational tasks, it should be composed of a LO per Member State, as well as a LO of Frontex and Eurojust as permanent representatives at Europol. If Europol deems it necessary, it may invite other actors (e.g. other relevant Union bodies or agencies). The proposal then proceeds to outline more specifically what the strategic and operational tasks of the EMSC should be (Articles 5 and 6). Strategic tasks, for example, include providing strategic analysis and threat assessment, as well as monitoring migrant smuggling and trafficking in human beings within the EU and beyond. Conversely, operational tasks refer to the identification of migrant smuggling and human trafficking cases that may require operational cooperation (e.g. through OTFs or Europol deployments), or cooperation with third countries. It may also cover Europol's support to Member States in cross-border information exchange activities or investigations.

Current state of play

The EMSC was established in 2016, following a Management Board decision to set up a Union centre of specialised expertise in the area of migrant smuggling and trafficking in human beings. In fact, the Europol Regulation expressly provides for the possibility that Europol develops 'Union centres of specialised expertise for combating certain types of crime'.³⁰⁵ In the Europol Regulation, specific mention is made solely of the European Cybercrime Centre (EC3), however, other centres have been established by Europol (such as for example the European Counter Terrorism Centre (ECTC) and the European Serious and Organised Crime Centre). The current regulation does not include information on the composition of the centres, nor their tasks. It merely states that the Management Board should decide on the establishment of Europol's internal structures, including the Union centres of specialised expertise, upon a proposal of the Executive Director.³⁰⁶ The EMSC is part of the European Serious and Organised Crime Centre, which is divided into three targeted Units, namely: (1) EU Drugs Unit, (2) EU Organised Crime Unit; and (3) EMSC.³⁰⁷

Limitations of the proposal

While the Commission proposal offers more transparency on the role and functioning of the Centre, it distinguishes the European Centre Against Migrant Smuggling from the other centres such as the ECTC or the EC3, without clarifying why. Additionally, next to the potential criticism on the composition of the Centre (as has been developed in section 6.1.), the proposal still leaves a lot of uncertainties with regard to its governance and tasks.

With regard to the composition of the Centre as provided for in the proposal, temporary deployments of LOs from other agencies, such as Frontex, already exist.³⁰⁸ It is difficult to assess whether a permanent deployment would have a significant impact, since such a deployment does not automatically lead to constant active participation.³⁰⁹ Additionally, in terms of operational tasks, it is in principle up to each Member State to decide which members can join the operational meetings.³¹⁰ To give a theoretical example, if France only wants to have Spain and Italy around the table, then others cannot join. Allowing every EMSC member to join these meetings would

³⁰⁵ Article 4(1)(l) of the Europol Regulation.

³⁰⁶ Article 11(1)(s) of the Europol Regulation.

³⁰⁷ Europol, webpage [European Serious and Organised Crime Centre – ESSOC](#), 2022.

³⁰⁸ Interview with Europol.

³⁰⁹ *ibid.*

³¹⁰ *ibid.*

jeopardise the investigation, as members would be less inclined to share concrete information on the operation.³¹¹ A clear distinction should be drawn between strategic and operational meetings.

Risks of less flexibility

From a law enforcement perspective, the Centre's codification may ultimately reduce the efficiency of Europol, instead of reinforcing it. The new proposal would put the rules regarding the organisation of the Centre in the hands of the EU legislators, and no longer in those of Europol's Management Board (upon proposal of the Executive Director). This would significantly reduce the flexibility of Europol's actions, as Europol itself also indicated.³¹² In the field of law enforcement, flexibility is key to be able to respond to major crisis. If compared with the national level, no Member States would regulate in national law the structure of the police up to the level of units, as an interviewee argued.³¹³ This relates to the idea that law enforcement authorities are better suited to decide on their priorities and working methods. In this respect, Europol also shared concerns about this provision in the Commission proposal and the extensive codification of the Centre, as this would significantly reduce its flexibility. Codifying the Centre in a regulation provides it with a permanent character, in the sense that any change to it would have to undergo a legislative procedure, which is a cumbersome and lengthy process. The criminal world is a dynamic landscape, and criminal priorities constantly evolve. In this regard, twenty years ago, migrant smuggling and trafficking in human beings were not considered to be key crime areas.³¹⁴ It is therefore difficult to predict how the criminal landscape will evolve in the future.

6.2.2. Additional resources

The proposal suggests to provide Europol with an additional budget of 50 million euros, as well as 50 additional posts by 2027.³¹⁵ Approximately half of the additional funds (i.e. 25.1 million euros) should be used to develop Europol's technological capabilities (e.g. biometric tools), and approximately 16.7 million euros would be earmarked for supporting OTFs and providing EMPACT grants.³¹⁶ The 50 additional posts would comprise 10 temporary agents, 20 contract staff and 20 Seconded National Experts (SNE).³¹⁷ The latter position is further discussed in section 6.4. The EU budget adopted for the financial year of 2025 shows that approximately 241 million euros (5 million euros over the amount that the Commission initially requested) is provided for Europol.³¹⁸ This amount is significantly higher than in 2024 (approximately 223 million euros).³¹⁹

Additional resources are of key importance to Europol, particularly in view of the potential new responsibilities and tasks given to the agency.³²⁰ However, while the material resources to build systems and buy hardware are reportedly high, the personal resources fall short.³²¹ Initially, Europol requested more staff to be hired, and particularly more temporary agents, since the positions of

³¹¹ Interview with Europol; but also interview with Swedish national authorities.

³¹² Interview with Europol.

³¹³ Interview with Europol; Interview with Swedish national authorities.

³¹⁴ Interview with Europol.

³¹⁵ Proposed regulation [COM\(2023\) 754](#), p. 9.

³¹⁶ Legislative financial statement, p. 9 (p. 21 of it).

³¹⁷ *ibid* (p. 23 of it).

³¹⁸ European Parliament legislative resolution of 27 November 2024 on the joint text on the draft general budget of the European Union for the financial year 2025 approved by the Conciliation Committee under the budgetary procedure ([15788/2024 – C10-0202/2024 – 2024/0176\(BUD\)](#)).

³¹⁹ Statement of revenue and expenditure for the 2024 financial year – European Union Agency for Law Enforcement Cooperation (Europol) – amending budget No 4 ([C/2024/7108](#)).

³²⁰ Interview with Europol.

³²¹ *ibid*.

contract staff and SNEs have contractual limitations.³²² Contract staff are usually not given access to operational data, and have merely supporting functions, while SNEs come from national authorities for a limited period of time to participate in OTFs.³²³ Thus, they do not offer the same added value as temporary agents. Similarly, external consultants can only be recruited for a period of two years, due to the legislation in the Netherlands, the host state of Europol, which results in considerable inefficiencies due to the constant rotation of staff working for example on IT systems.³²⁴

Additionally, some of the posts are proposed to be transferred from Frontex to Europol, as a result of the reduction of the future reinforcement in Frontex staff.³²⁵ Interviews with Frontex staff showed that although there is trust towards the proposed measures regarding resources, it will require Frontex to deprioritise some matters due to a lowering of personnel.³²⁶ Both Eurojust and Frontex expect the proposal to increase their workload, which would potentially require an increase in resources.³²⁷

Finally, it is important to note that while there was a significant increase in Europol's resources and staff in recent years,³²⁸ none have been expressly allocated to the supervisory mechanisms – neither the internal supervisors (the DPO and the FRO) nor the external supervisor (the EDPS). Also under the Commission proposal, the budget increase would be dedicated to the agency's operational mandate rather than the supervisory authorities.³²⁹ Subsequently, the agency's management could allocate more resources to the internal supervisors, if it deems it necessary. In order to be able to monitor and oversee all of the agency's activities, supervisory authorities need to have adequate resources and grow at the same pace as the agency itself.³³⁰ Europol's DPF had already pointed to the issue of resources in the last two annual data protection reports it presented to the Management Board.³³¹

6.3. Improving information sharing on migrant smuggling and trafficking in human beings

6.3.1. Enforcing binding rules on information sharing (including biometric data) for Member States

According to the European Commission, the current low levels of information sharing with Europol stem from the fact that Member States have the discretion to determine what information they consider necessary for Europol to fulfil its objectives.³³² To address this, the proposed regulation introduces enhanced responsibilities for Member States to share information with Europol, including biometric data, on migrant smuggling and trafficking in human beings. Article 8(1) of the proposal

³²² *ibid.*

³²³ *ibid.*

³²⁴ Interview with Europol.

³²⁵ Legislative financial statement, p. 9 (p. 23 of it).

³²⁶ Interview with Frontex.

³²⁷ *ibid.*; Interview with Eurojust.

³²⁸ See budget information on Europol's [website](#): in 2020, approximately 158 million euros; in 2021: approximately 178 million euros; in 2022 approximately 198 million euros; in 2023 approximately 213 million euros; and in 2024 approximately 223 million euros.

³²⁹ Interview with Europol.

³³⁰ Interview with EDPS; Interview with Europol DPF.

³³¹ Interview with Europol DPF.

³³² Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 27.

states that each Member State should, in accordance with the Europol Regulation, 'provide Europol with information held by its competent authorities and relating to criminal offences on migrant smuggling and trafficking in human beings'. Article 8(2) further specifies that this information must be provided 'in a timely manner'. According to the accompanying staff working document, this provision represents a new specific obligation for Member States to share any information they have on these crimes, as it may be necessary for Europol to establish links between isolated incidents, and to detect the criminal networks behind these serious crimes.³³³ The proposal thus introduces the presumption that any information national authorities possess on migrant smuggling and trafficking in human beings is instrumental in combating organised crime and transnational networks. Moreover, Article 8(3) requires that each Member State provides other Member States and Europol with relevant information where there are objective reasons to believe it could assist in preventing, detecting, or investigating such criminal offences in those Member States.

Limitations of the legislative proposal

Issues related to effectiveness

It remains unclear how the mandatory sharing of information will effectively solve the problem of insufficient police cooperation. The Commission identifies the insufficient sharing of information with Europol, both in terms of *quantity and quality*,³³⁴ as the most pressing issue. However, in practice, the proposal seems to focus on the quantity rather than the quality of shared information. The staff working document explains that Europol's ability to support efforts against migrant smuggling and trafficking in human beings is often compromised by the lack of quality information, i.e. data that goes beyond specific incidents and relates to criminal networks and groups actively involved along smuggling routes.³³⁵ Only such information is said to be useful in the context of Europol's mandate. However, EU law enforcement action is often limited to low-level facilitators, such as the skippers of vessels moving the irregular migrants into the EU,³³⁶ or refers to forms of facilitation of irregular migration not involving organised crime. This raises the concern that national authorities may be required to share all available information, including that related to low-level facilitators or cases not involving organised crime (see section 8 on the interplay of the proposal with the Facilitation Directive). While Europol has emphasised that any type of information can be relevant³³⁷, overwhelming the agency with low-quality or marginally significant data could raise proportionality concerns.

More fundamentally, the mandatory sharing of information under the Europol Regulation undermines the balance between Member States' and Europol's competence.³³⁸ Europol cannot compel Member States to cooperate and relies on the activities of the national law enforcement authorities, as reflected in several provisions of the Europol Regulation (see section 5.2 on subsidiarity). Past experience also shows that imposing cooperation obligations through EU regulations does not necessarily lead to effective implementation. For instance, while the Eurojust Regulation requires national authorities to inform their national members at Eurojust of any case affecting at least three Member States, including trafficking cases,³³⁹ this provision is often disregarded in practice.³⁴⁰ This suggests that information sharing is a complex, multi-faceted issue that cannot be addressed solely through legislative obligations – it requires genuine commitment

³³³ *ibid*, pp. 27–28.

³³⁴ *ibid*, p. 14.

³³⁵ *ibid*, pp. 17–18.

³³⁶ EMSC, [Tackling threats, addressing challenges](#), 2023, p. 10.

³³⁷ Interview with Europol.

³³⁸ Interview with academic.

³³⁹ [Regulation \(EU\) 2018/1727](#) of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, Article 21.

³⁴⁰ Interview with Eurojust.

from Member States. As explained by one Europol staff member, Europol's foundation lies in the voluntary sharing of information and if there is no obligation imposed by law, investigators may feel more comfortable sharing information with the agency.

Coherence with other EU legal acts

In terms of coherence with other EU legal acts, the proposed regulation introduces powers and responsibilities that go beyond those outlined in recent legislation. This may lead to inconsistencies in practice. In particular, Directive (EU) 2023/977 on the exchange of information between the law enforcement authorities of Member States requires law enforcement authorities to assess on a case-by-case basis whether a copy of the exchanged information should be sent to Europol.³⁴¹ In addition, the same directive leaves some level of discretion, allowing competent law enforcement authorities not to use SIENA to send requests for information when, inter alia, the exchange of information requires the involvement of third countries or international organisations.³⁴² However, the proposal does not provide for any exceptions in the obligation to share information via SIENA.³⁴³

Concerns regarding proportionality and fundamental rights

In addition to concerns about the effectiveness and coherence of the proposed amendment regarding mandatory information sharing, there are questions about the proportionality of this enhanced obligation and its potential impact on the fundamental rights of individuals involved in these cases. Interviews conducted in the context of the present study reveal that if the regulation is adopted as proposed, some Member States might share information on vulnerable individuals, including asylum seekers and refugees, who are often accused of migrant smuggling due to the broad contours of this crime.³⁴⁴ The sharing of information in these cases could lead to the classification of such categories of people as suspects involved in organised crime and to the further conflation of migration and criminal law enforcement objectives.³⁴⁵ In this regard, the broad definition of migrant smuggling in the proposed Facilitation Directive (COM(2023) 755) could further expand the scope of the information to be shared with Europol³⁴⁶ (see section 8 on the interplay between the proposal and the Facilitation Directive). This could heighten the risk of Europol receiving more information than it is entitled to process under the Europol Regulation but also more than is necessary for carrying out its tasks effectively. This was precisely the reason why in the final version of the new Directive (EU) 2023/977, upon the recommendation of the EDPS,³⁴⁷ the mandatory sharing of information with Europol was replaced by a case-by-case assessment of Member States on whether to send a copy of the exchanged information to the agency.

