



House of Commons
European Scrutiny Committee

Europol: opt-in Debate

**Twenty-first Report of
Session 2016–17**

Documents considered by the Committee on 23 November
2016, including the following recommendations for debate:

Europol: opt-in Debate

Report, together with formal minutes

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Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	Treaty on European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: <http://europeanmemoranda.cabinetoffice.gov.uk/>.

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1 Europol: the Government's opt-in decision

Committee's assessment	Politically important
<u>Committee's decision</u>	Documents (a) and (b) cleared from scrutiny; Document (c) not cleared from scrutiny; opt-in decision recommended for debate on the floor of the House; drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union
Document details	(a) Proposed Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol)—Commission proposal; (b) Proposed Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol)—Council General Approach; (c) Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol)
Legal base	(a) Articles 88 and 87(2)(b) TFEU; ordinary legislative procedure; QMV (b) and (c) Article 88 TFEU; ordinary legislative procedure; QMV
Department	Home Office
Document Numbers	(a) (34843), 8229/13 + ADDs 1-6, COM(13) 173 (b) (36118), 10033/14, — (c) (38252), —

Summary and Committee's conclusions

1.1 A spate of terrorist attacks in Europe and the growing threat posed by cybercrime have led to a deepening sense of insecurity and a heightened awareness of the transnational nature of much serious crime. Europol is at the forefront of the EU's response to international crime. Founded as an intergovernmental organisation in 1995 and operational since 1999, Europol became an EU Agency in 2009. It provides analytical and operational support to national law enforcement authorities in all 28 EU Member States, enhancing their capacity to tackle security threats which have a cross-border dimension. Since 2009 Europol has been led by Rob Wainwright, the former head of the international division of the UK's Serious and Organised Crime Agency (now the National Crime Agency). Europol's staff work alongside liaison officers seconded to its headquarters in The Hague by EU Member States and other partner countries or organisations in order to facilitate the rapid exchange of criminal intelligence, strategic and operational information. Europol

uses its intelligence-gathering and analytical capabilities to support more than 40,000 international criminal investigations each year, identify and assess emerging security threats, and develop and disseminate expertise on law enforcement. Europol officers may take part in Joint Investigation Teams but have no direct powers of arrest and no authority to use coercive measures.¹

1.2 Following three years of negotiation, a new Regulation updating Europol’s governance structure, objectives and tasks was adopted in May this year and will take effect on 1 May 2017. The Regulation is subject to the UK’s Title V (justice and home affairs) opt-in, meaning that it will not apply to the UK unless the UK opts in. The previous Coalition Government decided not to opt into the Commission’s proposal for a new Regulation—document (a)—when it was put forward in March 2013. The Government’s decision was based mainly on two concerns. First, it considered that the proposal would “increase obligations on Member States to provide data to Europol and call into question the operational independence of our police forces in exercising control over their own data”. Second, it would create “a presumption that Member States will comply with a request by Europol to initiate an investigation, as well as a stronger requirement to explain why an investigation has not been carried out”.² As the new Regulation would be subject to the jurisdiction of the Court of Justice, the Government also feared that opting in would expose the UK to the risk of legal proceedings if it failed to give adequate reasons for refusing to initiate an investigation.

1.3 In July 2013, the then Parliamentary Under-Secretary of State at the Home Office (James Brokenshire) told the House that the Government wished to remain part of Europol but would “wait to see what the final measure looks like before deciding whether to opt in”. Meanwhile, the Government intended to “play an active role in negotiations” and to “work with other Member States and the European Parliament to push for the changes we need”. The House agreed a motion stating that “the UK should opt into the Regulation post-adoption, provided that Europol is not given the power to direct national law enforcement agencies to initiate investigations or share data that conflicts with national security”. The Minister made clear that any recommendation to opt into the new Europol Regulation post-adoption would be “subject to further parliamentary scrutiny, and to the potential for a further debate in this House, to assess and analyse the provisions and to ensure that the appropriate safeguards are provided”.³

1.4 The Justice and Home Affairs Council agreed a general approach on the proposed Regulation in June 2014 setting out its position ahead of negotiations with the European Parliament. The UK had no right to vote on the general approach—set out in document (b)—but the Government considered that “significant improvements” had been made to the provisions concerning the initiation of criminal investigations and the sharing of information with Europol. It reiterated its commitment to ensuring that “Parliament is able to give its view on a post-adoption opt-in before any such decision is finalised”.⁴

1 Further information about Europol is available on the [Europol website](#).

2 See letter of 9 July 2013 from the then Security Minister (James Brokenshire) to the Chair of the European Scrutiny Committee.

