



## Statewatch analysis

### “The Future of Europol”

#### - more powers, less regulation, precious little debate

*The EU is currently discussing the future of Europol but is ignoring critical issues in favour of giving the agency more powers and a more “flexible” legal framework*

Ben Hayes, August 2006<sup>1</sup>

#### Introduction

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In January 2002 *Statewatch* published a detailed report on the activities and development of Europol, the European Police Office. The report considered the expansion of Europol’s mandate and powers, questioned its effectiveness and examined judicial and democratic controls and the decision-making process within the EU.<sup>2</sup> *Statewatch’s* concerns were reflected in the report’s subtitle: “towards an unaccountable “FBI” in Europe”. During 2006 the EU has been holding an internal “debate” on the “future of Europol”. This article analyses that debate in the context of those concerns.

#### Background

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Europol was one of the most ambitious aspects of the EU’s “Third Pillar” (on justice and home affairs cooperation) agreed in the 1991 Maastricht Treaty, and among the most controversial. The Europol Convention was not until agreed in 1997 and Europol did not officially become operational until 1999, following ratification by national parliaments. But in reality, Europol was up-and-running much earlier, successive EU decisions (formal and informal)

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<sup>1</sup> This article first appeared in CILIP 84, no 2, 2006 (Burgerrechte & Polizei). <http://www.cilip.de>

<sup>2</sup> Hayes, B (2002) *The activities and development of Europol: towards an unaccountable “FBI” in Europe* (London: Statewatch).

leading to the establishment of the Europol Drugs Unit (EDU) in The Hague in 1994.

Europol is now a well-resourced organisation with a staff of 530 (including 93 “liaison officers” on secondment from the member states) and an operating budget of just under 68 million euros for 2007.<sup>3</sup> It was set-up as a central hub to collect intelligence from regional/national police forces in order to make links between crimes, suspects and investigations. Crucially, Europol’s operational powers were limited to the collection and analysis of information and its mandate was limited to serious international crime. Europol is nevertheless able to retain a potentially endless cycle of data on criminals, suspects, victims and their associates, subject to the detailed data protection provisions in the Convention. This information is held in Europol’s computer systems which finally went online in October 2005, more than four years later than planned (the initial contractor was sacked after failing to deliver the system) and at a cost of at least 65 million euros.

Since the entry into force of the Europol Convention in 1999, Europol and its advocates have argued successfully that the agency required more powers and a wider remit to fulfil its mandate. Europol’s competence was expanded from five to 27 specific forms of crime and now potentially extends to (facilitating investigations into) any criminal conspiracy that could be perceived to affect two or more member states. Europol has also steadily become more “operational” and is now authorised to participate in “joint investigative teams” in the member states and empowered to request individual states to “initiate, conduct or coordinate investigations in specific cases”. National parliaments have been presented with three protocols to the Europol Convention to implement these changes and the EU Council (member states) have agreed somewhere in the region of 40 implementing measures, along with 18 cooperation agreements with non-EU states and agencies. In 2002, *Statewatch* suggested that Europol was being transformed from the “reactive”, analytical agency envisaged by the Convention into a “proactive”, investigative agency.

At the same time, there are serious concerns about Europol’s effectiveness. Some member states’ police forces are clearly reluctant to cooperate with Europol in the way that the Convention envisaged, preferring to cooperate

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<sup>3</sup> See “Europol Annual Report 2005”, 22 March 2006: <http://www.statewatch.org/news/2006/apr/europol-report-2005.pdf>, and “Europol Draft Budget 2007”, 31 March 2006: <http://www.statewatch.org/news/2006/apr/europol-budget.pdf>. By way of comparison, the UK’s National Criminal Intelligence Service (NCIS), prior to its recent incorporation into the Serious Organised Crime Agency, had a staff of over 800 (including seconded staff) and a budget of 67 million pounds.

through traditional bilateral channels. Europol is certainly providing logistical support to cross-border investigations and operations such as “controlled deliveries” (the surveillance of cross-border shipments of drugs, people or illegal goods) but is clearly hampered by a lack of quality intelligence from the member states. This in turn affects the quality of its analysis work on organised crime and terrorism and the extent to which its reports provide “added value” to policing in the member states. Europol’s annual reports naturally focus on “crime-busting” success stories but reports from the Dutch Central Investigative Agency (CRI) in 2001 and the United States FBI in 2006 have been a lot less complementary. The CRI described Europol as mostly “an upgraded serving-hatch for vehicle registration plates and telephone numbers”<sup>4</sup> while the FBI cited “uncertainty and even distrust concerning the information/law enforcement intelligence process applied by Europol among the law enforcement community in the US”.<sup>5</sup>

The EU has conducted occasional evaluations of Europol in order to improve member states’ compliance with the legislation (the results of which will have not been made public) but more searching questions are left unanswered. Was and is Europol a solution ahead of its time? What sort of EU police office does Europe need and want? Is Europol a good use of public money? Is it adequately regulated?