Enhanced information sharing could potentially also result in an increased sending of complex and large datasets of individuals with no clear link to any criminal activity. As will be further elaborated in section 7.1.1., this may infringe fundamental rights of individuals. The EDPS already noted in 2020 and subsequently in 2021, that the lack of Data Subject Categorisation (DSC) can create issues of

³⁴¹ Article 12 of [Directive \(EU\) 2023/977](#).

³⁴² Article 13 of [Directive \(EU\) 2023/977](#).

³⁴³ Still, the general exceptions under Article 7(7) of the Europol Regulation would apply (information contrary to the security interests of the Member State; information that could jeopardise an ongoing investigation or the safety of an individual; and disclosure related to national security activities).

³⁴⁴ PICUM, [How the new EU Facilitation Directive furthers the criminalisation of migrants and human rights defenders](#), 2024.

³⁴⁵ Interview with Statewatch; Interview with ECRE; Interview with EDRi; see also EDPS, Audit report on Europol ([Case number 2022-0382](#)), 16 December 2022.

³⁴⁶ Interview with academic.

³⁴⁷ EDPS, [Opinion 5/2022](#) on the Proposal for a Directive on information exchange between law enforcement authorities of Member States, 2022.

compliance with the principles of data minimisation and storage limitation.³⁴⁸ Thus, any increase in Big Data sharing could raise concerns for individuals.

Council position

In June 2024, the Council of the EU proposed to delete Article 8 (on the provision of information concerning criminal offences on migrant smuggling and trafficking in human beings to Europol and the Member States) of the proposed regulation. Instead, it suggested to introduce the wording 'including migrant smuggling and human trafficking' within the general obligation for Member States under Article 7(6) of the Europol Regulation to share information. This amendment intends to ensure the possibility of sharing such data with Europol, without introducing new obligations.³⁴⁹ However, the necessity of this amendment is unclear, as migrant smuggling and trafficking in human beings are already listed as crimes under Europol's remit, and a general obligation to share information already exists.³⁵⁰ It is true that reference in the Europol Regulation to a specific crime might help raise awareness about the role that the agency can play within that crime area.³⁵¹ At the same time, introducing specific obligations for individual crime areas through regulations could potentially become burdensome, making it difficult for police authorities to follow up on their obligations.³⁵² Additionally, it is possible that the priority currently given to the criminalisation of migrant smuggling may shift in the future toward other areas of crime.

6.3.2. Beyond Member States: Enhancing information sharing with third countries

Within the Commission proposal, the strengthening of information with third countries is reflected in two ways. Firstly, through tasking the European Centre Against Migrant Smuggling with identifying cases of migrant smuggling or trafficking in human beings requiring cooperation with third countries as regards information sharing; and secondly, through connecting ILOs in third countries to SIENA.

Direct information sharing with third countries

In the Explanatory Memorandum to the proposal, the European Commission emphasises the need for stronger and more systematic information sharing with third countries.³⁵³ In this sense, it tasks the Centre with identifying cases requiring information sharing with third countries, thereby supporting the Executive Director in deciding on personal data transfers to third countries on a case-by-case basis and indirectly promoting that basis of transfer, in accordance with Article 25(5) of the Europol Regulation.³⁵⁴

Current regime

To analyse the direct information sharing with third countries, it is important to understand how Europol currently cooperates with third countries, when it comes to personal data sharing. Europol

³⁴⁸ EDPS, [Decision](#) of 17 September 2020 relating to EDPS's own inquiry into Europol's big data challenge; EDPS, [Decision](#) on the retention by Europol of datasets lacking Data Subject Categorisation (Cases 2019-0370 & 2021-0699), 21 December 2021.

³⁴⁹ Interview with Polish national authorities.

³⁵⁰ Article 7(6) and Annex I of the Europol Regulation.

³⁵¹ For instance, Europol reported that reference to cybercrime added in the Europol Regulation did result in better involvement of Europol in cybercrime cases.

³⁵² Interview with Swedish national authorities.

³⁵³ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, p. 7.

³⁵⁴ Recital 8 of the proposed regulation [COM\(2023\) 754](#).

may share data³⁵⁵ on the basis of (a) an adequacy decision of the Commission pursuant to Article 36 of the Law Enforcement Directive (LED), finding that the third country in question ensures an adequate level of protection; (b) an international agreement concluded between the EU and the third country adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals; and (c) a cooperation agreement allowing for the exchange of personal data concluded by Europol before 1 May 2017³⁵⁶ (more specifically an operational agreement³⁵⁷). Europol may also conclude administrative arrangements with third countries to implement such agreements or adequacy decisions. Table 1 below lists the agreements currently in place.

In June 2018, the Council authorised the opening of negotiations with eight priority countries (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Türkiye)³⁵⁸ for agreements on the exchange of personal data between Europol and these countries, and more recently, in 2023, also with Ecuador,³⁵⁹ Bolivia,³⁶⁰ Mexico,³⁶¹ Peru,³⁶² and Brazil.³⁶³ Civil society quickly reacted to several agreements, arguing that some of these third countries have poor human right standards (e.g. Algeria and Egypt being authoritarian regimes; lack of specific data protection laws in some countries).³⁶⁴

Additionally, by way of derogation, the Management Board may authorise a transfer of personal data from Europol to a third country if there are appropriate safeguards in a legally binding document or if Europol in its assessment concludes that appropriate safeguards exist.³⁶⁵ The Management Board may also, in agreement with the EDPS, allow the transfer for a longer period of time (maximum one year, renewable).³⁶⁶ Finally, the Executive Director can also provide for a 'derogatory regime' to transfer personal data to one or more third countries on a case-by-case basis if the transfer is necessary for the reasons listed in Article 25 of the Europol Regulation (e.g. safeguard legitimate

³⁵⁵ Europol Regulation, Article 25(1).

³⁵⁶ In accordance with Article 23 of [Council Decision 2009/371/JHA](#) establishing Europol.

³⁵⁷ Europol can conclude two types of cooperation agreements: (1) operational agreements which include the exchange of personal data; and (2) strategic agreements which do not include the exchange of personal data.

³⁵⁸ EDPS, [Opinion 2/2018](#), Opinion on eight negotiating mandates to conclude international agreements allowing the exchange of data between Europol and third countries, 14 March 2018.

³⁵⁹ [Council Decision \(EU\) 2023/1008](#) of 15 May 2023 authorising the opening of negotiations with the Republic of Ecuador for an agreement between the EU and the Republic of Ecuador on the exchange of personal data between Europol and the Ecuadorian authorities competent for fighting serious crime and terrorism.

³⁶⁰ [Council Decision \(EU\) 2023/1009](#) of 15 May 2023 authorising the opening of negotiations with the Plurinational State of Bolivia for an agreement between the EU and the Plurinational State of Bolivia on the exchange of personal data between Europol and the Bolivian authorities competent for fighting serious crime and terrorism.

³⁶¹ [Council Decision \(EU\) 2023/1011](#) of 15 May 2023 authorising the opening of negotiations with the United Mexican States for an agreement between the EU and the United Mexican States on the exchange of personal data between Europol and the Mexican authorities competent for fighting serious crime and terrorism.

³⁶² [Council Decision \(EU\) 2023/1012](#) of 15 May 2023 authorising the opening of negotiations with the Republic of Peru for an agreement between the EU and the Republic of Peru on the exchange of personal data between Europol and the Peruvian authorities competent for fighting serious crime and terrorism.

³⁶³ [Council Decision \(EU\) 2023/1010](#) of 15 May 2023 authorising the opening of negotiations with the Federative Republic of Brazil for an agreement between the EU and the Federative Republic of Brazil on the exchange of personal data between Europol and the Brazilian authorities competent for fighting serious crime and terrorism. Most recently, on 18 December 2024, the Commission released proposals for Council decisions to conclude and sign the agreement with Brazil ([COM\(2024\) 580](#)) and ([COM\(2024\) 581](#)).

³⁶⁴ Statewatch, [EU: Warnings over proposed new Europol partners in Middle East and North Africa](#), 14 May 2018.

³⁶⁵ Europol Regulation, Article 25(4a).

³⁶⁶ *ibid*, Article 25(6).

interests of data subjects, protect the vital interests of the data subject).³⁶⁷ However, this latter transfer cannot be used for systematic, massive or structural transfers.

Table 1 – Europol's cooperation with third countries

Forms of cooperation	Third countries involved
Operational agreements (concluded before 1 May 2017)	17 agreements concluded: ³⁶⁸ Albania (2013), Australia (2007), Bosnia and Herzegovina (2016), Canada (2016), Colombia (2016), Georgia (2017), Iceland (2001), Moldova (2014), Montenegro (2016), Norway (2001), North Macedonia (2016), Serbia (2014), Switzerland (2016), Liechtenstein (2016), Monaco (2011), Ukraine (2016), United States (2001).
Adequacy decisions by the European Commission (under the LED)	United Kingdom (2021).
International agreements concluded under Article 218 TFEU	Working and Administrative Arrangement with New Zealand (2023); Working and Administrative Arrangement with the United Kingdom (2021). Further agreements are currently under negotiation (see below).
Derogations from the Executive Director	Happened on four occasions: with New Zealand (before the 2023 Arrangement was signed), India, Türkiye and Brazil. ³⁶⁹
Derogations from the Management Board	None to date. ³⁷⁰

Source: Author's elaboration

Insufficient safeguards in the information-sharing regime

The exchange of personal data regimes with third countries presents several issues. First and foremost, Europol can still exchange personal data on the basis of operational agreements that were concluded prior to 2017. Some of them date from the early years 2000 (e.g. the operational agreement with the United States, Norway and Australia), and may thus no longer comply with the high data protection standards developed in the EU.³⁷¹ These agreements should have been assessed by the Commission by 14 June 2021,³⁷² however, it appears no such evaluation report has yet been published.³⁷³ Additionally, based on an EDPS audit on the processing of minors' data received from third countries, it was noted that in some instances minors involved in relatively minor infractions (e.g. pickpocketing or shoplifting) were classified as the same level of suspicion as the

³⁶⁷ *ibid*, Article 25(5).

³⁶⁸ The operational agreement with Denmark concluded in 2022 was excluded from this list as Denmark is an EU Member State (a more privileged state with the same standards and safeguards). Under [Protocol \(No 22\) on the position of Denmark](#), it has an opt-out of all EU Justice and Home Affairs legislation adopted since the Lisbon Treaty. Consequently, Denmark cannot participate in Europol.

³⁶⁹ Interview with EDPS; Interview with Europol DPF.

³⁷⁰ Information obtained from the Commission's impact assessment supporting the revision of Europol's mandate [SWD\(2020\) 543](#).

³⁷¹ See the Data protection Package: [Regulation \(EU\) 2016/679](#) of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR); [Directive \(EU\) 2016/680](#) of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (LED); and the EUDPR; CJEU [Case C-362/14, Maximilian Schrems v Data Protection Commissioner](#), 2015; CJEU [Opinion 1/15](#), 2017.

³⁷² Article 25(4) of the Europol Regulation.

³⁷³ To initiate this evaluation report, the Commission launched a dedicated [call for evidence](#) in April 2022, but it seems this initiative was never brought to completion.

main organisers of the criminal activity, which may not comply with the principle of 'strict proportionality'.³⁷⁴ The EDPS also noted that Europol applied the same assessment as it does when it receives data from Member States, although in the case of third countries Europol should first check whether the data is lawful under the EU legal system.³⁷⁵

As noted above, the proposal indirectly promotes 'derogatory exchanges' of personal data, particularly those authorised by the Executive Director.³⁷⁶ The EDPS strongly advised to modify the relevant recital (Recital 8) of the proposal to avoid it to be interpreted as 'promoting or recommending regular and systemic use of derogations for transfer of data to third countries'.³⁷⁷ Derogations should remain an exception, particularly since they cannot ensure the same protection of fundamental rights as international agreements. Having an international agreement is a strong safeguard in itself, as it has to comply with the CJEU case-law, according to which the level of protection resulting from an international agreement should be essentially equivalent to the protection offered in EU law.³⁷⁸ Having an agreement in place ensures this *equivalent protection*, which may not be guaranteed in situations of 'derogatory exchanges'. Civil society representatives warn about the transferring of data outside of agreements, as this may violate fundamental rights.³⁷⁹

In theory, when the Executive Director authorises this transfer, the DPO and EDPS are not involved in the decision-making process. The EDPS is merely informed of the case, and may request documentation on it.³⁸⁰ The Executive Director should authorise the transfer only if it is necessary in listed situations,³⁸¹ complying thereby with the 'necessity' requirement but not with 'strict necessity' as is the case for transfer of data from Frontex (as discussed in section 6.1.2.) or with biometric data (as will be discussed in section 7.2.). This lowers the threshold to be met to transfer data to a third country with which no agreement has been signed. It is interesting to note that the protection granted in derogations authorised by the Management Board is higher as it requires an assessment of whether appropriate safeguards are in place,³⁸² and situations of a longer period authorising transfer require an EDPS agreement on the matter.³⁸³ It is unclear why the same safeguards do not apply to authorisations granted by the Executive Director. In practice, it seems that when the 'derogatory exchange' was authorised by the Executive Director, both the G24 Unit and Data Protection Function (DPF) were involved.³⁸⁴ The EDPS did, however, conclude that the procedure should be clarified and further developed.³⁸⁵ It notably stated that the DPF's request for advice

³⁷⁴ EDPS, [Audit report](#) on Europol (Case number 2022-0382), 16 December 2022, p. 3.

³⁷⁵ *ibid.*

³⁷⁶ Recital 8 of the proposed regulation [COM\(2023\) 754](#).

³⁷⁷ EDPS, [Opinion 4/2024 on the proposed regulation](#), p. 12.

³⁷⁸ CJEU [Case C-362/14](#), *Maximilian Schrems v Data Protection Commissioner*, 2015, paragraph 96; CJEU [Opinion 1/15](#), 2017, paragraph 93.

³⁷⁹ For example, interview with EDRI.