3 See [Hansard](#), *HC Deb*, 15 July 2013, cols. 863–83 and the Minister’s [Written Ministerial Statement](#) of 18 July 2013, *HC Deb*, col. 129WS.

4 See the [Explanatory Memorandum](#) of 7 July 2014 submitted by the then Minister for Modern Slavery and Organised Crime (Karen Bradley).

1.5 Negotiations with the European Parliament were concluded at the end of 2015 and the final text—[document \(c\)](#)—was formally adopted in May this year. The principal objective of the new Regulation is to strengthen mutual cooperation between national law enforcement authorities and enhance their operational effectiveness in preventing and combating terrorism and serious crime affecting two or more Member States. Europol will continue to develop its role as “a hub for information exchange”, gathering criminal intelligence and producing strategic analyses and threat assessments. The Regulation also seeks to “enhance the democratic legitimacy and accountability of Europol” through the inclusion of new provisions on the scrutiny of its activities by the European Parliament and national parliaments.⁵

1.6 In a letter dated 14 November, the Minister for Policing and the Fire Service (Brandon Lewis) wrote to inform us of the Government’s intention to opt into the new Europol Regulation, adding:

“Opting in will maintain operational continuity for UK law enforcement ahead of the EU exiting the EU, ensuring our Liaison Bureau at Europol is maintained, and that law enforcement agencies can continue to access Europol systems and intelligence. This decision is without prejudice to discussions on the UK’s future relationship with Europol when outside the EU.”

1.7 The Minister has also submitted an Explanatory Memorandum on the Regulation. Citing the Government’s Code of Practice on scrutiny of EU justice and home affairs measures, he says that we and our counterparts in the House of Lords will have an eight-week period in which to consider the Government’s opt-in recommendation.⁶ He continues:

“If and when this is complete, I will be in a position to inform the European Commission of our request to opt into this Regulation. The Commission have four months to consider this request, and we expect them, to confirm their response before the new Regulation comes into force on 1 May 2017.”⁷

1.8 The Minister indicates that the Government will need to notify the Commission of its opt-in request at the latest by 17 January 2017 to ensure that it has a full four months in which to reach a decision.

1.9 This House had the opportunity to debate and vote on the previous Government’s decision *not* to opt into the Commission’s proposal for a new Europol Regulation in 2013. There can be no doubt that the Government’s recommendation to opt into the Regulation now that is been adopted will attract “particularly strong parliamentary interest” and, potentially, have a “substantial impact” on the UK’s national security. These are the criteria set out in the Written Ministerial Statement made by the former Minister for Europe (Mr David Lidington) in January 2011 as warranting an opt-in

5 See recitals (2) and (58) and Article 51 of the new Europol Regulation.

6 See the [Code of Practice](#) which is annexed to *Cabinet Office guidance on parliamentary scrutiny of EU documents*.

7 See the Minister’s letter of 14 November 2016 to the Chair of the European Scrutiny Committee.

debate on the floor of the House.⁸ We therefore have no hesitation in recommending such a debate and make clear that it should take place before 17 January 2017, the latest date given by the Government for notifying the Commission of its opt-in decision.

1.10 We recommend that the debate should explore the Government's reasons for seeking to opt into the Regulation now, when it was unwilling to do so three years ago. In particular:

- Do the provisions of the Regulation on data sharing and the initiation of criminal investigations include sufficient safeguards to ensure the operational independence of the UK's police forces?
- Has the Government's earlier concern that bringing the Europol Regulation within the jurisdiction of the Court of Justice might have implications for the independence of the police and the setting of operational priorities been adequately addressed?
- What views have UK law enforcement authorities expressed on the Government's opt-in recommendation? There is no indication in the Minister's Explanatory Memorandum that there has been any consultation beyond the Devolved Administrations.

1.11 To ensure that the House is able to come to an informed view, we consider that the debate should also address the consequences of not opting into the new Europol Regulation. In particular:

- Has the Government discussed with the Commission the possibility of the UK remaining a member of Europol on the basis set out in the 2009 Europol Council Decision until it leaves the EU?
- What assessment has the Government made of the likelihood that the UK would be ejected from Europol next May, when the new Regulation takes effect, if the UK has not opted in by then?

1.12 The Government's recommendation to opt into the new Europol Regulation comes at a time when it is preparing to enter into negotiations on the terms of the UK's withdrawal from the EU. The Secretary of State for Exiting the European Union (Mr David Davis) told the House in October that one of the Government's "four aims" for the Brexit negotiations is to "keep our justice and security arrangements at least as strong as they are".⁹ Given this wider context, would opting into the new Europol Regulation be an anomaly at a time when the UK is seeking to loosen rather than strengthen its ties with EU institutions and agencies and to develop alternative methods of cooperation on policing and security matters? Conversely, would opting in help to bridge the gap between the UK's existing security arrangements with EU partners and agencies and the equally strong ties which the Government intends to develop once the UK has left the EU?

