

28-04-2022

Subject: Plenary vote on the revision of Europol's mandate

Dear Member of the European Parliament,

On 3 May, you will vote on the final trilogue compromise for the revision of Europol's mandate (2020/0349(COD) and the Schengen Information System 2020/0350(COD)).

We urge you to vote against these proposals, as we believe they will lead to a massive expansion of Europol's operational powers without sufficient democratic accountability, oversight and safeguards to guarantee the protection of fundamental rights. In particular, the legislation would create considerable risks of violations of the right to a fair trial, to privacy and data protection and to non-discrimination as well as freedom of expression.

Europol's reform undermines the rule of law

Law enforcement authorities are rightly required to operate within the law. One of the functions of a fair and open criminal justice system is to expose whether law enforcement authorities have exceeded their legal powers. This is required to uphold the rule of law, ensure the fairness of the criminal trial and remove the incentive for law enforcement authorities to act outside of the law. The same fundamental principle applies to the EU's policing agency, Europol.

However, Europol has been disregarding the applicable legal framework. After an extensive review of Europol's practices, the European Data Protection Supervisor (EDPS) ordered Europol in January 2022 to delete data that had been illegally retained and processed for years, in order to bring Europol's data processing practices back in line with its current mandate. This decision took place in the context of Europol's increasing operational role in collecting massive amounts of personal data and analysing it with the use of data mining techniques.

Unfortunately, instead of recognising the need for reinforced oversight to ensure compliance with Europol's existing mandate and the fundamental principles of necessity and proportionality, policymakers are now seeking to amend Europol's mandate in order to retroactively legalise the illegal retention of data on individuals (non-suspects) and in effect annul the impact of the EDPS order. If approved by the European Parliament, the reform will quash the EDPS's enforcement work of the past years and undermine the respect for its supervisory mandate, setting a terrible precedent for the future independent oversight of Europol's new expanded data processing powers.

It would mean that previously illegal conduct is retroactively made lawful – a clear affront to the rule of law and the values upon which the Union is founded.

Europol's reform bypasses the ongoing democratic debate on the AI Regulation

The report is in direct contradiction with the European Parliament's own position defined in the 2021 resolution on the use of Artificial Intelligence (AI) in criminal law and its use by the police and judicial authorities in criminal matters, which opposes the use of AI to predict future criminal behaviour. The report calls for a ban on the use of AI applications that could result in mass surveillance, including biometric mass surveillance, and highlights the risks of including historical racist data in AI training data sets, which inevitably leads to "racist bias in AI-generated findings, scores, and recommendations".

It is extremely concerning to see that these same conclusions are not being applied to the proposed Europol reform. If approved, the current proposal would give the agency free rein to develop and use high risk AI tools to analyse the data it collects as well as to supply national law enforcement authorities with automated decision making and profiling tools. The reform would reinforce a data-driven model of policing in Europe. EU legislators should discuss Europol's ability to conduct "research and innovation" and to use AI systems within the current discussion on the proposed AI Act (AIA)¹ and the specific exemptions the proposal contains for law enforcement uses. Instead, by voting for the Europol mandate, policymakers are pre-empting the ongoing democratic debate on the AIA through the rushed adoption of a new Europol mandate. In this context, 45 civil society organisations have called on EU legislators to prohibit predictive and profiling AI systems in law enforcement and criminal justice.² Any ban would also apply to Europol as a user, developer, and provider of such AI tools.

Europol's reform reinforces discriminatory policing practices in Europe

Europol's mandate reform will contribute to making predictive policing the new norm in Europe. Predictive policing is a controversial method known to have a disproportionate effect on racialised and marginalised communities.³ Europol would be allowed to seek "suspicious behaviours" and identify "persons of interest" by means of algorithmic data analysis of large datasets. This could lead to potentially severe violations of the right to non-discrimination as Big Data analysis relies on the prioritisation of certain characteristics informed by racialised and other discriminatory assumptions. As such, the outcomes of Europol's data analysis risk having a disproportionate impact on the fundamental rights of racialised and other marginalised groups.