³⁸⁰ Article 25(7) and (8) of the Europol Regulation.

³⁸¹ Article 25(5) of the Europol Regulation lists several situations: (a) necessary in order to protect the vital interests of the data subject or of another person; (b) necessary to safeguard legitimate interests of the data subject; (c) essential for the prevention of an immediate and serious threat to the public security of a Member State or a third country; (d) necessary in individual cases for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal sanctions; or (e) necessary in individual cases for the establishment, exercise or defence of legal claims relating to the prevention, investigation, detection or prosecution of a specific criminal offence or the execution of a specific criminal sanction.

³⁸² Article 25(4a) of the Europol Regulation, as amended in 2022.

³⁸³ Article 25(6) of the Europol Regulation.

³⁸⁴ EDPS, Access to document request – [Report on inspection at Europol](#), Section 4.5. Transfer to third countries and EU bodies.

³⁸⁵ *ibid.*, pp. 39–40.

should be included in the legal provision, and be used in all cases; that the procedure should clarify the scope of the endorsement by the Executive Director of the advice given notably by the DPF; and that the procedure should include a regular review of the situation to see whether the original conditions which gave rise to the authorisation are still complied with.

The Council has, in its negotiating position, deleted Recital 8, referring to the 'derogatory exchanges' authorised by the Executive Director, as well as most references to third countries.³⁸⁶

The role of immigration liaison officers

Under Article 8(5) of the Commission proposal, Member States should connect their ILOs based in third countries to SIENA, with a requirement to share information on migrant smuggling and trafficking in human beings. If that proves difficult for technical reasons in the third country, they are required to share the information with a national competent authority which then provides it to Europol through SIENA (directly or through Europol's national unit). Until now, ILOs were not connected to Europol's operational work, and, therefore, Europol was not directly receiving information from them.³⁸⁷ National authorities should solely ensure that information obtained from deployed ILOs, reaches the relevant EU agencies (including Europol).³⁸⁸ ILOs should carry out their tasks in accordance with EU and national laws, including those on the protection of personal data, and any agreement concluded with the third country.³⁸⁹ By February 2024, approximately 500 ILOs were deployed around the world.³⁹⁰ The proposal would thus have a significant impact, since it would (in)directly connect all these ILOs to Europol.

The proposal envisages wide information sharing, that would include anything related to migrant smuggling and trafficking in human beings. However, this would be hard to justify in light of the necessity and proportionality principles,³⁹¹ particularly when information is collected in a country with a poor fundamental rights record.³⁹² The conditions of collection and transfer of data are not further clarified in the proposal, and the latter does not contain any specific safeguard. As the EDPS noted in its audit, when Europol receives data from Member States, it may rely on the national authority's assessment that the transfer is lawful under their legal system.³⁹³ With regard to third countries, the EDPS recommended that Europol should instead perform its own assessment on the lawfulness of data under the EU's legal system.³⁹⁴ In cases when the immigration liaison officer is posted in a third country and is directly connected to SIENA, it is not clear whether the data transfer falls under data obtained from Member States or third countries. If one assumes the latter, then specific safeguards need to be implemented to ensure their lawful transfer.

Another issue relates to the nature of these ILOs. They are defined as LOs deployed in third countries to deal with immigration-related issues (Article 2(5)) of the proposed regulation). However, SIENA, in principle, connects Member States' law enforcement authorities (as well as those of third

³⁸⁶ Council of the EU, Interinstitutional file [2023/0438\(COD\)](#), 30 April 2024.

³⁸⁷ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 25.

³⁸⁸ Recital 18 of [Regulation \(EU\) 2019/1240](#) of 20 June 2019 on the creation of a European network of immigration liaison officers (recast), which reinforces the gathering and sharing of information among immigration liaison officers deployed to third countries.

³⁸⁹ *ibid.*, Articles 3(1) and 10(1).

³⁹⁰ Council of the EU, Presidency discussion paper [5494/24](#), Annex on Liaison Officers as partners to build a stronger common European return system, 1 February 2024, p. 6.

³⁹¹ Interview with EDPS.

³⁹² Interview with EDRI.

³⁹³ EDPS, [Audit report](#) on Europol (Case number 2022-0382), 16 December 2022, p. 3.

³⁹⁴ *ibid.*

countries) and their Single Point of Contact to Europol.³⁹⁵ This means that competent law enforcement authorities could be involved in SIENA, but not immigration authorities. According to the Europol Regulation, competent authorities can also include 'other public authorities existing in the Member States which are responsible under national law for preventing and combating criminal offences in respect of which Europol is competent'.³⁹⁶ Thus, for ILOs to fall under the definition of competent authorities, they should have law enforcement competencies under national law.

Related to that, it is interesting to observe that the proposal does not provide for direct connection to SIENA for police liaison officers deployed in third countries. While some Member States may already directly connect their police liaison officers with SIENA, others may not.³⁹⁷ They may also have relevant information to share with Europol on the fight against migrant smuggling and trafficking in human beings, as they broadly collect information which may serve to combat serious cross-border crime.³⁹⁸ The focus on ILOs echoes back to the criticism that was made already above, and as was also raised by several interviewees, that border management issues increasingly tend to be merged with law enforcement matters.³⁹⁹

The Council position does not introduce major changes with regard to the duty to connect ILOs to SIENA. It further refers to those cases in which due to legal, organisational or technical reasons, ILOs should submit information relating to criminal offences on migrant smuggling and human trafficking to a national competent authority through other channels.⁴⁰⁰

6.4. Reinforcing Member States' resources to prevent and combat migrant smuggling and trafficking in human beings

6.4.1. Designating specialised units and deploying experts

The fourth objective of the Commission proposal aims to reinforce Member States' resources to prevent and combat migrant smuggling and trafficking in human beings. To this end, it is suggested that designated specialised units at the national level are connected to Europol's SIENA platform (within one year of the regulation's entry into force).⁴⁰¹ It is also proposed that 'Member States second experts to the European Centre Against Migrant Smuggling to form an enhanced cross-border investigation support unit, capable of providing quick and comprehensive support to the investigation of major migrant smuggling incidents in the EU'.⁴⁰² Furthermore, Member States should make available 'an appropriate number'⁴⁰³ of staff members of its specialised services in a reserve pool,⁴⁰⁴ to ensure that those staff members can participate in Europol deployments for operational support as seconded national experts (see section 6.5.).

³⁹⁵ Article 13(1) of [Directive \(EU\) 2023/977](#) of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/690/JHA; Europol, More than 3000 law enforcement authorities now connected to Europol, [News](#), 2024; Interview with Swedish national authority.

³⁹⁶ Article 2(1) of the Europol Regulation.

³⁹⁷ Interview with Swedish national authority.

³⁹⁸ Article 2(2) of [Council Decision 2003/170/JHA](#) of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States.

³⁹⁹ Interview with EDRi; Interview with Statewatch; Interview with EDPS; Interview with Frontex FRO.

⁴⁰⁰ Article 7a of Council of the EU, [Mandate for negotiations](#) with the European Parliament, agreed on 19 June 2024.

⁴⁰¹ Analytical staff working document accompanying the proposed regulation, [SWD\(2024\) 94](#), p. 4.

⁴⁰² *Ibid.*, p. 31.

⁴⁰³ Article 7(5) of the proposed regulation [COM\(2023\) 754](#).

⁴⁰⁴ *ibid.*

6.4.2. Current state of play

According to the ECA special report, the number of SIENA access points available to law enforcement officers varies greatly from one Member State to the other.⁴⁰⁵ For many Member States, Europol's National Units play a role of centralisation and coordination of intelligence exchange with Europol.⁴⁰⁶ However, in recent years, some Member States have made efforts to expand SIENA access to additional law enforcement authorities responsible for combating organised crime.⁴⁰⁷ In some countries, border guards have a separate connection directly to SIENA.⁴⁰⁸

While the proposal intends to formally set up a reserve pool of experts, this already exists on a voluntary basis. In 2016, Europol formed the pool of law enforcement officers in the wake of the large wave of migration at the external borders of Greece and Italy.⁴⁰⁹ These experts are distinct from Europol's permanent staff, and function as an on-demand resource that can supplement Europol's regular operations when needed. The officers act as seconded national experts, and are posted at the EU external borders (e.g. at migration hotspots) in order to conduct criminal and forensic analysis and direct information exchange with Europol. This pool is based on a voluntary approach, with Europol launching a call for relevant national authorities in the Member States to second investigators to this pool of experts. Today, Europol Guest Officers are present in 11 countries and 32 operational areas.⁴¹⁰

6.4.3. Limitations of the proposal

While these initiatives are designed to improve Europol's ability to provide rapid and comprehensive support for cross-border investigations, they have raised significant concerns among Member States regarding feasibility, resource allocation, and proportionality. A major issue is the limited availability of highly trained staff, as many national law enforcement authorities are already under-resourced. Countries like Poland and Greece, which face significant migration challenges, argue that deploying additional experts to Europol could overburden their systems and compromise national operations.⁴¹¹ A number of countries have called for a flexible deployment strategy that accounts for Member States' varying capacities and avoids placing undue strain on their resources.⁴¹²

A few Member States have also raised concerns regarding the necessity and proportionality of the measures outlined in the proposal. Germany, for instance, has pointed out that the creation of new obligations should be carefully examined, particularly in view of the existing structures, such as ENUs, which already play a significant role in coordination and information exchange.⁴¹³ The concerns regarding the necessity of the proposal appear also justified in light of the new obligation introduced by Directive (EU) 2023/977 on the exchange of information between Member States' law enforcement authorities. This directive stipulates that all competent law enforcement authorities that might be involved in the exchange of information in Member States should have

⁴⁰⁵ ECA [special report 19/2021](#), p. 17.

⁴⁰⁶ Written replies by French national authorities; Written replies by Greek national authorities; Interview with Dutch Liaison Officer at Europol.

⁴⁰⁷ Written reply by Greek national authorities.

⁴⁰⁸ Interview with Polish national authorities.

⁴⁰⁹ Europol, Europol setting up team of 200 investigators to deploy to migration hotspots, [press release](#), 12 May 2016.

⁴¹⁰ 15th [meeting](#) of the Joint Parliamentary Scrutiny Group (JPSG) on Europol, 12 November 2024.

⁴¹¹ Interview with Polish national authority; Written reply by Greek national authorities.

⁴¹² See for example the written replies to the Proposal by Latvia, Lithuania, Poland, Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024; Written reply by Greek national authorities.

⁴¹³ Written reply to the Proposal by Germany, Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024.

direct access to SIENA.⁴¹⁴ Member States have until 12 June 2027 to comply with this obligation. The Swedish Parliament has, in form of a reasoned opinion, raised doubts about the mandatory reserve pool as well as the obligation to designate specialised services, stating that these are in tension with the principle of subsidiarity, and that it should be up to the Member States to determine how their national authorities should be organised internally, given the increased costs.⁴¹⁵

A key concern regarding the proposal is the financial burden associated with seconding additional experts to Europol. The Commission's proposal does not provide financial aid to Member States, thus placing the burden of covering secondment costs on national authorities. This has sparked calls for increased EU support to incentivise participation and ensure that the responsibilities are distributed equitably among Member States. Poland, for instance, expressed strong reservations, arguing that the obligation to send a national representative to the European Centre Against Migrant Smuggling is disproportionate and exceeds its capacity.⁴¹⁶ The Polish authorities highlighted the challenge of allocating their limited resources to such commitments without compromising national operations. A potential solution could involve recruiting these specialised officers either as seconded national experts or on a contract basis directly with Europol.

In addition to these practical concerns, there is also criticism of the proposal's vague language. Terms such as 'appropriate number' of staff have been flagged as ambiguous, creating uncertainty about the scope of Member States' obligations.⁴¹⁷

Council position

To address Member States' concerns, the Council has proposed amendments to the original proposal.⁴¹⁸ These include maintaining the voluntary nature of the reserve pool⁴¹⁹ and encouraging Member States to set up specialised national units rather than mandating their establishment.⁴²⁰ Such adjustments aim to balance the need for enhanced cooperation with the practical realities faced by Member States.

6.5. Reinforcing Europol's support through operational task forces and Europol deployments for operational support

This sub-section discusses the fifth objective of the Commission's proposal, which aims to reinforce Europol's support in the fight against migrant smuggling and trafficking in human beings. This increasing support would materialise through OTFs and Europol deployments for operational support. OTFs have already been deployed on multiple occasions by Europol. The proposed regulation aims to further reinforce and codify them. It is worthwhile noting that this part of the proposal has a broader scope than merely focusing on migrant smuggling and human trafficking.

6.5.1. The codification of OTFs and operational deployments

The proposal provides for the codification of OTFs and defines them as coordination mechanisms set up by Member States with the support of Europol 'to conduct joint, coordinated and prioritised

⁴¹⁴ [Directive \(EU\) 2023/977](#), Article 13.

⁴¹⁵ Reasoned [opinion](#) of the Swedish Riksdag, 6 March 2024.

⁴¹⁶ Interview with Polish national authorities.

⁴¹⁷ See for example the written replies to the Proposal by Hungary and Latvia, Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024.

⁴¹⁸ Council of the EU, [Mandate for negotiations](#) with the European Parliament, 19 June 2024.

⁴¹⁹ *ibid*, Article 1(3).