1.13 The new Europol Regulation will set the terms for the UK's future cooperation with Europol. We ask the Minister to explain during the debate whether the Regulation will

8 See the former Minister for Europe's [Written Ministerial Statement](#) on enhancing parliamentary scrutiny of EU business, *HC Deb*, 20 January 2011, col. 51WS.

9 See the Minister's [Statement](#) on *Next Steps in Leaving the European Union*, Hansard, 10 October 2016, col. 55.

make it easier or harder for the UK to exchange sensitive law enforcement information with Europol once it has left the EU, in light of the previous Government’s concern that the provisions on the transfer of personal data to third countries would reduce Europol’s autonomy and give the Commission greater powers to determine the third countries with whom Europol should establish information-sharing arrangements. We also ask the Minister whether he expects the UK’s future relationship with Europol as a third (non-EU) country to be based on the existing models of cooperation—“strategic” or “operational” agreements—or on a new bespoke model? Would either of the existing models allow direct access to Europol’s information systems? In negotiating the UK’s future relationship with Europol, is the Government’s objective to preserve the same access to Europol’s databases and analytical information once the UK has left the EU as it currently has as a member of the EU?

1.14 Finally, we draw the House’s attention to the provisions on parliamentary scrutiny of Europol’s activities contained in the new Europol Regulation. We have made clear in our earlier Reports that the outcome of negotiations on this aspect of the Regulation would be a key factor in considering any recommendation to opt in. Despite difficult negotiations with the European Parliament, we are satisfied that the outcome achieved respects the division of competences between Member States and EU institutions set out in the EU Treaties, does not interfere with Member States’ fundamental political and constitutional structures, and ensures that national parliaments themselves will shape the emerging structures for political oversight and monitoring of Europol.

1.15 We draw this Report and our debate recommendation to the attention of the Home Affairs Committee and the Committee on Exiting the European Union. As documents (a) and (b) have been superseded, we are content to clear them from scrutiny. Document (c) remains under scrutiny pending the opt-in debate. We ask the Minister to report back to us on the outcome of the debate and to inform us formally of any request made to the Commission to opt into the new Europol Regulation.

Full details of the documents

(a) Proposed Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA: (34843), 8229/13 +ADDs 1–6, COM(13) 173; (b) Proposed Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA—Council General Approach: (36118), 10033/14, —; (c) Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA: (38252), —.

Background

UK participation in Europol

1.16 The UK has participated in Europol since its creation in 1995. Europol currently operates on the basis of a Council Decision adopted in April 2009 and various related

instruments.¹⁰ The Decision is one of a number of EU police and criminal justice measures adopted before the Lisbon Treaty took effect—on 1 December 2009—which fell within the scope of the UK’s “block opt-out”. The previous Coalition Government decided to opt out *en masse* of these measures in 2014 but successfully applied to rejoin 35 of the measures, including the 2009 Europol Council Decision. The Government published a detailed assessment of the costs and benefits of remaining part of Europol which is set out in Command Paper 8897.¹¹ It estimated that membership of Europol cost the UK £2.3 million a year (covering the staffing and running of the UK’s National Europol Unit and Liaison Bureau, and IT infrastructure). This is in addition to the UK’s annual contribution to Europol through the EU budget. According to the Command Paper, “the UK will have to pay £8.4 million per annum contribution to Europol up to 2020 due to EU budgets that have already been agreed. This will still be the case if we do not rejoin the Europol Council Decision and associated instruments”.¹²

1.17 The Government concluded that continuing participation in Europol would be more cost-effective than establishing a system of bilateral agreements and liaison networks with each Member State. It also concluded that remaining in Europol would be in the UK’s national interest as it would enable the UK to maintain access to Europol’s cross-border data-sharing systems, extensive analytical resources and expertise and to contribute to Europol’s forward-looking threat assessments which set the agenda for EU action to combat serious organised crime and terrorism.