### ***The EU “debate” on the future of Europol***

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The current EU debate on the future of Europol addresses these questions selectively. While the lack of confidence in Europol among the member states is acknowledged, there has been no in-depth review of Europol’s activities to date, nor any objective assessment of its shortcomings and weaknesses. Instead, the “debate” about the future of Europol is a blueprint for more powers and a wider remit based on two assumptions. First, Europol’s “cumbersome” legal framework is preventing it fulfilling its potential (a lack of “awareness” of Europol on the part of the member states is also cited). Second, that Europol needs yet more powers and a wider mandate to fulfill its potential. The circular nature of this argument is, of course, a recipe for Europol’s continuous expansion.

The trajectory of this debate is hardly surprising given its orientation. A discussion at the informal EU Council of Justice and Home Affairs ministers

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<sup>4</sup> The CRI’s criticism is discussed in the 2002 *Statewatch* report (see note 1, above).

<sup>5</sup> “Europol-USA agreement: Was it really needed?”, *Statewatch News online*, July 2001: <http://www.statewatch.org/news/2006/jul/01europol-usa.htm>.

in January 2006 was followed by a high-level, “stakeholders” conference on the “future of Europol” in February, where

*“A discussion emerged on whether Europol required enlargement or deepening. It was argued that this was not necessarily a contradiction, since these processes can be carried out simultaneously”*<sup>6</sup>

A “Friends of the Presidency” (FOP) group was then convened to produce an “options paper” on the future of Europol. FOP groups are *ad hoc* groups of experts from the General Secretariat of the Council, Commission and member states that are playing an increasing role in the development of EU justice and home affairs policy.

In April, draft Council Conclusions entitled “Europol: the way forward towards more efficiency *and accountability*” appeared (emphasis added).<sup>7</sup> The Conclusions called upon member states to speed-up ratification of the protocols to the Europol Convention and invited the Commission to prepare proposals for Europol on the basis of the FOP report and principles for a “new legal framework” (discussed further below). There were no actual references to “accountability” within the text, the title apparently referring to the single suggestion that the “Council should encourage the European Parliament to set-up a joint EP-national parliament mechanism to *follow* Europol’s activities” (emphasis added), a proposal that did not appear in the draft Council Conclusions on the “future of Europol” that followed in May.<sup>8</sup>

### ***The Friends of the Presidency “options paper”***

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The FOP report sets out a blueprint for the future of Europol.<sup>9</sup> It starts by lamenting the position of “old age” Europol in comparison to “younger brother organisations” such as Eurojust (the EU prosecutions agency), FRONTEX (EU border police) and CEPOL (EU police college), arguing that they benefit from “state of the art legislation”. What the FOP actually means is that these EU agencies, which were established by EU Council Decisions, can be developed without the approval of national parliaments

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<sup>6</sup> “Chairman’s Summary of the High Level Conference on the Future of Europol (23 and 24 February 2006)”, EU Council doc. 7868/06,29 March 2006: <http://www.statewatch.org/news/2006/apr/europol-future-06.pdf>

<sup>7</sup> “Europol : the way forward towards more efficiency and accountability - draft Council conclusions”, EU Council doc. 8234/06,6 April 2006.

<sup>8</sup> “Draft Council Conclusions on the future of Europol”, EU Council doc. 9670/1/06 REV 1, 30 May 2006: <http://www.statewatch.org/news/2006/may/eu-future-of-europol-concl-06.pdf>

<sup>9</sup> “Friends of the Presidency’s report to the Future of Europol”, EU Council doc. 9184/1/06 REV 1, 19 May 2006: <http://www.statewatch.org/news/2006/may/eu-fop-future-of-europol-06.pdf>

but Europol, which was established by Convention, can not. For the FOP, the time taken by national parliaments to ratify new powers for Europol in the protocols to the Convention is “clearly not tolerable”.

The “options paper” then goes on to present a significant expansion in Europol’s powers across the board. At only one point does the FOP present more than one “option” on any given issue (!), putting forward two possible ways to phrase the Europol mandate. Many of the “concrete options” - there are 78 of them in the annex to the report - are not discussed or justified in the commentary.