⁴²⁰ *ibid*, Recital 13.

criminal intelligence activities and investigations' (Article 9, adding Article 2(x)). A new Article 5a sets out the procedure. Member States may set up an OTF for a certain duration, while Europol should facilitate the process (e.g. agree on the planning, coordination and application) and support its implementation (e.g. make available analytical, operational, technical, forensic and financial support). Other Member States, third countries or other partners may participate in or support the OTF (Article 5a(4)). The Executive Director may also propose to set up an OTF to the authorities concerned in the Member States, if they consider it an added value (Article 5a(7)). These provisions have been met with scepticism. A few Member States have expressed concerns over the fact that including a detailed regulation of OTFs in EU law might reduce the required level of tactical flexibility for this form of cooperation.⁴²¹ Other points of criticism included the fact that the proposal provides Europol with new powers in relation to all crimes under its remit and not only in relation to migrant smuggling and trafficking in human beings.⁴²²

Furthermore, the proposal defines Europol deployments for operational support as 'the deployment of Europol staff or seconded national experts in the territory of a Member State, upon request of that Member State, to provide analytical, operational, technical and forensic support in liaison and in agreement with the competent authorities of that Member State' (Article 9, adding Article 2(y)). The proposed regulation introduces a new Article 5b according to which a Member State may request the deployment of Europol staff 'for operational support on its territory to make use of the analytical, operational, technical, forensic and financial support'. This support should take place in the context of 'complex and large-scale investigations' including JITs, OTFs or migration management support teams (Article 5b(2)), and may also take place in a third country⁴²³ (Article 5a(10)). Once a request is made, it is for the Executive Director to evaluate it and approve the deployment for a limited period of time on the basis of a risk assessment (Article 5b(3)). Similarly as with OTFs, the Executive Director may propose Europol's deployment in the territory of a Member State, if there is added value to the prevention and fight against a crime falling within Europol's objectives (Article 5b(8)). To accommodate this need, Europol should set up a reserve pool of national experts that can be placed at the immediate disposal of Europol (Article 5b(6)).

The proposal further notes that for both OTFs and Europol deployment for operational support, Europol's Management Board should further adopt implementing rules for their setting up and implementation.⁴²⁴

Related to OTFs and Europol deployment, the proposal amends Article 4(5) aiming to clarify the nature of operational support that Europol staff may provide on the ground (Article 9 replacing Article 4(5)). While the amendment keeps the existing obligation for Europol not to apply coercive measures in performing its tasks, it grants Europol the power to provide support to national authorities while they execute investigative measures (at their request and in accordance with national law). However, Europol should have the power to execute non-coercive investigative measures, if requested by a Member State and authorised by the Executive Director. The Council proposed the deletion of this provision due to concerns raised by several Member States about the

⁴²¹ See for example the written replies to the Proposal by Austria, Germany and Italy, Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024; Interview with Swedish national authorities.

⁴²² Statewatch, [Expansive new police powers hidden behind EU's migrant smuggling proposals](#), 12 December 2023.

⁴²³ With whom there is either an adequacy decision signed by the Commission, an international agreement under Article 218 TFEU, or a cooperation agreement concluded before 1 May 2017.

⁴²⁴ Article 9, adding Articles 5a(8) and 5b(9) of the proposed regulation.

ambiguity surrounding the definition of 'non-coercive measures'⁴²⁵ and how these measures might conflict with existing national laws.⁴²⁶

6.5.2. Current legal framework

As already pointed out above (under section 6.5.1), the OTFs and Europol's deployments are not new. Guest Officers were for example deployed to hotspots in Greece and Italy to support the national authorities and reinforce secondary security checks. In the course of 2023, Guest Officers were deployed in ten countries.⁴²⁷ Next to the Guest Officers, Europol, particularly through the EMSC, deployed experts in the field, through Europol Mobile Investigation or Analysis Teams.⁴²⁸ It also participated in several OTFs, as mentioned in section 2.

The proposal formalises and develops the concept of OTFs. In comparison, the current legal framework does not contain any provision specifically relating to OTFs. Article 4 of the Europol Regulation, however, provides some indication as to the tasks of Europol, notably in relation to the coordination, organisation and implementation of investigative and operational actions (Article 4(1)(c)), Europol's participation in the JITs (Article 4(1)(d)) and Europol's support in the screening (Article 4(4a)).

'Hotspot' approach

The Commission set up the 'hotspot' approach, where the European Asylum Support Office (EASO)*, Frontex and Europol work on the ground with frontline Member States to rapidly identify, register and fingerprint incoming migrants. Europol should assist the host Member States with investigations to dismantle trafficking and smuggling networks. Hotspots were set up in Greece and Italy.

Source: European Commission, A European agenda on migration (2015), [COM\(2015\)240](#)

* After 10 years of operation, EASO was transformed into the EUAA through Regulation (EU) 2021/2303 on the Establishment of a European Union Agency for Asylum.

Some interviewees noted that the way OTFs operate provides for a high degree of flexibility, without formal legal obligations.⁴²⁹ There is in fact merely a Standard Operating Procedure on the Selection of High Value Targets and Establishment of OTFs developed by Europol that gives further indications on the OTFs.⁴³⁰ Overall, OTFs seem to have an opaque and unclear structure. Thus, while some welcome this flexibility related to the lack of formalisation, other interviewees deem the proposal a good opportunity to establish OTFs in law and make them more transparent.⁴³¹

⁴²⁵ See the written replies to the Proposal by Germany, Hungary, Latvia and Sweden in Council of the European Union, Interinstitutional file [2024/0438\(COD\)](#), 12 January 2024.

⁴²⁶ For instance, the Italian government considers the provision to be incompatible with the rules of the Italian Code of Criminal Procedure which reserves the adoption of certain non-coercive measures, such as restrictive measures, exclusively to the judicial authorities (Camera dei Deputati, Dossier n. 62, 26 March 2024). Similar concerns were expressed by France in its written reply.

⁴²⁷ In Bulgaria, Cyprus, Greece, Hungary, Italy, Lithuania, Malta, Romania, Slovakia and Moldova as noted in Europol, [Consolidated annual activity report 2023](#), 18 June 2024, p. 18.

⁴²⁸ EMSC, [Infographic](#), last updated 6 December 2021.

⁴²⁹ Interview with Eurojust.

⁴³⁰ Interview with Eurojust – the document is not publicly available.

⁴³¹ For example, Interview with EDRi; Interview with Statewatch; Interview with Eurojust.

6.5.3. Limitations of the proposal

Lack of clarity

Although codification would enhance the transparency of OTFs, some interviewees find the proposal not going far enough and still lacking clarity with regard to OTFs.⁴³² This uncertainty concerns OTFs' relation with JITs, the rules on data processing and the allocation of controllership. This is not only an issue of accountability and transparency, but also more broadly speaking of democratic legitimacy. The civil society organisation EDRI pointed out, also referring to the lack of impact assessment, that they were 'not getting the legal clarity we really need to have a proper democratic debate in the first place'.⁴³³

Insufficient safeguards in place

The safeguards provided by the proposal in relation to OTFs and Europol deployments for operational support are very limited. With regard to OTFs, the proposal does not add any specific safeguards. Member States and Europol merely have to agree on the planning, coordination and implementation, and ensure coherence with EMPACT. Only the Management Board can adopt implementing rules that may offer some guidance and safeguards. With regard to deployment, the Executive Director must at least evaluate the request and determine if it is based on a risk assessment. It is not, however, further clarified what is meant by 'risk assessment'. Additionally, Europol may not operate in a fully discretionary manner and will not have the power to execute coercive investigative measures. The proposal does not, however, define 'coercive investigative measures', leaving it to the Member States to decide what falls under the definition. Additionally, even non-coercive powers may have significant consequences for individuals, if the information shared by Europol is for example used for repressive purposes.⁴³⁴

A comparison with Frontex and its operational deployments evidences the lack of safeguards provided for in the current proposal. Frontex provides for the deployment of staff to the territories of Member States and third countries through the standing corps (composed of operational staff including border guards, return escorts, return specialists and others).⁴³⁵ The deployment is requested by a Member State to implement their external border control obligations, and Frontex should organise appropriate technical and operational assistance through various means, including joint operations, rapid border interventions, and migration management support teams.⁴³⁶ Similarly to Europol, when it comes to deployments, the Executive Director of Frontex should, following 'a thorough, reliable and up-to-date risk analysis', evaluate, coordinate and approve the Member State's proposal for joint operations or rapid border interventions.⁴³⁷ This echoes the 'risk assessment' upon which Europol's Executive Director should make a decision on deployment. However, the Frontex Regulation provides for further details as to what should be considered when approving rapid border interventions. In these cases, the Executive Director has to take into account notably Frontex's risk analysis, the analysis layer of the European situational picture (in Eurosur),⁴³⁸

⁴³² Interview with Eurojust; Interview with EDRI.

⁴³³ Interview with EDRI.

⁴³⁴ *ibid.*

⁴³⁵ Article 5(2) of ECBG Regulation.

⁴³⁶ *ibid.*, Section 7.

⁴³⁷ *ibid.*, Article 37(3).

⁴³⁸ Launched in 2013, the European Border Surveillance System (EUROSUR) serves as a framework for information sharing and collaboration between Member States and Frontex, aimed to enhance situational awareness and boosting response capabilities at the EU's external borders. The European situational picture is part of Eurosur, and offers effective, accurate and timely information and analysis on the European external border, pre-frontier area and unauthorised secondary movements.

and the vulnerability assessment.⁴³⁹ This is where the first issue lies – neither Europol's current legal framework nor the proposed regulation clarify the elements to be included in the Executive Director's risk assessment. It merely states that the European Centre Against Migrant Smuggling should support the Executive Director in the evaluation of the requests (Article 6(d) of the proposal). Europol does not (as opposed to Frontex) conduct a risk assessment but actually assists the Commission and the Member States in carrying them out, by providing threat assessment analyses based on the information it holds on criminal phenomena and trends.⁴⁴⁰

Another safeguard established under the Frontex framework relates to the appointment of one (or more) experts to be deployed as coordinating officers,⁴⁴¹ that must be assisted and advised by at least one fundamental rights monitor to ensure the protection of fundamental rights.⁴⁴² Concretely, fundamental rights monitors would essentially hold discussions with relevant stakeholders in the area of deployment (e.g. staff members, national authorities, civil society, lawyers, international organisations), in order to provide both operational recommendations to the coordinating officers as well as strategic recommendations which they report to the Management Board members.⁴⁴³ In 2023, Frontex fundamental rights monitors spent approximately 346 days in Greece, monitoring land and sea borders.⁴⁴⁴ In contrast, Europol does not have fundamental rights monitors, and the provision on Europol's deployment in the proposal does not specify a role for the FRO. Before the FRO was legally introduced in the Europol Regulation, Europol's Guest Officers were deployed in-the-field.⁴⁴⁵ This could be seen as problematic, since irregularities occurred in Greece with regard to the respect of fundamental rights. In fact, Frontex's FRO noted during their on-site visit to Greece, that Europol's Guest Officers had joined some debriefing interviews and asked questions (in)directly to migrants.⁴⁴⁶ This is, of course, not allowed without proper guarantees and safeguards. Europol's FRO has now existed for two years, but it is solely a one-person office, that has to conduct a minimum of one field visit per year.⁴⁴⁷ Europol's 2023 annual report noted that Europol's FRO checked the weekly reports drafted by Guest Officers, and visited them in Greece.⁴⁴⁸ If the number of Guest Officers increases, there will be a need to do more on-site visits, which could require additional resources. One could also argue that if Europol gets stronger operational powers, the FRO should be accountable to the Management Board (rather than the Executive Director), so as to ensure an even stronger independence of its function and missions.⁴⁴⁹ While being accountable to the Executive Director and reporting to them allows for swift reactions and changes within the organisation, it affects the independence of the position.⁴⁵⁰ This could become problematic when both functions disagree on a matter.

Finally, Frontex has reports of serious incidents in place, as well as complaint mechanisms that are key when agency staff are acting in the field.⁴⁵¹ For instance, the FRO was initially notified about the

⁴³⁹ Articles 32 and 39(3) of the EBCG Regulation.

⁴⁴⁰ Article 4(3) of the Europol Regulation, as amended in 2022.

⁴⁴¹ Now also a contingent of commanders as informed by the interview with Frontex FRO.

⁴⁴² Article 44 of the EBCG Regulation.

⁴⁴³ Interview with Frontex FRO.

⁴⁴⁴ Interview with Frontex FRO – the days are counted in man days, thus if three people go for 5 days, it counts as 15 days in the field.

⁴⁴⁵ The function of FRO was introduced by the 2022 amendment to the Europol Regulation (Article 41c).

⁴⁴⁶ Interview with Frontex FRO.

⁴⁴⁷ Interview with Europol FRO.

⁴⁴⁸ Europol, FRO, 2023 [Annual Report](#), Fundamental rights at Europol – it takes all of us, p. 10.

⁴⁴⁹ Interview with Frontex FRO.

⁴⁵⁰ Interview with Europol FRO.

⁴⁵¹ Articles 46(6) and 111 of the EBCG Regulation.

issue regarding Europol's Guest Officers in the debriefing interviews through a serious incident report.⁴⁵² Such an internal complaint mechanisms is not legally set out in the proposal. The only complaint mechanism mentioned in the current regulation is before the EDPS and is limited to data protection matters.⁴⁵³ It is key to have sufficient safeguards to protect individuals, particularly when the operational support takes place in a third country, which may not have the same level of fundamental rights protection as the EU.

Potential implications of OTFs and deployments

The EDPS opinion on the proposed regulation points to potential subsequent issues that may occur when Europol provides operational support to Member States.⁴⁵⁴ Recital 18 of the proposal states that Europol (through its deployed staff and seconded national experts) may carry out investigative non-coercive measures related to data processing in liaison and in agreement with the competent national authority. In such cases, there is a need to clarify whether the controllership remains in the hands of the Member States, whether Europol and the competent authorities are in fact joint controllers that determine jointly the purposes and means of processing,⁴⁵⁵ or whether Europol perhaps becomes the controller. This needs to be further clarified either in the Europol Regulation, or at least in the implementing rules of the Management Board.

Investigative non-coercive measures

Europol is not competent to apply coercive measures in carrying out its tasks and Europol staff should not have the power to execute 'investigative measures' (Article 4 of the Europol Regulation). Nevertheless, Europol staff is increasingly working more closely with national authorities and it is not clear whether, in practice, they might assume their operational work on the ground, especially in the context of a JIT.

Source: V. Mitsilegas and F. Giuffrida 'Bodies, Offices and Agencies' in V. Mitsilegas, *EU Criminal Law*, 2nd edition (2022).

The proposed regulation would amend Article 4 and introduce the possibility for deployed Europol staff and seconded national experts to carry out 'investigative non-coercive measures' that relate to data processing if they liaise and are in agreement with the competent authorities of the Member State concerned (Article 9(2)). However, the proposal does not provide a clear definition of these investigative measures, raising questions as to whether the regulation is intended to formalise practices already occurring in the field or to establish new procedures.