Changes to Europol under the Lisbon Treaty

1.18 The Lisbon Treaty requires Europol to be based on a Regulation adopted jointly by the Council and the European Parliament. It also stipulates that national parliaments should be involved in the political monitoring of Europol and that the Regulation should establish “procedures for scrutiny of Europol’s activities by the European Parliament, together with national parliaments”.¹³

The Commission proposal—document (a)

1.19 The Regulation proposed by the Commission in 2013 sought to align Europol’s legal framework with the requirements of the Lisbon Treaty, consolidate Europol’s role as a hub for information exchange between national law enforcement authorities and enable Europol to develop centres of expertise for certain types of transnational crime, such as the European Cybercrime Centre.¹⁴ The Commission also proposed changes to Europol’s governance structures to reflect the Common Approach on EU Agencies agreed by the Council, European Parliament and Commission in July 2012. This seeks to enhance the efficiency and accountability of EU Agencies and ensure greater coherence in the way they operate. The Commission’s proposal to create a single EU Agency for Law Enforcement

10 See [Council Decision 2009/371/JHA](#) establishing the European Police Office (Europol).

11 See [Command Paper 8897](#) published in July 2014, pp.145-65.

12 See p.157 of [Command Paper 8897](#).

13 See Article 12(c) of the *Treaty on European Union* and Article 88(2) of the *Treaty on the Functioning of the European Union*.

14 The [European Cybercrime Centre](#)—EC3—began operations in January 2013. Its purpose is to strengthen the law enforcement response to cybercrime.

Cooperation and Training through the merger of Europol and the European Police College (CEPOL)—an EU Agency responsible for developing training materials to support cross-border police cooperation—was abandoned at an early stage in the negotiations.

1.20 The Commission proposal was supported by an Impact Assessment which indicated that significant disparities in the volume and quality of information sent by Member States to Europol were a significant impediment to Europol becoming an effective hub for information exchange. The Commission observed:

“If a Member State does not share information on a given serious cross-border crime, Europol is incapable either of identifying patterns and links with crime phenomena in other countries or of coordinating joint investigative actions at the EU level.”¹⁵

1.21 The 2009 Europol Council Decision stipulates that National Units responsible for liaising with Europol are required to supply, “on their own initiative”, information for storage in Europol’s databases and any additional information and intelligence necessary for it to carry out its tasks.¹⁶ By contrast, the Commission proposal imposed an express obligation on Member States to “cooperate with Europol in the fulfilment of its tasks” and to ensure that their National Units “supply Europol with the information necessary for it to fulfil its objectives”. This included copies of bilateral or multilateral exchanges with other Member States on crimes falling within Europol’s mandate. The Commission considered that a stronger obligation to provide information was necessary to enhance Europol’s capacity to develop an up-to-date criminal intelligence picture and identify connections between serious criminal activity in different Member States.

1.22 The Commission also sought to make Member States more responsive to requests made by Europol to initiate a criminal investigation. Under the 2009 Council Decision, Member States are required to give “due consideration” to such requests, inform Europol if they decide not to proceed with an investigation, and explain why unless to do so would harm national security or jeopardise an on-going investigation or the safety of individuals.¹⁷ The Commission proposal included more prescriptive language requiring Member States’ Europol National Units to inform Europol “without delay” if an investigation is initiated or, if it is not, to provide reasons within one month.

The Government’s position

1.23 The then Government recognised at the outset of negotiations that the Commission proposal would retain most of Europol’s existing functions without significantly expanding its powers. The Government identified two principal concerns. First, it considered that the Commission proposal included an “inferred wider obligation” to provide information to Europol. Whilst acknowledging that “not all Member States share the same amount of information with Europol, and that it would be desirable for some to share more”, the Government expressed a preference for “allowing Member States discretion to prioritise their own data provision”, adding:

15 See p.10 of [ADD 1](#), the Impact Assessment accompanying the Commission proposal.

16 See Article 8 of [Council Decision 2009/371/JHA](#), OJ No. L 121, 15.05.2009.

17 See Articles 7 and 5(1)(d) of [Council Decision 2009/371/JHA](#).

“We are concerned that a stronger legal requirement to share information could lead some to prefer quantity over quality, uploading information in order to avoid infringement proceedings rather than because it is useful. An obligation to share information would also reduce Member States’ control over intelligence they own.”¹⁸

1.24 Second, the Government considered that the provisions on the initiation of a criminal investigation if requested by Europol were “much more specific, possibly creating the presumption that Member States will comply” and would place “a stronger responsibility on Member States to give a reason, by imposing a time limit”. The Government made clear that “Member States should take their own decisions on operational actions.”¹⁹

1.25 The Government raised a third concern which takes on greater significance in light of the UK’s decision to leave the EU once Article 50 negotiations are concluded. Under the 2009 Europol Council Decision, the Council establishes a list of third (non-EU) countries and organisations with which Europol may enter into cooperation agreements and approves their conclusion. Council oversight is intended to ensure that Europol only enters into agreements with third parties that ensure an adequate level of data protection. The Commission proposal preserves the legal effects of cooperation agreements already concluded, but includes two new bases on which a transfer of personal data may take place:

- international agreements concluded by the EU under Article 218 of the Treaty on the Functioning of the European Union which adduce “adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals”; or
- a Commission decision certifying that a third country, international organisation or processing sector within it ensures an adequate level of data protection (so-called “adequacy decisions”).