### ***Europol’s mandate: from “reactive” to “proactive” to “investigative”***

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The first option for phrasing Europol’s mandate is “combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy”. This would extend the current Europol mandate from 27 specific crimes to somewhere in the region of 40 (almost all criminality) and give Europol a role in national as well as cross-border investigations where “federal” or “EU crimes” are concerned. The second option, “serious international crime and terrorist offences affecting two [MS]”, would maintain the status quo. However, in “exceptional cases”, suggest the FOP group, “Europol should not be prohibited from assisting [in cases] which are only related to one Member State”, again suggesting that Europol should have a hand in national investigations (a proposition that is repeated later in the FOP report).

In its commentary the FOP group proposes seven particularly controversial extensions to Europol’s remit. First, it suggests the addition of “major events with a public order policing impact” to the Europol mandate, a clear departure from “serious organised crime”. Second, it proposes that Europol should “act as service provider for EU information systems in the area of internal security”. Specifically, it is proposed that Europol could host “a general EU-wide DNA database that is not limited to the forms of crime under Europol’s mandate” (a “PNR” database of information on air travelers is also suggested). Third, it proposes the “integration of [national] police databases to enable/simplify the flow of information to Europol”. Fourth, it proposes wider access to its own information system, suggesting that “Europol should be able to act as a black-box facilitator for all data exchange via and processed by Europol”. Fifth, citing the “principle of availability”, under which it is proposed by the EU that agencies in one member state should be able to access *all* law enforcement data in all the

others, the FOP suggests that “Europol should get access to the IT systems of the Member States on the same footing... (e.g. regarding DNA, fingerprints, etc.). Sixth, “Europol should be in a position to coordinate (not lead) a JIT” (joint investigation team), suggesting it should run cross-border investigations rather than simply assisting them as agreed in the protocol to the Convention. Seventh,

*“as a long-term option, the role of Europol in the fight against the Euro counterfeiting and possibly EU crimes (to be defined) should be reinforced by granting Europol investigative (but not coercive) competences (following the model of OLAF [the European Commission’s anti-fraud office] with regard to the fight against defrauding the Communities’ financial interests”.*

This is the first significant demand for formal investigative powers which certainly *are* coercive as far as they would allow Europol to conduct independent investigations in the member states.

These proposals will likely face significant opposition. However, future opposition may be weaker when long standing demands to replace the “cumbersome” and “inflexible” Europol Convention with an EU Council decision are implemented (demands now endorsed by the Council). This presents an opportunity to introduce new powers for Europol and will in any case mean that subsequent amendments to its mandate and powers will not require ratification by national parliaments, so controversial proposals will be subject to less scrutiny and debate. The FOP group also proposes that implementing legislation should be “simplified” by “creating one single procedure for preparing and deciding secondary legislation”.

*“The [Europol] Management Board could be designated as the legislative authority for staff and financial regulations, rules governing the relations with third parties, and analysis as well as confidentiality rules”.*

So much for the separation of legislative and executive powers.

### ***Regulation and data protection: from safeguards to scapegoats?***

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The FOP implies that a lack of “flexibility” over management, supervision and data protection issues have hampered Europol’s development and proposes a number of far-reaching changes. “More flexible data protection rules” are needed to allow Europol to access national police databases and host an EU DNA database. A specific “legal basis should be created for specialised databases at Europol, e.g. in the area of child pornography and terrorism”. At the same time, the prohibition in the Convention on linking

the Europol databases to other systems should be removed, and Europol should also be given access to the EU's Customs Information System and Eurodac database (of asylum applicants' fingerprints) as well as the Schengen Information System (partial access already agreed)<sup>10</sup> and Visa Information System (access proposed).<sup>11</sup>

These developments would undermine at a stroke many of the rules in the Convention that restrict data processing by Europol and access to its files. More importantly, as the Joint Supervisory Body on Europol has observed in respect to Europol access to EU visa data, this *“introduces a new policy concerning a specific element of Europol's task: the obtaining of information”* (emphasis added).<sup>12</sup> Similarly, the FOP group also proposes that Europol should be allowed to obtain information from and cooperate with private entities, another new significant investigative power.

The rules on Europol cooperation with third states and agencies are also audited for “flexibility”. Nine “operational agreements” with third countries and bodies that the Council has decided offer an adequate level of data protection have so far been concluded, together with another nine “strategic agreements”, which do not permit exchanges of personal data. Europol's strategic partners include Colombia, Russia and Turkey and negotiations are underway with Albania, Bosnia-Herzegovina, Moldova, Serbia and Montenegro and the Ukraine. The FOP group clearly believes that cooperation with these countries should override any concern for data protection standards in those countries. First, it proposes a “clarification” of the

*“possibilities under the current provision on transmission of personal data to third parties that permit Europol to exchange information also with third countries that do not have adequate data protection standards as stipulated in article 18 of the Convention”* (emphasis added).