The issue of joint controllership also arose with Eurojust in the JITs,⁴⁵⁶ and with Frontex in its operational deployment. The latter was clarified earlier this year in a Management Board Decision, delineating specifically the situations in which Frontex becomes the controller, and situations (the majority of cases) where it is solely the processor.⁴⁵⁷ The same decision states that in situations of joint controllership, Joint Controllership Agreements should be concluded to clarify the respective roles and functions, and determine the allocation of responsibilities. This would prevent a situation of back and forth in which each authority claims the other to be responsible. It would also allow for

⁴⁵² Interview with Frontex FRO.

⁴⁵³ Article 47 of the Europol Regulation.

⁴⁵⁴ EDPS [Opinion 4/2024](#), p. 11.

⁴⁵⁵ As defined by Article 86 of the [Regulation \(EU\) 2018/1725](#) of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (EUDPR).

⁴⁵⁶ Interview with EDRI.

⁴⁵⁷ Frontex Management Board Decision 4/2024 of 18 January 2024 adopting the general rules on the application of the Data Protection Regulation by the Agency (accessible in the [Public Register of Documents](#)).

better protection of individuals and prevent scenarios where shared liability is not recognised by courts.⁴⁵⁸ Similar rules may be envisaged for Europol.

⁴⁵⁸ As has been the case frequently with Frontex, see CJEU, [Case T-600/21](#), *WS and Others v Frontex*, 2023; M. Gkliati, 'Shaping the joint liability landscape: the broader consequences of *WS v Frontex* for EU law', *European Papers*, Vol. 9 (1), 2024, pp. 69-86.

7. Fundamental rights implications of the proposal

This section examines the fundamental rights impacts of the proposed regulation, focusing particularly on the strengthening of the processing of personal data, and more specifically of biometric data. It assesses the proposal's compliance with fundamental rights as developed under the Charter of Fundamental Rights, secondary legislation and relevant CJEU case-law.

7.1. Fundamental rights impact of the processing of personal data

The Commission proposal refers to the protection of fundamental rights in Recital 26 and the Explanatory Memorandum.⁴⁵⁹ It essentially states that the processing of personal data must fully comply with fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union, particularly with regard to the protection of personal data and the respect for private life. This section not only assesses the impact on the two latter fundamental rights, but also addresses the issue of vulnerability.

7.1.1. Data protection concerns and respect for private life

The proposal envisages strengthening information sharing and data processing in cases of migrant smuggling and trafficking in human beings.⁴⁶⁰ This would be the result of enhanced cooperation with Member States and third countries (see section 6.3.), as well as a stronger operational role for Europol in the field (see section 6.5.). Several data protection concerns can be raised in light of this.

Enhanced information sharing could result in an increased sending of large-scale datasets, the legality of which has been subject to debate by the EDPS.⁴⁶¹ Significantly, the EDPS noted issues of compliance with the principles of data minimisation and storage limitation.⁴⁶² Despite warnings from the Union's independent data protection authority, the 2022 amendments to the Europol Regulation empowered Europol to process large and complex datasets without Data Subject Categorisation (DSC) for a longer period of time than the one initially suggested by the EDPS.⁴⁶³ The EDPS subsequently also provided recommendations on Europol's Management Board's decisions implementing the newly adopted Articles 18(6), 18(6), 18(6a) and 18a.⁴⁶⁴ It noted that the lack of

⁴⁵⁹ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, pp. 8–9. Additionally, fundamental rights are mentioned in the Legislative Financial Statement accompanying the proposal, with regard the Joint Parliamentary Scrutiny Group's role in monitoring Europol and 'the impact of those activities on the fundamental rights and freedoms of natural persons', p. 16.

⁴⁶⁰ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, p. 3.

⁴⁶¹ EDPS, [Decision](#) of 17 September 2020 relating to EDPS's own inquiry into Europol's big data challenge; EDPS, [Decision](#) on the retention by Europol of datasets lacking Data Subject Categorisation (Cases 2019-0370 & 2021-0699), 21 December 2021; For a more detailed story line, see S. Tas, '[Europol's 'Big Data Challenge'](#)', *Digi-Con*, 2022.

⁴⁶² The principle of data minimisation is explained above under section 6.1.2. The principle of storage limitation requires personal data to be kept only for as long as is necessary for the purposes for which the data is processed.

⁴⁶³ Article 18a(6) of the Europol Regulation, as amended in 2022, notes that Europol has 18 months (extendable to up to three years) to assess data subject categorisation of personal data, instead of the 6 months suggested by the EDPS; Article 74a notes that for datasets sent prior to this regulation, the data storage time can range up to three years, way beyond the 12 months suggested by the EDPS.

⁴⁶⁴ Management Board Decision further specifying procedures for the processing of information for the purposes listed in Article 18(2) of the Europol Regulation of 21 March 2023 ([EDOC#1252127v8A](#)); Management Board Decision on the conditions related to the processing of personal data on the basis of Article 18(6) of the Europol Regulation of 21 March 2023 ([EDOC#1252123v8A](#)); Management Board Decision on the conditions related to the processing of personal data on the basis of Article 18(6a) of the Europol Regulation of 21 March 2023 ([EDOC#1252125v10A](#)); Management Board Decision on the conditions related to the processing of personal data on the basis of Article 18a of the Europol Regulation 21 March 2023 ([EDOC#1252126v9A](#)); EDPS, [Supervisory opinion](#) on Europol's Management Board Decisions adopted pursuant to Articles 11(1)(q), 18 and 18a of the Europol Regulation (Case 2022-0923).

DSC can significantly affect data subjects' fundamental rights, and that it is key to have sufficient safeguards and limitations in place.⁴⁶⁵ If the proposal were to be adopted, it would further accentuate this issue.

With regard to Europol's operational support to Member States, concerns of joint controllership and shared liability may emerge. This has already been addressed under section 6.5.3. and was pointed out by the EDPS in its opinion on the proposal.⁴⁶⁶ It is essential to clarify, particularly when Europol has operational presence (in the field), whether the controllership remains in the hands of the Member States, or whether Europol and the national authorities determine jointly the purposes and means of processing. This issue is, however, not limited to Europol's role in the field, but affects Europol's operational support more broadly. It has been addressed in recent CJEU case law, *Kočner v Europol*,⁴⁶⁷ in which Europol provided analytical support from its headquarters. More specifically in this case, the Slovakian authorities requested Europol's support in retrieving data stored on a USB device and on two mobile phones, allegedly belonging to a suspect. Private information extracted from these devices was published in various media outlets. The Court overturned the initial General Court's ruling,⁴⁶⁸ and stated that both Europol and the Slovak Republic were jointly liable for the unauthorised disclosure of intimate conversations between the data subject and his girlfriend. It is then up to Europol's Management Board to determine whether Europol or the national authority should bear the ultimate responsibility.⁴⁶⁹

The Court of Justice had to step in to clarify the regime of shared liability, since the Europol Regulation did not provide sufficient clarity. The Court's jurisdiction relates to Article 50 of the 2016 Europol Regulation, read in light of the joint and several liability mechanisms developed in Recital 57. This recital was, however, omitted in the 2022 amendment of the Europol Regulation, leaving doubts as to the application of this case-law to subsequent situations.⁴⁷⁰ The current proposal does not bring clarity to the liability regime, which risks becoming ever-more complex with the increase of Europol deployments in the field. This ultimately leads to processing operations taking place outside of the headquarters, making it harder to supervise those *ex ante*.⁴⁷¹ Interviewees stressed the need to have a clear allocation of responsibilities in the operations.⁴⁷²

7.1.2. Fundamental rights concerns of vulnerable individuals

The European Economic and Social Committee notes in its opinion on the anti-smuggling package that the 'fundamental rights safeguards mentioned in the proposals should be expanded outside the narrow concern over the protection of personal data and respect for private life, to include the rights of those being assisted by smugglers'.⁴⁷³ Vulnerable individuals at risk should not be neglected.

One concern shared by several stakeholders interviewed for this study relates to the fact that, while the proposal will undoubtedly affect vulnerable individuals, no specific reference is made to them.⁴⁷⁴

⁴⁶⁵ Meijers Committee, Comment on Europol's Data Subject Categorisation based on the amended Europol Regulation, [CM2405](#), May 2024, pp. 3-5.

⁴⁶⁶ EDPS [Opinion 4/2024](#), p. 11.

⁴⁶⁷ CJEU [Case C-755/12 P](#), *Marián Kočner v Europol*, 5 March 2024.

⁴⁶⁸ CJEU [Case T-528/20](#), *Marián Kočner v Europol*, 29 September 2021.

⁴⁶⁹ CJEU [Case C-755/12 P](#), *Marián Kočner v Europol*, 5 March 2024.

⁴⁷⁰ For a more detailed analysis, see J. De Coninck and S. Tas, 'Marian Kočner: Five dimensions in the EU's liability regime', *Common Market Law Review* (forthcoming).

⁴⁷¹ Interview with Europol DPF.

⁴⁷² Interview with EDPS; Interview with Europol DPF.

⁴⁷³ EESC, Anti-smuggling package, [Opinion](#), SOC/787, 31 May 2024, p. 5.

⁴⁷⁴ Interview with FRA; Interview with ECRE; Interview with PICUM; Interview with Europol DPF; Interview with academic.

This encompasses among others victims of human trafficking and (unaccompanied) minors, as well as individuals at risk of prosecution in their country of origin who rely on smugglers. A stronger fundamental rights clause could have been envisaged in the proposal, to ensure that there would be no prejudice to other relevant international legal instruments,⁴⁷⁵ such as the Convention on the Child and the Refugee Convention (including the non-penalisation provision in Article 31).⁴⁷⁶

Interestingly, Europol's FRO does not expect any additional risks to fundamental rights resulting from the proposed regulation.⁴⁷⁷ He notes that while the volume of data processed may change, the working methods will not. Europol does not have coercive powers, and thus the risk of fundamental rights violations other than the violation of data protection and privacy rules, is deemed low.⁴⁷⁸ However, there is a risk that staff deployed in the field and working with local law enforcement agents could at some point deviate from official procedures and arrangements.⁴⁷⁹ This is particularly important in the context of migrant smuggling and border management policies, where national authorities supported by Europol regularly deal with the detention of smuggled migrants, and have on many occasions been found in violation of the European Convention on Human Rights when operating at borders.⁴⁸⁰

More generally, while Europol aims to target the criminal organisations behind irregular migration, its operations also impact individual migrants in the sense that by targeting such organisations it makes it more difficult and riskier for these migrants – including people seeking international protection – to enter the EU.⁴⁸¹

Finally, the Europol Regulation already provides for the processing of specific categories of personal data and of different categories of data subjects for victims of a criminal offence, witnesses or other persons who can give information concerning criminal offences, as well as minors.⁴⁸² However, the status of smuggled migrants in criminal proceedings varies widely across Member States. Depending on the legal context, they may be treated as victims, witnesses, or suspects in relation to smuggling offences (or a mix, depending on the specific circumstances).⁴⁸³ Furthermore, minors and asylum seekers regularly become suspects in criminal investigations into migrant smuggling.⁴⁸⁴ This

⁴⁷⁵ Interview with FRA.

⁴⁷⁶ [UN Convention on the Rights of the Child](#), 20 November 1989; [UN Convention relating to the Status of Refugees](#), 28 July 1951.

⁴⁷⁷ Interview with Europol FRO.

⁴⁷⁸ Europol, [Annual Report](#) of the Fundamental Rights Officer at Europol, 2023.

⁴⁷⁹ *ibid.*, p. 4; Interview with Europol FRO.

⁴⁸⁰ In particular, Article 3 (prohibition of inhuman or degrading treatment), Article 5 (right to liberty and security), Article 13 (lack of effective remedy), Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsion of aliens). See, for instance, ECtHR, *J.M.K. v. Poland*, ECHR 224 (2020); *Sharifi v Italy and Greece*, ECHR 304 (2014); ECtHR, *Hirsi v. Italy* ECHR 075 (2012); *Daraibou v. Croatia*, ECHR 012 (2023); *J.A. v. Italy*, ECHR 097 (2023).

⁴⁸¹ E. Guild et al., [Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies \(Frontex, Europol and the European Asylum Support Office\)](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2011; J. Carling, 'How should migrant smuggling be confronted?', in M. McAuliffe and M. Klein Solomon (conveners), Ideas to inform international cooperation on safe, orderly and regular migration, IOM: Geneva, 2017; PICUM, [The EU Migration Pact: a dangerous regime of migrant surveillance](#), 2024; Amnesty International, [Joint civil society statement ahead of European Parliament vote on EU asylum reforms](#), 2024.

⁴⁸² Article 30 of the Europol Regulation.

⁴⁸³ Eurojust, [Booklet](#), Judicial use of information following the debriefing of migrants at external borders, 2021.

⁴⁸⁴ S. Malichudis et al., [Pylos shipwreck: Greece knew the real smugglers](#), Solomon Investigation, 2024; UNHCR [Comments](#) on the Commission proposal for a Facilitation Directive (Anti-smuggling Directive) – COM(2023) 755, 14 March 2024. This issue has been raised particularly in relation to the criminalisation of asylum seekers who act as boat drivers, and the consequences this has on their asylum applications: see for example, ARCI Porco Rosso and Alarm Phone, [From sea to prison: the criminalisation of boat drivers in Italy](#), 2021; V. Hänsel et al., [Incarcerating the marginalized: the fight against 'alleged smugglers' on the Greek hotspot islands](#), Border Monitoring, 2020; F. Patané

fragmentation at the national level underscores the need for tailored safeguards and clearer guidelines to ensure that the rights of smuggled migrants are consistently upheld during data processing. Categorising an individual as a victim or as a suspect will have consequences for the assessment of the (strict) necessity and proportionality of the processing operations, and ultimately the rights and freedom of the individual.