1.26 The Government expressed concern that Europol would lose the autonomy it currently has, subject to Council oversight, to negotiate its own information-sharing agreements with third countries and that negotiations would, instead, be conducted by the Commission:

“We believe that the Commission will argue that this reflects the position on third country negotiations following the Lisbon Treaty. Article 216 of the TFEU states that ‘[t]he Union may conclude an agreement with one or more third countries or international organisations where ... [it] is provided for in a legally binding Union act’. The Government’s view, however, is that this does not prevent individual EU Agencies such as Europol being given the power to negotiate their own agreements. The Government is concerned about the potential expansion of EU competence here, in particular because of the operational urgency in establishing third country cooperation agreements with Europol. There may also be a risk that the Commission would not give agreements with countries that are important in the context

18 See the [Explanatory Memorandum](#) of 3 May 2013 submitted by the then Parliamentary Under-Secretary of State at the Home Office (James Brokenshire) and his letter of [20 June 2013](#) to the Chair of the European Scrutiny Committee.

19 See para 33 of the Government’s [Explanatory Memorandum](#) of 3 May 2013.

of organised crime appropriate priority if those countries were not also key priorities for engagement by the EU as a whole. We would be keen to ensure that Europol can establish relationships effectively to meet Member States' needs and operational priorities.”²⁰

The Government's reasons for not opting into document (a)

1.27 In July 2013, the Government informed our predecessors that the UK would *not* opt into the proposed Regulation for the following reasons:

“The Government acknowledges that Europol plays a key role in supporting Member States in tackling organised crime and other forms of serious crime and terrorism, and that our law enforcement agencies work closely with it at many levels. These capabilities improve the level of security within the UK and amongst Member States. Moreover the Treaties prevent Europol from having coercive powers, and this is clearly reiterated in the text of the proposal.

“However, the opt-in decision must be taken on the basis of an assessment of the overall balance of the proposed text. Despite the benefits Europol affords the UK, the proposal contains significant implications for the balance of competence between the UK and the EU in relation to policing. The Government is particularly concerned that the draft would increase obligations on Member States to provide data to Europol and call into question the operational independence of our police forces in exercising control over their own data. These are important issues and, while we do support Europol, we cannot agree to participate in it at any price.

“It is important that Member States provide Europol with data in order to ensure it remains effective. However, the Government does not believe that an increased legal obligation is the correct way to do this. It would interfere with Member States' ownership of their own law enforcement intelligence, and, most crucially, there are no exemptions that permit a Member State to refuse information on the basis of national security, the need to protect ongoing investigations or for where an individual's safety may be at risk. The protection of national security is clearly one of the most important functions of any Government, and we cannot recommend opting in to a measure that could make this more difficult.

“The draft Regulation also contains a presumption that Member States will comply with a request by Europol to initiate an investigation, as well as a stronger requirement to explain why an investigation has not been carried out. Given that ECJ [Court of Justice] jurisdiction will apply this has implications for the independence of our law enforcement agencies, as there is a risk that a Member State's refusal to comply with a request from Europol could be challenged before the Court. The Government cannot accept any suggestion that law enforcement authorities should be accountable to an EU Agency, or that the scope for them to consider and decide their own operational priorities should be reduced.

²⁰ See para 39 of the Government's [Explanatory Memorandum](#) of 3 May 2013.

“If the UK opted in now, and if we could not gain amendments to the text during negotiations, we would be bound by the elements which cause us concern, and would be subject to infraction if we failed to abide by provisions in the Regulation.

“The Government will, however, continue to engage fully in the negotiations in order to make the case for the amendments it is seeking. We will keep you informed as negotiations progress, and will reconsider the opt-in decision once the text of the Regulation is agreed and adopted.”²¹

1.28 In subsequent correspondence, the Government made clear that “our long-term membership of Europol does depend on our eventual participation in the new measure”.²²

The Council General Approach—document (b)

1.29 The Government considered that the General Approach agreed by the Justice and Home Affairs Council in June 2014 addressed many of its concerns. In particular, it included wording that could be read as “not presupposing any element of obligation and the ability to turn down a request” by Europol to initiate a criminal investigation. Moreover, an exemption had been reinstated, ensuring that Member States would be under no obligation to share information with Europol if this would conflict with national security interests.²³

Procedures for opting in post-adoption

1.30 Under the UK’s Title V (justice and home affairs) opt-in Protocol, the UK is entitled to apply to opt into the new Europol Regulation “at any time” following its adoption. The UK is first required to notify the Council and the Commission that it wishes to opt in. The Commission then has four months from the date of notification to satisfy itself that the UK fulfils all the conditions needed to apply the Regulation and, if it does, to “confirm” the UK’s participation.²⁴

What happens if the UK does not opt in?

