

Europol's main operational considerations in light of the Europol Regulation

The following comments on the initial experience with the implementation of the Europol Regulation are provided to support the discussion by the Law Enforcement Working Party.

Europol's ability to process information

As indicated in the Commission's Inception Impact Assessment, some language of Europol's legal basis has given rise to problems of interpretation. The current legal basis for processing (personal) data does not match the operational requirements and does not provide sufficient legal certainty for Europol to perform its tasks in support of the Member States.

The first challenge that Europol is facing in this context concerns the direct access of Member States to data processed in Europol's processing environment. **There is a clear business need to perform joint operational analysis with our stakeholders in major investigations**, in particular those focusing on High Value Targets or performed in the framework of dedicated Operational Taskforces, which target the most dangerous organised crime groups active in the EU. There is a need for Member States to have direct access to Europol data in the Analytical Projects. The analysis process would be faster if analysts and investigators from MS could jointly work on the data in Europol's processing environment.

Another challenge Europol is facing **is related to the processing and analysing of high volumes of data**. Data submitted by Member States in serious and organised crime and terrorist investigations are increasing in size and becoming semantically more complex. These investigations create the necessity to process 'high volumes of data' involving sometimes terabytes of data, including audio, video and machine-generated data. As an example, in his decision on FIU.net¹, the European Data Protection Supervisor (EDPS) questioned **the lawfulness of Europol's ability to process 'high volumes of data'**². The main issue is the precise personal implication of data subjects, which is not evident at every stage of big data processing operations. The matter concerns, in particular, individuals who cannot be considered as suspects (yet), and, therefore, do not correspond to any of the data subject categories referred to in Article 18(5) and Annex II of the Europol Regulation.

Europol's duties stemming from the **Interoperability legal regime**, as well as the responsibilities addressed to Europol in the **new SIS II Regulations**, are also not fully mirrored or reflected in Europol's current legal regime.

¹ EDPS Decision C 2018-0548 on the technical administration of FIU.net by Europol, dated 20 December 2019.

² The EDPS has issued a ban concerning "(...) all processing by Europol of data related to individuals who are not classed as "suspects" under the applicable national criminal procedure law (...)."

Europol's 'service provider' status

An important task for Europol is to facilitate information exchange between Member States, Europol, other Union bodies, international organisations and third countries, as outlined in Article 18(2)(d). Europol's infrastructure can also be used to exchange information between Europol's partners on a bi- or multilateral basis, including also for information outside of Europol's mandate. This service provider role is currently implemented for a number of important cooperation areas. Europol's ability to play this role was challenged by the EDPS for both WHOIS and FIU.net, indicating that he does not believe Europol has the proper legal basis for this intermediary role³.

There is, therefore, a need to clarify the ability to use Europol's infrastructure for the facilitation of information exchange also between private parties and, ultimately, also the public, if appropriate. Additionally, there is a need to make clear that such a use can also occur, as it can at present, outside Europol's mandate, and subject to applicable national law, and that Europol is not responsible for any such bi- or multilateral exchanges, as is indeed also currently the case.

Europol's external relations regime

Operational cooperation with third countries requires, under the current legal regime, **the establishment of at least three legal instruments before full cooperation is possible**⁴. Although the conclusion of a working arrangement between Europol and a third country, i.e. the law enforcement authorities of a third country, is less cumbersome and time-consuming, this arrangement without an EU agreement in place, does not allow for the sending of personal data by Europol, and is, therefore, not fully reciprocal. Consequently, third countries are reluctant to engage in a process that they perceive as complicated, cumbersome and unbalanced.

Europol's possibilities to interact with private parties

The need for, and existence of, cooperation between law enforcement and private parties is an undisputed core ingredient of today's law enforcement, also for Europol. At present, Europol may receive personal data from private parties only indirectly, i.e. via a national unit or national authority (see Article 26(1) of the Europol Regulation), preventing Europol to receive such data directly from private parties in a structured manner. The current legal framework **limits Europol's ability to process data obtained from private parties on the substance**, which can cause considerable delays and ultimately render such data obsolete or cause a complete loss of relevant information for the law enforcement community in the European Union. Upon a Finnish Presidency initiative, the Council adopted recently the Conclusions on Europol's cooperation with private parties, formalising the **principle of the operational need for Europol to receive - and request - personal data directly from private parties**. This principle of direct receipt and request is not reflected in the current Europol Regulation.

Considerations on Europol's staff

Europol **should be allowed to use 'Europol experts'/'special advisors'**, in addition to the seconded national experts (SNE) category referenced in Art. 56 ER. In an operational context, it has turned out that the SNE concept, as well as the staff category of special advisors (Art. 5 CEOS), are not fully covering Europol's needs to make use of Member States' expertise in operational matters, to be provided often on a 'part-time

³ The EDPS argued that the Regulation does not refer to private parties in Article 18 and does not explicitly state that the exchanges may occur outside of Europol's competence in Article 18.

⁴ An EU agreement (Article 218 of TFEU) or an Adequacy Decision by the Commission, a Europol working/administrative arrangement and an arrangement on the exchange of classified information.

basis' only. Inspiration to design the new category could be taken from the existing rules on special advisors at Europol or the European Delegated Prosecutor concept of the new EPPO Regulation.

There is also a need to establish a pool of 'guest experts' under the aegis of Europol. Along the line of the EBCGA model ('standing corps') and elaborating the 'guest officer' concept at the migration hotspots, a group of law enforcement experts on various matters would be established for deployment at the Member States' request.