7.2. Fundamental rights implications of the processing of biometric data

This sub-section discusses the specificities of biometric data in processing operations, and the related fundamental rights implications. Biometric data means personal data 'resulting from specific technical processing relating to physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person'.⁴⁸⁵ This may include fingerprints, facial images or DNA. They are usually classified as sensitive data under EU law, and deserve specific protection, as they may significantly affect the fundamental rights of individuals.

7.2.1. Strengthening Europol's capabilities

The Commission's proposal emphasises the need to strengthen both Member States' obligation to share data (including biometric data) on migrant smuggling and trafficking in human beings,⁴⁸⁶ as well as Europol's support to Member States in effectively and efficiently processing biometric data (Article 9 adding Article 4(za)).

More specifically, the Commission intends to develop new biometric tools and improve existing ones. This encompasses among others a new Automated Fingerprint Identification System (AFIS), performance and functionality improvements to a new face recognition solution (FACE), as well as developing the capability to process DNA profiles.⁴⁸⁷ These tools should be upgraded by 2026, with the biometric workflows and data intake being automated by 2027.

The proposal does not entail any additional safeguards, and essentially relies on the existing safeguards in the processing of biometric data set out both in the Europol Regulation and the EUDPR.

7.2.2. Current legal framework on the processing of biometric data by Europol and law enforcement authorities

Europol's legal framework

The processing of special categories of personal data within Europol was first mentioned in the 2016 Europol Regulation. The subsequent amendment of 2022 explicitly added the notion of biometric data in its provision.⁴⁸⁸ For example, according to a Europol Management Board meeting of

et al., '[Asylum-seekers prosecuted for human smuggling: a case study of Scafisti in Italy](#)', *Refugee survey quarterly*, Vol. 39(2), 2020, pp. 123–152.

⁴⁸⁵ Article 4(14) of GDPR; Article 3(14) of LED; Article 3(18) of the EUDPR.

⁴⁸⁶ Proposed regulation [COM\(2023\) 754](#), explanatory memorandum, p. 3.

⁴⁸⁷ Proposed regulation [COM\(2023\) 754](#), Legislative Financial Statement 'Agencies', p. 7.

⁴⁸⁸ Article 30(2) of the Europol Regulation, as amended in 2022.

September 2018, Europol had received a large amount of biometric data from third partners (such as tenprints of known terrorists and latent fingerprints⁴⁸⁹ found on large drug seizures).⁴⁹⁰

In principle, the processing of this data must comply both with Article 76 of the EUDPR, and Article 30(2) of the Europol Regulation. The former solely refers to the criteria of strict necessity, while the latter stipulates that it must be 'strictly necessary and proportionate [...] for operational purposes, within Europol's objectives, and only for preventing or combating crime that falls within Europol's objective'.

Furthermore, the Europol Regulation states that the processing should be subject to appropriate safeguards. Firstly, the DPO should be informed swiftly if biometric data is being processed (Article 30(2a)). Secondly, the EDPS should receive every year a statistical overview of Europol's processing of special categories of data (Article 30(6)). Thirdly, only a limited number of staff may access biometric data, under authorisation of the Executive Director (Article 30(3)). The Executive Director can also grant competent national authorities or EU agencies (such as Eurojust and Frontex) direct access to the data, if it is necessary for the performance of their tasks. Fourthly, biometric data processing for any purpose, with the exception of identification purposes, may be allowed only if it supplements other personal data processed by Europol (Article 30(2)). Fifthly, there should be no transmission of biometric data to Member States, EU bodies, third countries or international organisations except if it is required under EU law or is 'strictly necessary and proportionate in individual cases' (Article 30(5)). Finally, personal data should only be stored for as long as is necessary and proportionate, and the storage should be reviewed after 3 years (Article 31). If the storage of biometric data exceeds five years, the EDPS needs to be informed (Article 31(3)).

Before assessing the relevant framework and changes in the proposal, it is worth looking at the framework surrounding the processing of biometric data by law enforcement authorities at the national level. This serves both as an element of comparison, and as a key element of analysis, since the biometric data that Europol processes comes in part from Member States.

The processing of biometric data by law enforcement authorities

The Law Enforcement Directive (LED) regulates the processing of biometric data at the national level. Similarly to the Europol Regulation, the LED provides for the processing of special categories of data, including biometric data, only when it is strictly necessary, and subject to appropriate safeguards.⁴⁹¹ In the first report on the application and functioning of the LED published in July 2022, the Commission noted that most Member States required strict necessity as a prerequisite to processing operations, some added consent as an additional safeguard, while others did not yet provide for the relevant safeguards.⁴⁹² Following a request for a preliminary ruling on the protection of natural persons with regard to the processing of personal data by competent authorities, the CJEU, in 2023, clarified the notion of strict necessity.⁴⁹³ It noted that it requires stronger conditions

⁴⁸⁹ Tenprints are a full set of fingerprints taken from an individual and collected on a single sheet; latent fingerprints are unseen marks individuals leave behind by touching something (e.g. sweat or oil).

⁴⁹⁰ Management Board Information Management WG meeting, [Possible Europol involvement in Prüm information exchange](#), 19 September 2018.

⁴⁹¹ Article 10 of the LED.

⁴⁹² European Commission, Communication on the application and functioning of the Law Enforcement Directive, [COM\(2022\) 364](#), section 2.2.5.

⁴⁹³ CJEU [Case C-205/21](#), *Ministerstvo no vatreshnite raboti*, 26 January 2023. The request for a preliminary ruling concerns the interpretation of Article 4(1)(a) and (c), Article 6(a) and Articles 8 and 10 of [Directive \(EU\) 2016/680](#) of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, and of Articles 3, 8, 48 and 52 of the EU Charter of Fundamental Rights.

for the lawful processing of sensitive data, which should entail strict checking as to whether the principle of data minimisation is observed.⁴⁹⁴ It further explained that 'necessity' is met where the objective pursued cannot be achieved as effectively by other means, and that 'strict necessity' requires assessing the specific importance of the objective that the processing intends to achieve.⁴⁹⁵

With regard to the storage limitation, the LED leaves it to the Member States' discretion to either provide for appropriate time limits, or for a periodic review.⁴⁹⁶ Thus, while Europol provides for both, Member States have the choice between the two options. The Court offered some clarity in 2024 in a preliminary reference from Bulgaria on biometric and genetic data stored in police records.⁴⁹⁷ It noted that a general and indiscriminate storage of biometric and genetic data of convicted individuals until their death, was not in compliance with EU law and the requirement of strict necessity. Strict necessity applies 'only if it takes into consideration the nature and seriousness of the offence which led to the final criminal conviction, or other circumstances such as the particular context in which that offence was committed, the possible connection with other ongoing proceedings or the background or profile of the convicted person'.⁴⁹⁸ The data controller is required to periodically review whether the data storage is still necessary and erasure must be possible. Thus, the national level gives indications on the safeguards that should be in place and their interpretation when it comes to biometric data.

7.2.3. Lack of clarity and insufficient safeguards

The processing of biometric data may have significant consequences for the fundamental rights and freedoms of individuals. These range from a potential violation of the right to human dignity when taking fingerprints, to the right of data protection and privacy once the data is collected and stored.⁴⁹⁹ It may also affect the right to non-discrimination, the right to an effective judicial remedy, the rights of the child and elderly, the right to free movement and the right to asylum.⁵⁰⁰ To give a concrete example, the EU's Fundamental Rights Agency (FRA) observed that disproportionate force or detention has been used when fingerprinting asylum seekers. When it comes to the processing of this data, data protection issues may arise due to issues of quality of the biometric information. Several concerns have been expressed as illustrated below.

Lack of clarity in the implementation

Concerns relate to the lack of clarity in the implementation of the current rules on the processing of biometric data. Overall, the purpose and use of these biometric tools by Europol are not clarified in the legal framework.⁵⁰¹ The purposes should be clearly spelled out in the proposal, as different rules may apply depending on what Europol intends to do/how Europol intends to act. If Europol aims to become a European criminal law agency, it must respect criminal rules on the chain of custody, which is not required if it merely supports national authorities through analysis.⁵⁰²

⁴⁹⁴ *ibid*, paragraph 125.

⁴⁹⁵ *ibid*, paragraphs 126-127.

⁴⁹⁶ Article 5 of the LED.

⁴⁹⁷ CJEU [Case C-118/22](#), *Direktor na Glavna direksia "Natsionalna politsia" pri MVR - Sofia*, 30 January 2024.

⁴⁹⁸ *ibid*, paragraph 67.

⁴⁹⁹ Défenseur des Droits, [Biometrics: the urge to safeguard fundamental rights](#), 2021; FRA, [Under watchful eyes: biometrics, EU IT systems and fundamental rights](#), 2018; FRA, [Fundamental rights implications of storing biometric data in identity documents and residence cards](#), 2018.

⁵⁰⁰ *ibid*; Interview with ECRE.

⁵⁰¹ Interview with EDRI.

⁵⁰² Interview with Frontex DPO.

Additionally, the EDPS opinion on the proposal notes a lack of clarity with regard to the requirement of strict necessity and proportionality, as well as data quality.⁵⁰³ Regarding the former, the proposed regulation fails to clarify how the requirements are to be interpreted and ensured in practice. It is important that Europol follows the CJEU case-law on the matter.⁵⁰⁴ According to case-law, strict necessity may be seen as a high-level version of the principle of purpose limitation, precluding systematic and general data processing and requiring strict necessity for a specific purpose.⁵⁰⁵ Strict proportionality implies for each purpose to assess whether less intrusive means may achieve the same aim and whether the interests are correctly balanced. The EDPS's audit on minors noted that strict proportionality may not be met when minors who were merely caught shoplifting were classified as main organisers of the criminal activities.⁵⁰⁶ This is due to the lack of acknowledgment of potential nuances of their participation in the organised crime group. In this scenario, a less intrusive classification would have probably achieved the same aim.

Concerning data quality, the EDPS pointed out that rules providing for appropriate safeguards, for example on data quality, need to be laid down either in the Europol Regulation, or in an implementing or delegated act.⁵⁰⁷ The latter choice was made in the SIS and VIS Regulation.⁵⁰⁸ The EDPS commented on the implementing decisions related to the SIS, and regretted that these acts offered solely a very limited level of detail regarding data quality standards and the sub-delegated powers to eu-LISA (e.g. on the allocation of responsibility).⁵⁰⁹ One may argue that these essential elements should be provided for in Europol's Regulation.⁵¹⁰ Alternatively, the amendment to the Europol Regulation should at least require the adoption of implementing or delegated acts by the Commission to specify the data quality thresholds and controls, and restrict the discretion of the agency.

Finally, turning to the derogations provided for by the Executive Director, to either authorise Europol staff to access information, or to grant direct access to national authorities or EU agencies, it is unclear how that would be applied in practice. The Executive Director would decide so on the basis of the necessity requirement (and not *strict* necessity), and no supervisory authority appears to be involved (e.g. DPO or EDPS). This is problematic due to the potential risk that any further access may entail for the individual concerned.

Control mechanisms in place

The lack of accountability and monitoring of the biometric data processing operations also appears problematic. The proposal (as well as the specific provisions within the Europol Regulation) provide for a limited role of both the DPO (internal supervisor) and the EDPS (external supervisor). For example, the DPO, while informed 'without undue delay' of a processing operation, does not seem to be involved *ex ante*, before any processing operation takes place, or when data is being deleted. On that matter, Article 29 of the Data Protection Working Party Opinion, considered it as 'good practice' to share statistical information on the deletion of data with both the DPO and data

⁵⁰³ EDPS [Opinion 4/2024](#) on the proposed regulation, 23 January 2024, pp. 7-9.

⁵⁰⁴ CJEU [Case C-205/21](#), 2023; CJEU [Case C-118/22](#), 2024.

⁵⁰⁵ Interview with EDPS.

⁵⁰⁶ EDPS, [Audit report](#) on Europol, Case number 2022-0382, 16 December 2022, p. 3.

⁵⁰⁷ EDPS [Opinion 4/2024](#), p. 9.

⁵⁰⁸ Article 42(5) of [Regulation \(EU\) 2018/1862](#) on the establishment, operation and use of the SIS in the field of police cooperation in criminal matters, 28 November 2018; Article 29(2a) of [Regulation \(EU\) 2021/1134](#) concerning the Visa Information System, 9 July 2008.

⁵⁰⁹ EDPS, [Formal comments](#) on the draft Commission implementing decision on the SIS, 26 August 2020.

⁵¹⁰ Interview with EDPS.

protection authorities (which in the case of Europol would be the DPO and the EDPS).⁵¹¹ The EDPS involvement is limited to a statistical overview, and being informed when the data storage period exceeds five years. Additionally, the storage and review period are the same for both sensitive (including biometric data) and other personal data. Stricter rules could have been envisaged in light of the specific and sensitive nature of processing operations involving sensitive data. In the Financial statement, the Commission solely refers to the revision or inclusion of data review and retention requirements across the solutions (without further clarification).⁵¹²

In practice, the EDPS also monitors Europol's biometric data processing.⁵¹³ If the proposal is adopted and Europol develops new types of processing operations, Article 39 on prior consultation of the EDPS would apply. According to Article 39, any type of new processing operation(s) that involves a high risk to the rights and freedoms of the individuals requires prior consultation of the EDPS, which will ultimately be the case with the development or improvement of biometric tools.⁵¹⁴ It is essential that this procedure is followed when strengthening Europol's biometric processing tools, to ensure compliance with EU data protection provisions. At the end of 2023, the EDPS had already issued an opinion following a prior consultation on a Face Recognition Solution, assessing *inter alia* whether the conditions of strict necessity and proportionality were met.⁵¹⁵ The EDPS opinion presented six recommendations, one of which pertained to the implementation of a pilot approach in handling facial images through the new tool.