1.31 The new Europol Regulation will repeal the existing 2009 Council Decision (and some other Europol-related Council Decisions), but only for Member States participating in the new Regulation. If the UK does not opt in, the repeal of the earlier Decisions will not apply to the UK and they will continue to be binding on the UK.

1.32 The UK’s Title V opt-in Protocol includes a procedure which could be used to eject the UK from Europol. For this to happen, the Commission must first put forward a proposal establishing that the UK’s failure to opt into the new Europol Regulation would make the Regulation “inoperable” for the other Member States. The proposal would have to be

21 See the [letter](#) of 9 July 2013 from the then Security Minister (James Brokenshire) to the Chair of the European Scrutiny Committee.

22 See the [letter](#) of 18 July 2013 from the then Security Minister (James Brokenshire) to the Chair of the European Scrutiny Committee.

23 See the [Explanatory Memorandum](#) of 7 July 2014 submitted by the former Minister for Modern Slavery and Organised Crime (Karen Bradley).

24 The procedures to be followed are set out in Article 331(1) of the Treaty on the Functioning of the European Union.

adopted by the Council (acting by a qualified majority of Member States participating in the new Europol Regulation—all bar the UK and Denmark). Once adopted, the clock would start to run—the UK would be ejected from Europol after the expiry of a two-month grace period in which the UK has the opportunity to change its mind and opt in or (if later) the date on which the new Europol Regulation takes effect.²⁵

1.33 This ejection procedure has never been used. The previous Government commented:

“It is unclear what the effect of continuing to be bound by the current Council Decision would be once the new Regulation has come into force. As such, the only way to guarantee our continued participation in Europol will depend on our participation in this new measure, as it would remain open for the UK to be ejected from the old measure upon adoption of the Regulation [if] our continued participation rendered the new measure inoperable.”²⁶

1.34 Our predecessors agreed that opting into the new Regulation would be the only failsafe option for the UK to remain in Europol, but questioned how likely it was that the UK would be ejected if it chose not to do so:

“We note that Denmark, unlike the UK, is precluded from participating in the draft Regulation, but that Article 2 of Protocol No. 22 on the position of Denmark makes clear that Denmark will continue to remain bound by the 2009 Europol Council Decision and associated Decisions. If these Decisions are to remain operable in relation to Denmark, it is difficult to see how they could not also be considered operable in relation to the UK.”²⁷

Parliamentary scrutiny of Europol

1.35 We have taken a particular interest in the drafting of provisions on parliamentary scrutiny of Europol’s activities. We requested the opinion of the Home Affairs Committee and published our own legal opinion at an early stage in the negotiations explaining why we consider that national Parliaments cannot be the subject of binding obligations under the EU Treaties or EU secondary legislation, such as the Europol Regulation.²⁸ We have made clear that any attempt to prescribe or impose on national parliaments a particular form of scrutiny, or to dictate how this House should exercise its oversight of an EU Agency, would raise profound constitutional questions and contradict Article 4 of the Treaty on European Union which requires the Union to respect Member States’ “national identities, inherent in their fundamental structures, political and constitutional”.

1.36 Although the UK had no vote on the Europol Regulation, the Government has played a constructive role in building alliances with like-minded Member States to oppose the far-reaching and excessively prescriptive proposals on scrutiny put forward by the European Parliament which would have given it a dominant role in overseeing Europol’s activities.

25 Article 4a of [Protocol 21 to the EU Treaties](#) on the Position of the UK and Ireland in respect of the Area of Freedom, Security and Justice.

26 See the [letter](#) of 9 December 2014 from the former Minister for Modern Slavery and Organised Crime (Karen Bradley) to the Chair of the European Scrutiny Committee.