The new proposed mandate would furthermore give Europol a role in identifying research priorities to which EU funds should be allocated. The selection of law enforcement related research projects could dramatically affect future policing practices on the ground, with detrimental impact on the rights of persons affected. Europol will also be allowed to develop its own algorithms with data it receives and stores in its databases. However, the data collected by national police authorities and by third countries and subsequently sent to Europol is generally

1 https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1682

2 Civil society calls on the EU to prohibit predictive and profiling AI systems in law enforcement and criminal justice, available at: <https://edri.org/wp-content/uploads/2022/03/prohibit-predictive-and-profiling-ai-systems-in-law-enforcement-and-criminal-justice.pdf>

3 Fair Trials (2021) Automating Injustice: The Use of Artificial Intelligence & Automated Decision-Making Systems in Criminal Justice in Europe, available at: https://www.fairtrials.org/app/uploads/2021/11/Automating_Injustice.pdf

obtained as a result of discriminatory policing practices, posing serious risks of bias based on race, socio-economic status or class and nationality. Europol's research project outcomes could lead to the deployment of unlawful biometric mass surveillance or 'predictive' policing technologies by EU and national law enforcement bodies that reinforce structural discriminations.

Europol's reform lacks meaningful accountability and crucial safeguards

Despite the proposed expansion of Europol's mandate, including extensive new data-processing capabilities, the existing oversight mechanisms will barely be adapted or strengthened. The new mandate provides that the European Data Protection Supervisor's ability (EDPS) to oversee Europol's new processing activities will be restricted and the new Fundamental Rights Officer will be appointed among Europol's staff, making it very difficult to independently exercise their missions. The supervision of Europol's day-to-day work and its compliance with the law will therefore remain superficial.

Furthermore parliamentary oversight by the Joint Scrutiny Parliamentary Group and access to information foreseen by the Regulation will never amount to robust scrutiny of Europol's operative work. The risks of rights violations going unnoticed for years, notably the right to fair trial, to privacy and data protection and the right to non-discrimination, are considerable. Effective and independent democratic oversight and accountability mechanisms are essential in ensuring that Europol exercises its powers in a proportionate and legitimate manner, in line with fundamental rights protections, and does not engage in any form of mass surveillance.

Europol's reform undermines the right to a fair trial

The proposed extension of Europol's mandate would increase its capacity to collect, analyse and process personal data. Some of this will end up being used as evidence in criminal proceedings. It is crucial that the fairness and reliability of this evidence can be challenged in court. Unless this evidence can be scrutinised, it will not be possible to identify errors (deliberate or not) in how evidence was collected and analysed which weaken its reliability. It will also be impossible to identify whether evidence was obtained lawfully, i.e. as a result of unlawful surveillance or, in the most extreme cases, as a result of torture (note Europol's increasing cooperation with third countries, including MENA⁴).

In purely domestic investigations, national law typically provides safeguards to allow the defence to identify and challenge unfairly obtained or unreliable evidence. This not only safeguards the fairness and integrity of justice systems; it also operates as a disincentive for law enforcement authorities to violate the law. However, in cross-border cases (where Europol is involved) these safeguards are not working. The inability to challenge the fairness and reliability of evidence obtained by Europol (or with its assistance) is currently being litigated in courts

4 <https://www.europarl.europa.eu/news/en/agenda/briefing/2018-07-02/12/strengthening-europol-s-cooperation-with-middle-eastern-countries>



across Member States in the context of the EncroChat⁵ and Sky ECC6⁶ investigations. Defence lawyers of people arrested pursuant to the evidence obtained by Europol are challenging the admissibility of the evidence on the basis that it was not gathered in a way that would be compliant under national investigative powers (see in the UK⁷) or that it violated the right to privacy enshrined in national law (see for instance in Germany⁸). However, the defence is hindered by the very limited transparency available over the data collection and analysis process – which some forensic experts have described as a “black hole”.⁹

Lastly, we also would like to highlight the risk of the reform being invalidated by the Court of Justice of the EU on the basis that Europol's new operational powers extend beyond the limits imposed by TFEU Article 88.

We urge Members of the European Parliament to put an end to current rights violations and vote against the legislative proposals to prevent enabling future violations.

We remain available should you have any question and we thank you for your attention.

Sincerely,

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5 <https://www.europol.europa.eu/media-press/newsroom/news/dismantling-of-encrypted-network-sends-shockwaves-through-organised-crime-groups-across-europe>

6 <https://www.europol.europa.eu/media-press/newsroom/news/new-major-interventions-to-block-encrypted-communications-of-criminal-networks>

7 <https://www.bailii.org/ew/cases/EWHC/Admin/2020/2967.html>

8 <https://www.landesrecht-hamburg.de/bsha/?query=DOKNR%3AJURE210003021>

9 <https://www.youtube.com/watch?v=JogUfLFtVMU>