Other potential issues

Next to the lack of clarity and potential control issues, it is also important to briefly point out three issues emerging from the strengthening of Europol's powers. Firstly, these powers will not only be expanded to the fight against migrant smuggling and trafficking in human beings, but to all the crime areas under Europol's competence. This would imply an exponential increase of biometric data processing within Europol. Secondly, in the case of processing of biometric data for the purpose of uniquely identifying a natural person, the processing operations of the data do not need to supplement other personal data processed by the agency. This offers lesser protection to individuals in situations of identification. However, it is unclear why biometric identification is considered to be less intrusive than biometric verification or authentication.⁵¹⁶ It is also hard to prevent further use of this data for other purposes, such as profiling (namely the practice of categorising individual and predict their behaviour). Finally, the proposal also aims to strengthen biometric data processing, to include biometric data originating from third countries. To echo the argument developed in section 6.3.2, this may be highly problematic, particularly if the data have been collected in countries with low data protection safeguards, and with which Europol concluded agreements many years ago, without ever having them updated. In conclusion, more stringent control rules on data quality may be required to ensure strong data protection safeguards for individuals.

⁵¹¹ Article 29 Data Protection Working Party [Opinion WP 258](#), on key issues of the Law Enforcement Directive, 2017, p. 4.

⁵¹² Proposed regulation [COM\(2023\) 754](#), Legislative Financial Statement 'Agencies', p. 7.

⁵¹³ Interview with EDPS.

⁵¹⁴ *ibid.*

⁵¹⁵ EDPS, [Supervisory opinion](#) on a prior consultation requested by Europol on a Face Recognition Solution (Case 2023-1104), 20 December 2023.

⁵¹⁶ Biometric identification is a process which allows the identity of an unknown individual to be determined; biometric verification is a process that allows for verification of an individual's claimed identity; and finally, biometric authentication is a process that confirms an individual's identity (e.g. their authorisation to access a system).

8. Proposal's interplay with the proposed Facilitation Directive

This section addresses the interaction between the two instruments in the Commission's migrant smuggling package: on the one hand, the Facilitation Directive, and on the other hand, the proposal discussed in this targeted impact assessment. As outlined below, the interplay between the Directive and the proposed regulation on enhancing police cooperation, particularly Europol's involvement, raises several points of incoherence, contradictions, and criticalities.

8.1. The proposed directive and its complementarity with the proposed regulation

The proposed directive on preventing and countering the facilitation of unauthorised entry, transit, and stay in the EU (COM(2023) 755) seeks to replace the current EU legal framework (commonly referred to as the 'Facilitators Package'), by introducing clearer definitions and more effective sanctions.⁵¹⁷ The key objectives of the directive are:

- Clearly defining and criminalising the facilitation of unauthorised entry, transit, and stay.
- Ensuring effective investigation, prosecution, and sanctioning of organised criminal networks involved in migrant smuggling.
- Harmonising penalties to reflect the seriousness of the offence.
- Extending the jurisdictional reach of EU Member States.
- Strengthening resources for Member States to address and prevent migrant smuggling.
- Improving data collection and reporting related to migrant smuggling.⁵¹⁸

The proposed directive draws on the 2017 REFIT evaluation,⁵¹⁹ which identified challenges with the overly broad definition of facilitation offences, including difficulties distinguishing between migrant smuggling and humanitarian assistance.⁵²⁰

A significant area of complementarity is Article 16 of the proposed directive, which requires Member States to ensure effective and proportionate investigative tools for prosecuting smuggling-related offences, including those used in countering organised crime or other serious crime cases. Synergies between the two acts also result from the adoption of the same offence definition. For the purpose

⁵¹⁷ Proposed directive COM(2023) 755, explanatory memorandum. For an in-depth analysis of the legal shortcomings of the Facilitators Package and its divergence from international law, see, inter alia, A. Spena, 'Human smuggling and irregular immigration in the EU: from complicity to exploitation?' in S. Carrera and E. Guild (eds), *Irregular migration, trafficking and smuggling of human beings*, CEPS, 2016; S. Zirulia, 'Is that a smuggler? The blurring line between facilitating illegal immigration and providing humanitarian assistance at the European borders', in G. L. Gatta, V. Mitsilegas and S. Zirulia (eds), *Controlling immigration through criminal law: European and comparative perspectives on "crimmigration"*, Hart Publ., 2022, pp. 235-265; V. Mitsilegas, 'The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law', *New journal of European criminal law*, Vol. 10(1), 2019, pp. 68-85.

⁵¹⁸ Proposed directive COM(2023) 755, explanatory memorandum, pp.3-5. For an in-depth analysis of the proposed directive, see V. Moreno-Lax, Commission proposal for a revised Facilitation Directive: targeted substitute impact assessment, EPRS, European Parliament, 2025 (forthcoming).

⁵¹⁹ European Commission, REFIT evaluation of the Facilitators Package, [SWD\(2017\) 117](#).

⁵²⁰ Proposed directive COM(2023) 755, explanatory memorandum. Various studies have called for a legislative revision of the Facilitators Package to bring greater legal clarity and alignment with international standards: see, for instance, S. Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#): 2018 update, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

of the proposed regulation, 'migrant smuggling' means any of the activities referred to in Articles 3, 4 and 5 of the proposed directive.⁵²¹ The regulation therefore adopts the new proposed definition of facilitation of irregular migration and equates it with migrant smuggling. More particularly, the proposed directive criminalises:

1. the intentional assistance of a third-country national to enter, transit across or stay within the territory of any Member State where the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit (Article 3(1)(a));
2. the intentional assistance of a third-country national to enter, transit across or stay within the territory of any Member State where there is a high likelihood of causing serious harm to a person and without financial or material benefit (Article 3(1)(b));
3. the public instigation of third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals (Article 3(2)).

Article 4 of the proposed directive provides for aggravated criminal offences when:

- a) the criminal offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA20;
- b) the criminal offence deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence;
- c) the criminal offence was committed by use of serious violence;
- d) the third-country nationals who were subject to the criminal offence were particularly vulnerable, including unaccompanied minors;
- e) the criminal offence caused the death of third-country nationals who were subject to the criminal offence.⁵²²

8.2. Critical contradictions, legal uncertainties and human rights implications

8.2.1. Exacerbating the conflation of criminal law and migration control

The objectives of the two legal instruments seem to diverge fundamentally. The proposed regulation focuses on enhancing police cooperation and Europol's support in combating migrant smuggling, framed within the context of organised crime and security threats, and trafficking in human beings. Conversely, the proposed directive aims to manage migration through criminal law by clarifying and sanctioning facilitation offences, as evidenced by the choice of legal basis, which is Article 83(2) TFEU (to enhance the effectiveness of the implementation of the EU policy of migration management), rather than Article 83(1) TFEU (to address major security threats including organised

⁵²¹ Article 2(1) of the proposed regulation [COM\(2023\) 754](#).

⁵²² It should be noted that in the [Council's general approach](#) on the proposed Facilitation Directive, adopted on 13 December 2024, Article 4 was removed, while the commission of a criminal offence involving cruel, inhuman, or degrading treatment of a third-country national subjected to the offence was introduced as an aggravating circumstance under Article 9 of the proposed directive.

crime).⁵²³ Linking the two legal acts could create a situation where the enhanced transnational powers granted to law enforcement agencies and Europol expand the scope of EU criminal law in migration control. This, in turn, raises concerns about broader implications, particularly with regard to the potential criminalisation of humanitarian assistance and the protection of migrants' rights.

8.2.2. Over-broad definition of the criminal offence

The definition in the proposed directive extends the scope to non-organised crime activities, equating all facilitation of irregular migration with migrant smuggling, regardless of whether it is linked to organised crime.⁵²⁴ The lack of legal certainty may potentially be abused by Member States, thus exacerbating the hostile environment against humanitarian actors and/or migrants themselves who participate in smuggling-related activities.⁵²⁵ While the directive has the aim to harmonise penalties that take account of the seriousness of the offence,⁵²⁶ the excessively large scope of the offences falling under the definition of migrant smuggling in the proposed directive exacerbates the risk of inconsistency across Member States with regard to their understanding and interpretation of what the crime of migrant smuggling should and should not entail.⁵²⁷ These concerns have implications for Europol's involvement in cases that may fall outside its mandate, particularly if national authorities are not required to assess on a case-by-case basis whether a request for information or information related to migrant smuggling cases should be forwarded to Europol, as outlined in Article 8(1) of the proposed regulation.

The lack of any profit motive as an element of the newly proposed offence of 'public instigation' also raises concerns (Article 3(2) of the proposed directive).⁵²⁸ Some interviewees have cautioned that this definition is overly broad, and may include the conduct of those who provide any information that is useful for migrants about reaching Europe or information about safe routes posted by migrants themselves on social media. It could also concern civil society organisations advocating for more liberal policies in the EU.⁵²⁹

8.2.3. Impact on humanitarian actors and people on the move

The UNHCR and various NGOs have criticised the proposed directive for its potential negative impact on forcibly displaced individuals and those providing humanitarian assistance. One of the primary concerns is that the directive fails to include an explicit and mandatory exemption for

⁵²³ V. Mitsilegas, ['Reforming EU criminal law on the facilitation of unauthorised entry: the new Commission proposal in the light of the Kinshasa litigation'](#), *New journal of European criminal law*, Vol. 15(1), 2024, pp. 3–11.

⁵²⁴ The compatibility of EU and national law criminalising the facilitation of unauthorised entry, even when conducted on a non-profit basis, with the Charter of Fundamental Rights is currently under review by the CJEU in the Kinsa case ([C-460/23](#)). On 7 November 2024, the Advocate General issued an advisory [opinion](#), concluding that Directive 2002/90 aligns with the principle of legality and proportionality of criminal offences and penalties. However, as the opinion is non-binding, the court's final ruling, expected in early 2025, could take a different direction.

⁵²⁵ V. Mitsilegas, ['Reforming EU criminal law on the facilitation of unauthorised entry: the new Commission proposal in the light of the Kinshasa litigation'](#), *New journal of European criminal law*, Vol. 15(1), 2024, pp. 3–11; see also G. Sanchez, L. Achilli and F. Alagna, [The EU's new counter-smuggling directive proposal: persisting challenges and recommendations towards implementation](#), EUI, RSC, Policy Brief, 2024/01, Migration Policy Centre; N. Vavoula, 'The criminalisation of irregular migration under EU law: an evolving human-rights centred legal framework?', in V. Mitsilegas, M. Bergström and T. Quintel (eds), *Research handbook on EU criminal law*, 2nd ed., Edward Elgar Publ., 2024, pp. 296–320.

⁵²⁶ Proposed directive COM(2023) 755, explanatory memorandum, p.4.

⁵²⁷ Council of Europe, Parliamentary Assembly, [Resolution 2568](#), 2024, Recital 15.

⁵²⁸ It should be noted that in the [Council's general approach](#) on the proposed Facilitation Directive, adopted on 13 December 2024, Article 3(2) was removed, along with the relevant part of Recital 6 and Recital 25.

⁵²⁹ Interview with FRA; Interview with EDRI.

persons seeking international protection and migrants subject to smuggling.⁵³⁰ This omission reflects a disregard for international legal standards,⁵³¹ particularly those outlined in the UN Smuggling Protocol, which emphasises the non-penalisation of smuggled migrants.⁵³² The recommendation of a need to take a more nuanced approach to criminalisation has come from different sources, especially in relation to those migrants who may be charged with aiding and abetting the irregular entry of others when they had no intention of obtaining a financial or material benefit, but rather their primary interest was reaching safety and securing their own entry to seek asylum.⁵³³ Several interviewees expressed concerns that Europol's overreach in cases of migrant smuggling could have negative consequences for specific categories of individuals involved,⁵³⁴ including possible asylum applications of people investigated and/or prosecuted for migrant smuggling.⁵³⁵

A way to minimise the risks outlined above is to disconnect the discussion on the proposed regulation from the discussion surrounding the revision of the Facilitation Directive as recommended by the Parliamentary Assembly of the Council of Europe.⁵³⁶ Alternatively, the definition of 'migrant smuggling' as included in Article 2 of the proposed regulation should include solely the activities referred to in Article 4 (a) and (b) of the Facilitation Directive (the criminal offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA or the criminal offence deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence).

⁵³⁰ UNHCR, [Comments](#) on the Commission proposal for a Facilitation Directive (Anti-smuggling Directive) – COM (2023) 755, 14 March 2024; PICUM, [How the New EU Facilitation Directive furthers the criminalisation of migrants and human rights defenders](#), 2024.

⁵³¹ Interview with ECRE.

⁵³² [UN Smuggling Protocol](#), Articles 5 and 19.

⁵³³ Council of Europe, A shared European approach to address migrant smuggling, [Report](#), Doc. 16032, 6 September 2024.

⁵³⁴ Interview with Statewatch; Interview with FRA.

⁵³⁵ Interview with ECRE; Interview with EDRi; Interview with PICUM.

⁵³⁶ Council of Europe, Parliamentary Assembly, [Resolution 2568](#), 2024.

9. Key findings and recommendations

This targeted impact assessment aims to provide a legal analysis of the context and the main elements of the proposed regulation, to support the European Parliament's considerations of the legal instrument. As demonstrated in this study, the proposed regulation would significantly strengthen both Europol's resources and role, particularly in relation but not limited to the fight against migrant smuggling and trafficking in human beings. The proposal was presented without an impact assessment, which the Commission justified by the urgency to act. However, the urgency of the matter remains contentious. The lack of an impact assessment hinders a proper in-depth assessment of the need for EU action and the possible impacts of the proposed measures. The analytical supporting document the Commission issued several months after the proposal cannot substitute the added value of a fully-fledged impact assessment. This study notes that the process has been rushed, although it would have required a more careful assessment of Europol's current mandate and of the potential impact the proposal has on individuals and the protection of fundamental rights. The proposal partly deals with vulnerable individuals (e.g. migrants, victims of trafficking), yet this vulnerability is neither assessed nor considered in the proposal. Additionally, the proposal lacks clarity in its objectives, creating a number of uncertainties (these are further detailed below in the assessment of the main elements of the proposal).

The targeted impact assessment starts by looking at the legal framework currently in place, to discuss the problem definition and drivers as determined by the Commission. Although the Commission's prioritisation of migrant smuggling and trafficking in human beings over other crimes is not justified in the proposal, stakeholders engaged in operational activities confirmed the proposal's underlying rationale, namely the need to strengthen police cooperation in these areas. Nonetheless, the study finds that there are multiple drivers the proposal does not sufficiently address, such as difficulties encountered at national level, lack of trust and awareness of national criminal justice authorities, and interoperability issues.