27 See our Twenty-seventh Report HC 219-xxvi (2014–15), [chapter 8](#) (17 December 2014).

28 See our Twenty-ninth Report HC 83-xxvi (2013–14), [chapter 11](#) (8 January 2014).

The Government's position on the new Europol Regulation—document (c)

1.37 The Minister (Brandon Lewis) sets the Government's opt-in decision within the wider context of the referendum on the UK's membership of the EU:

“On 23 June, the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.”²⁹

1.38 He makes clear that the Government “values the role of Europol in helping UK law enforcement coordinate cross border organised crime investigations” and accepts that “in light of the level of coordination and services provided by Europol, it is clear that the objective of greater law enforcement cooperation through a central agency is better achieved at Union level”.³⁰

1.39 The Minister explains why the previous Coalition Government decided not to opt into the Commission's proposal for a new Europol Regulation in 2013. He highlights two concerns: first, that the proposal would have interfered with the operational independence of UK policing and, second, that it would have increased the UK's obligation to provide data to Europol, even where such provision would conflict with national security, or endanger ongoing investigations or an individual's safety. The Minister considers that the final text of the Regulation—document (c)—addresses both concerns and respects the important principle that “Europol action is always in support of the Member States which carry out the operational activity”. The Regulation states explicitly that “Europol shall not apply coercive measures in carrying out its tasks”.³¹

1.40 The Minister sets out the key changes which the Government was able to secure during negotiations.

“The Commission's original proposal presented a risk that Member States could be required by Europol to initiate investigations in some circumstances and could be challenged at the Court of Justice of the European Union (CJEU) when they refuse to do so; for example, where they fail to give reasons or when the reasons provided are judged to be inadequate. The Government successfully removed the wording in question (‘the National Units shall inform Europol without delay of the initiation of the investigation’) and replaced it with wording which makes clear that Member States can turn down the request.

“The Government secured improved language in the Regulation relating to national security matters, as compared to the existing Council Decision. The Regulation now refers to ‘the essential interests of the Member State's security’, which the Government judges to be preferable to ‘essential national security interests’ as it provides for less scope for the CJEU to opine on whether some national security interests are not ‘essential’.

29 See para 6 of the Minister's Explanatory Memorandum.

30 See paras 5 and 8 of the Minister's Explanatory Memorandum.

31 See para 11 of the Minister's Explanatory Memorandum.

“The Government has also addressed concerns that the UK would be obliged to provide data to Europol, even where such provision would conflict with national security, or endanger ongoing investigations or an individual’s safety. The Regulation makes clear that Member States are not obliged to supply information to Europol where doing so would;

- a) be contrary to the essential interests of the Member State’s security;
- b) jeopardise the success of a current investigation or the safety of individuals; or
- c) disclose information relating to organisations or specific intelligence activities in the field of national security.”³²

1.41 The Minister explains how the Regulation will expand Europol’s tasks.³³ Changes include:

- an explicit reference to the work carried out by the EU Internet Referral Unit based within Europol³⁴—the Minister notes that the Unit replicates the UK’s approach to tackling online terrorist propaganda and has a clear mandate which “does not expand Europol’s work in a manner which would lead to competence issues”;
- a clearer remit for Europol to coordinate, organise and implement investigative and operational actions carried out in conjunction with national law enforcement authorities or within a Joint Investigation Team—the Minister considers that “Europol would need our consent to undertake any actions in the UK, and therefore that we retain control”;
- provision for Europol to cooperate with other EU police and criminal justice bodies and with OLAF, the EU’s Anti-fraud Office, and to support the EU’s crisis management structures; and
- a clear mandate for the European Cybercrime Centre to operate as “a centre of specialised expertise”—the Minister notes that the UK participates in the Joint Cybercrime Action Taskforce which the European Cybercrime Centre hosts.³⁵

1.42 The Minister considers that the expansion of Europol’s tasks is largely a matter of “putting existing practice on a firm legal footing”. He welcomes Europol’s enhanced capacity to carry out operational actions and considers that it will facilitate Europol’s role in Joint Operational Team Mare which was established in March 2015 to tackle the organised criminal groups involved in migrant smuggling in the Mediterranean.³⁶ He continues:

“Europol’s tasks have not increased to expand its competence beyond what is acceptable to the Government. [...] Europol’s actions remain fundamentally in support of Member States.”³⁷

32 See paras 12–14 of the Minister’s Explanatory Memorandum.

33 See Article 4 of the [Europol Regulation](#).

34 The [EU Internet Referral Unit](#) was launched in July 2015.

35 See para 15 of the Minister’s Explanatory Memorandum.

36 See Europol’s [press release](#) of 15 March 2015 on the launch of JOT Mare.

37 See para 16 of the Minister’s Explanatory Memorandum.

1.43 Turning to the governance arrangements, the Minister explains that Europol's Management Board will include a representative of the Commission (although this is already the case under the 2009 Europol Council Decision) and will play "an important role in the selection and appointment of the Executive Director and Deputy Executive Directors".³⁸

1.44 The Minister says that the Government "succeeded in ensuring that the Parliamentary scrutiny of Europol does not go beyond the Treaties", adding:

"Specifically, it is clear that national parliaments are not subordinate to the European Parliament in terms of the exercise of their scrutiny and the procedure through which scrutiny of Europol occurs. National Parliaments are also not required to provide any particular degree of scrutiny. The Government also managed to ensure that the new Regulation strengthens the ability for national parliaments to scrutinise Europol's activities (should they wish to do so). In particular, as part of the Joint Parliamentary Scrutiny Group, national parliaments will be consulted on Europol's annual work programme."³⁹

1.45 The Minister concludes with this assessment of the new Europol Regulation:

"Overall, Europol provides a valuable service to Member States by supporting and strengthening action by Member States' law enforcement authorities and facilitating cooperation between these authorities in preventing and combating organised crime, serious crime such as murder, and terrorism where the crimes affect two or more EU Member States. Opting-in will also enable us to maintain our current access to law enforcement intelligence from other EU Member States which is held in Europol, and to the analysis and links made by Europol in cross-border cases for the remaining time that we are in the EU. We would also maintain a seat on the Management Board, which would help us steer the direction of Europol and help protect the UK's interests during this period."⁴⁰

Previous Committee Reports

Seventh Report HC 342-vii (2015–16), [chapter 9](#) (28 October 2015); First Report HC 342-i (2015–16), [chapter 36](#) (21 July 2015); Thirty-sixth Report HC 219-xxxv (2014–15), [chapter 10](#) (11 March 2015); Twenty-seventh Report HC 219-xxvi (2014–15), [chapter 8](#) (17 December 2014); Twenty-third Report HC 219-xxii (2014–15), [chapter 1](#) (26 November 2014); Ninth Report HC 219-ix (2014–15), [chapter 16](#) (3 September 2014); Fifth Report HC 219-v (2014–15), [chapter 7](#) (2 July 2014); First Report HC 219-i (2014–15), [chapter 14](#), (4 June 2014); Thirty-third Report HC 83-xxx (2013–14), [chapter 9](#) (29 January 2014); Twenty-ninth Report HC 83-xxvi (2013–14), [chapter 11](#) (8 January 2014); Thirteenth Report HC 83-xiii (2013–14), [chapter 21](#) (4 September 2013); Eleventh Report [HC 83-xi](#) (2013–14) (10 July 2013); Seventh Report HC 83-vii (2013–14), [chapter 1](#) (26 June 2013); Third Report HC 83-iii (2013–14), [chapter 1](#) (21 May 2013).

38 See para 17 of the Minister's Explanatory Memorandum. Article 54 of the Europol Regulation stipulates that Executive Director and Deputies will continue to be appointed by the Council, based on a shortlist of candidates drawn up by the Management Board.

39 See para 18 of the Minister's Explanatory Memorandum.

40 See para 19 of the Minister's Explanatory Memorandum.

Formal Minutes

Wednesday 23 November 2016

Members present:

Sir William Cash, in the Chair

Peter Grant

Mr Andrew Turner

Kate Green

David Warburton

Michael Tomlinson

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.45 read and agreed to.

Resolved, That the Report be the Twenty-first Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Wednesday 7 December at 1.45pm.]

Standing Order and membership

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at www.parliament.uk.

Current membership

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Geraint Davies MP](#) (*Labour/Cooperative, Swansea West*)

[Steve Double MP](#) (*Conservative, St Austell and Newquay*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Peter Grant MP](#) (*Scottish National Party, Glenrothes*)

[Kate Green MP](#) (*Labour, Stretford and Urmston*)

[Kate Hoey MP](#) (*Labour, Vauxhall*)

[Calum Kerr MP](#) (*Scottish National Party, Berwickshire, Roxburgh and Selkirk*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Craig Mackinlay MP](#) (*Conservative, South Thanet*)

[Mr Jacob Rees-Mogg MP](#) (*Conservative, North East Somerset*)

[Graham Stringer MP](#) (*Labour, Blackley and Broughton*)

[Michael Tomlinson MP](#) (*Conservative, Mid Dorset and North Poole*)

[Mr Andrew Turner MP](#) (*Conservative, Isle of Wight*)

[David Warburton MP](#) (*Conservative, Somerset and Frome*)

[Mike Wood MP](#) (*Conservative, Dudley South*)

The following members were also members of the Committee during the parliament:

Nia Griffith MP (Labour, Llanelli), Rt Hon Damian Green MP (Conservative, Ashford), Kelvin Hopkins MP (Labour, Luton North), Alec Shelbrooke MP (Conservative, Elmet and Rothwell), Kelly Tolhurst MP (Conservative, Rochester and Strood), Heather Wheeler MP (Conservative, South Derbyshire)