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<sup>10</sup> “Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism”, OJ (2005) L 68/44.

<sup>11</sup> “Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences”, Commission document COM (2005) 600, 24 November 2006: <http://www.statewatch.org/news/2006/jan/com-600-05-VIS-security.pdf>

<sup>12</sup> “Opinion of the Joint Supervisory Body of Europol (Opinion 06/22) with respect to the proposal for a Council decision concerning access for consultation of the Visa Information System (VIS) by authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences”, 26 June 2006: <http://www.statewatch.org/news/2006/jul/jsb-europol-vis-access-opinion.pdf>

which is disingenuous because article 18 provides no such “possibilities” (it expressly requires “an adequate level of data protection”). Second, the FOP proposes a “review” of the rules on Europol agreements with non-EU states to “eliminate lengthy procedures”. At present, these agreements require a decision of the Europol Management Board, a report on standards in the cooperating state/agency from the Europol Joint Supervisory Body on data protection, and a Council Decision. These rules should be “simplified”, according to the FOP, so that only “one MB decision and one Council decision” are required.

Europol is also said to need “more flexible and efficient procedures for its management and supervision”. Europol’s Director should have “more autonomy”, the Heads of National Europol Units should be given more powers to implement Europol decisions at the national level, and Europol’s governance structure should be reformed. All member states currently have a seat on the Europol Management Board but the FOP proposes that this Board could become “a strategic body dealing with high level decisions... that convenes with a limited number of members” (rather than simply being “a forum for Member States’ representation”). The FOP notes that some member states “said that every MS should have a seat on the board”, but only the idea of a new “Executive Management Board” (comprised of “not all but for example 5 five MS”) made it through to the “concrete options”. These also suggest that the “supervision of Europol should be divided in two, administrative (functioning of the organization) and professional” - the Management Board would be responsible for the “administrative, financial tasks etc” while “professional supervision” should be “managed by” the EU Police Chiefs’ Task Force (PCTF). The PCTF was set-up in 1999 but still has no formal legal status in the EU; it now meets regularly at Europol in The Hague to discuss “operational matters”.<sup>13</sup> As the FOP group acknowledges, Europol-PCTF cooperation also lacks a formal legal footing.

Finally, the FOP addresses long-standing concerns about Europol’s legal and parliamentary accountability and the need for Europol to be “better marketed”. However, apart from the proposal to remove the opt-out in the Europol Convention allowing states to deny jurisdiction for the European Court of Justice over cases challenging the legality of Europol’s activities, the concrete options lack substance. The FOP also acknowledges the “clear case” for “more parliamentary oversight over Europol’s functioning” but then states that “such oversight [should] not have any unintended negative

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<sup>13</sup> See “The EU’s Police Chiefs Task Force (PCTF)”, *Statewatch News Online*, March 2006: <http://www.statewatch.org/news/2006/mar/pctf.pdf>

effects on Europol's effectiveness". Proposals are subsequently limited to existing plans to make Europol's Director testify before occasional hearings in the European Parliament and establish a joint committee of MEPs and national parliamentarians, both of which have been around for five years.

***Conclusion: towards an unaccountable EU FBI?***

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Europol is a frustrated organisation in a frustrating political process. It is supposed to be the "centerpiece" of EU police cooperation and understandably wants to be a "real police force". But Europol's ambitions are matched by neither political will nor practical demand from the member states. So instead Europol is developing by default, slowly acquiring new powers to fulfill an expanding remit and trying to establish a "patch" in an already crowded and guarded terrain. Whether this is the best way to establish an EU police force (or a good use of public funds - half a billion euros by 2009) is highly debatable. But it is not debated.

The European and national parliaments have not been party to the EU debate on the "future of Europol" and the various options for consulting civil society and the public ignored. The FOP group's "options paper" is very ambitious (to say the least), but the same can be said of the EU, and Europol is apparently too politically important to be seen as a flawed or failing organisation. The Europol Convention is to be replaced by more "flexible" legislation and some new powers and a wider remit appear inevitable.

The way Europol is developing is symptomatic of much EU decision-making on justice and home affairs issues. In the absence of meaningful debate about the role and function of Europol (and other components of the European state) the incremental extension of its remit and powers will continue until the current wish list becomes a reality and the next one has taken its place.

Ben Hayes, *Statewatch*, August 2006

NB: Sources: please note that the links to documents are live.

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