The analysis also raises questions regarding the necessity for and coherence of the proposal within the existing legal landscape, particularly with the new EU Police Cooperation Code and the obligations it introduces for Member States to exchange data with Europol. Furthermore, it questions the complementarity with the upcoming interoperability framework as it is unclear, from today's perspective, how these systems will interact and work together in the future to achieve the core objective of improving police cooperation and information sharing in cross-border cases. Given that some databases essential to the system have yet to be implemented, their impact remains hard to assess. In light of this, the study recommends further clarification of the proposal's position within the broader framework of legal instruments governing Europol's role in police cooperation. The study finds the proposal somewhat premature and recommends to first evaluate Europol's remaining challenges in information exchange once the interoperability system is fully operational.

In terms of subsidiarity and proportionality of the proposal, the study notes a clear need for EU action in relation to combating migrant smuggling and trafficking in human beings. This should nonetheless respect the principle of national sovereignty and not impose obligations or regulate services that should remain under the national legal framework.

Turning to the main elements of the proposal, the targeted impact assessment offers a legal analysis of the five distinct objectives put forward by the Commission.

(1) Strengthening inter-agency cooperation on migrant smuggling and trafficking in human beings

Regarding the secondment of representatives and liaison officers of Eurojust and Frontex to the European Centre Against Migrant Smuggling, the study finds that there is a lack of clarity as to the role of such secondments. While their role can be beneficial in strengthening inter-agency

cooperation (although informally similar cooperation already exists), Member States can still restrict their participation in operational meetings and operational task forces (OTFs).

With regard to Europol's cooperation with Eurojust, the proposal only mentions an 'appropriate involvement of judicial authorities in criminal investigations' in its recital. The study notes that it is important for Eurojust to be informed of OTFs as the lack thereof may result in missed opportunities for cross-border judicial cooperation in cases that involve EU-wide criminal networks or multi-jurisdictional issues. However, this should not equate to constant involvement of Eurojust, since a 'one-size-fits-all' approach may not be desirable in view of the diverse operational needs in OTFs. Furthermore, it is up to national authorities to decide whether or not to involve Eurojust.

The study also notes a clear need to delineate Frontex's and Europol's functions in order to avoid potential overlap and duplication of data. With a potential increase of Europol deployments for operational support, the risk of overlap with Frontex's standing corps may arise. The proposal does not clarify the tasks and responsibilities of Europol's officers, nor how coordination should take place in the field. In line with the European Data Protection Supervisor's opinion, the study concludes that Frontex's role in the fight against migrant smuggling and trafficking in human beings should be clarified, particularly with regard to its complementarity with Europol, so that Europol remains the law enforcement agency and Frontex does not turn into one.

The study therefore recommends that steps are taken to:

- further clarify the various roles and functions of Europol, Eurojust and Frontex to ensure complementarity and avoid potential overlap (e.g. finalise and develop new cooperation agreements; develop clear agreements of allocation of responsibility when acting in the field);
- ensure that Eurojust is informed of necessary OTFs, namely those in which a judicial authority is involved (through potential guidelines or clarified in a working arrangement);
- ensure that cooperation and information sharing between Frontex and Europol only occurs when it is necessary and falls within their mandates;
- ensure that inter-agency cooperation takes place in compliance with fundamental rights, and particularly data protection rules (e.g. adapt the working arrangements in light of the EDPS' recommendations and EU data protection rules).

(2) Strengthening steering and coordination on countering migrant smuggling and trafficking in human beings at EU level

With regard to the codification of the Centre Against Migrant Smuggling, the study concludes that, whilst codification allows for more transparency on the functioning of this (and other) centres within Europol, it would significantly limit its flexibility. Compared to the proposed legislation, Europol internal regulations would provide for more flexibility. As the proposed codification leaves questions as to the exact functioning and composition of the Centre, internal rules would be needed, for example to further clarify and delineate strategic and operational meetings. The study also examined the resources provided for Europol to perform these proposed enhanced tasks and notes two main points. Firstly, material resources do not always ensure adequate personal resources, which may hamper effective implementation. Secondly, resources granted to Europol do not automatically imply an increase in resources of supervisory authorities.

In light of the above, the study concludes that there is room for improvement, as follows:

- to require the development of transparent internal rules (e.g. Management Board implementing rules) clarifying the functioning of the Centre and the safeguards. Potential consultation of an internal or external supervisor could be envisaged;

- to delineate more clearly the strategic and operational meetings, as some actors should not be involved in the latter;
- to further reflect on the resources needed and the implementation of the proposal and ensure a budget increase of the supervisory authorities.

(3) Improving information sharing on migrant smuggling and trafficking in human beings

The introduction of an obligation for national authorities to share all information on migrant smuggling and trafficking in human beings reflects a broader trend towards centralising powers within Europol, which reverses the logic of the agency's original mandate. This centralisation raises concerns about effectiveness, coherence with other EU acts, and potential fundamental rights implications. Notably, the proposal does not address the quality of the information being shared and seems to focus rather on the quantity of data shared.

Regarding information sharing with third countries, the study concludes that 'derogatory regimes' for sharing data with third countries should remain an exception and clearly state adequate safeguards. It also comments on the proposed direct connection between ILOs and SIENA, questioning whether this is possible and desirable, as it is not accompanied by sufficient safeguards.

The study suggests the following:

- to raise awareness about the added value of Europol's involvement in criminal investigations and focus on building trust with national authorities rather than introducing additional obligations specific to certain crime areas;
- to clarify in the legal framework the procedure to use derogatory regimes to share data with third countries, more particularly with regard to their safeguards;
- to keep derogatory regimes to share data with third countries as an exception, and put more effort into developing cooperation agreements at the EU level;
- to ensure proportionality and necessity of information sharing from ILOs, particularly when the data has been collected in third countries with low fundamental rights protection standards (compared to the EU).

(4) Reinforcing Member States' resources to prevent and combat migrant smuggling and trafficking in human beings

While the establishment of specialised units at national level and the mandatory reserve pool could enhance Europol's operational capacities, these measures raise questions about feasibility, proportionality and subsidiarity. The study finds that the proposal imposes financial and operational burdens on Member States, requiring substantial investments in human and financial resources to support Europol. This may be particularly difficult for Member States that face strong migration challenges and/or whose law enforcement sectors are under-funded.

It therefore suggests:

- not to develop a mandatory reserve pool of experts without financial support from EU funds;
- to support Member States in their adaptation to technological tools and connection to SIENA.

(5) Reinforcing Europol's support for the prevention and combating of migrant smuggling and trafficking in human beings through OTFs and Europol deployments for operational support

While the codification of OTFs and operational deployments in law is welcome in principle, this should have been preceded by an in-depth assessment of their functioning, particularly since it affects not only the fight against migrant smuggling and trafficking in human beings but provides Europol with enhanced powers in relation to every crime falling under its mandate. The study finds

that there is a need for clearer definition of OTFs and Europol deployments for operational support, as well as detailed rules regarding the division of tasks and responsibilities (as witnessed with the issue of joint controllership). Furthermore, it notes that these Europol tasks are not accompanied by specific and sufficient safeguards.

The study therefore recommends:

- to define the scope and limits of Europol's non-coercive powers in the legal framework in order to avoid ambiguity that could lead to tensions between the agency and national law enforcement agencies;
- to develop clear rules on joint controllership (e.g. in joint controllership agreements);
- to explicitly mention safeguards in the deployment of Europol on the ground (e.g. the role of FRO or DPO).

In addition to assessing the proposal's objectives, the study also examines the proposal's fundamental rights implications. Minimal references are made to compliance with fundamental rights in the proposal, even though it will undoubtedly affect the fundamental rights of (vulnerable) individuals, particularly the right to data protection and privacy. With regard to the processing of personal data, the study finds that the proposal would further enhance information sharing and intensify existing data protection issues, particularly in relation to large datasets and issues of potential joint controllership. It also notes that no referral is made to the protection of vulnerable individuals. With specific regard to biometric data, the study concludes that the proposal does not specify the purposes and the use of biometric tools by Europol, nor the procedure to be complied with when processing biometric data (e.g. the principles of strict proportionality and necessity). It further notes that the proposal only provides for a limited role for supervisory authorities, even though the processing entails highly sensitive data from potentially vulnerable individuals.

In light of this, the study suggests:

- to address (the issue of) vulnerability in the proposal, as well as other fundamental rights affected;
- to explicitly mention the role of supervisory mechanisms in the processing of (biometric) data in the proposal to safeguard individuals' fundamental rights;
- to clarify Europol's role in relation to biometric data processing, and the applicable rules to ensure compliance with strict necessity and proportionality;
- to require the adoption of additional rules on biometric data processing (e.g. implementing or delegated acts) to specify the threshold required for data quality and controls and to limit Europol's discretion.

Finally, the study assesses the interplay between the proposed regulation and the proposed directive on preventing and countering the facilitation of unauthorised entry, transit and stay in the Union, which is part of the migrant smuggling package. It concludes that the over-broad definition of migrant smuggling in the proposed directive, extending it to non-organised crime activities, perpetuates the risk of legal uncertainty and blurs the lines between criminal law enforcement and migration control. This might exacerbate the hostile environment for humanitarian actors and migrants involved in smuggling activities, potentially involving Europol in cases beyond its mandate.

The study therefore suggests:

- to clarify the scope of criminal offences in the directive, amending legislation to clearly define organised crime as it pertains to Europol's mandate, ensuring that only activities involving organised criminal networks are included;
- to explicitly exempt from criminalisation humanitarian assistance and actions aligned with international protection, such as mutual aid between smuggled migrants;

- if the definition is adopted as it stands, to develop stringent criteria for Member States to refer cases to Europol, for instance by providing that Member States should share information with Europol only when 'the criminal offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA⁵³⁷ or 'the criminal offence deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence'.⁵³⁸

⁵³⁷ Article 4(a) and (b) of the proposed directive COM(2023) 755.

⁵³⁸ Article 4(b) of the proposed directive COM(2023) 755.

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Annex I – List of interviews

Date	Institution/Organisation
20 September 2024	Statewatch
25 September 2024	Eurojust
27 September 2024	Academic
2 October 2024	Eurojust
4 October 2024	Eurojust
4 October 2024	European Council on Refugees and Exiles (ECRE)
7 October 2024	EU Anti-Trafficking Coordinator
7 October 2024	Eurojust
7 October 2024	Frontex (Fundamental Rights Office)
8 October 2024	Platform for International Cooperation on Undocumented Migrants (PICUM) (two staff members)
9 October 2024	Polish authorities (three staff members)
10 October 2024	Frontex (Data Protection Office)
10 October 2024	European Digital Rights (EDRi) (two staff members)
11 October 2024	Fundamental Rights Agency (FRA) (two staff members)
11 October 2024	European Data Protection Supervisor (EDPS) (five staff members)
15 October 2024	Swedish authorities (three staff members)
24 October 2024	Liaison Office (Netherlands) at Europol
4 November 2024	Europol (three staff members)
4 November 2024	Europol (Fundamental Rights Office)
11 November 2024	Europol (Data Protection Office) (three staff members)
15 November 2024	Frontex (five staff members)
Written replies to written questionnaire	
4 November 2024	French authorities
4 November 2024	Greek authorities

Annex II – The EU's interoperability framework

Database/System	Legal basis	Type of data	Europol access
Interoperability Framework			
Schengen Information System (SIS II)	Regulation (EU) 2018/1862	Provides real-time alerts and information on persons and objects to assist in cross-border enforcement. It contains different biometrics (such as photographs and fingerprints) to confirm and verify the identity of people registered in the system, including those of smugglers and irregular migrants.	Europol has had full access since September 2020. Europol has access to all alert categories in SIS and exchanges supplementary information with countries on alerts related to crimes within its remit.
Visa Information System (VIS)	Regulation (EU) 2021/1134	Visa data. The system can perform biometric matching, primarily of fingerprints, for identification and verification purposes.	Europol's access was supposed to be completed in 2021, but has been postponed to 2026.
Eurodac	Regulation (EU) 2024/1358	Digitalised fingerprints of asylum seekers and irregular migrants who have entered a European country.	Access under certain conditions (see Article 34).
European Criminal Records Information System (ECRIS) [application pending]	Regulation (EU) 2019/816	Conviction information on third-country nationals and stateless persons.	Full access foreseen by Article 14.
Entry/Exit System (EES) [application pending]	Regulation (EU) 2017/2226	The system will register the person's name, the type of travel document, biometric data (fingerprints and captured facial images) and the date and place of entry and exit for short-stay visa holders and visa exempt travelers, each time they cross an EU external border.	Access by Europol foreseen by Article 34.
European Travel Information and Authorisation System (ETIAS) [application pending]	Regulation (EU) 2018/1240	ETIAS will be a largely automated IT system created to identify security, irregular migration or high epidemic risks posed by visa-exempt visitors travelling to the Schengen States.	Not yet operational. Article 53 provides that Europol may request to consult data stored in the ETIAS Central System and submit a reasoned electronic request to consult a specific set of data stored in the ETIAS Central System to the ETIAS Central Unit. Consultation of Europol is envisaged in cases where Europol is identified as having supplied the data having triggered a hit.

As part of a package to address migrant smuggling, on 28 November 2023, the European Commission proposed a regulation to strengthen police cooperation and Europol's role in the fight against migrant smuggling and trafficking in human beings (COM(2023) 754). The proposal was not supported by an impact assessment. Following a request by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), this study presents a targeted substitute impact assessment of the proposed regulation. It provides an analysis of the current legal and political framework, reviews the problem definition and drivers identified by the Commission and assesses the proposed measures. It concludes that while the proposal seeks to address gaps in inter-agency cooperation and information sharing, it raises concerns about its alignment with existing frameworks, insufficient data protection safeguards, and risks of conflating criminal law with migration control. The study also examines the proportionality of the proposed measures and stresses the need for a more robust evaluation of fundamental rights impacts.

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