DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committee on Criminal Law

on the Proposal for a Regulation COM(2020) 796 final amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation

Position Paper No.: 31/2021 Berlin/Brussels, April 2021

Members of the Committee

- RA Dr. Rainer Spatscheck (Chair)
- RA Stefan Conen, Berlin
- RAin Dr. Gina Greeve, Frankfurt
- RA Dr. Stefan Kirsch, Frankfurt am Main
- RAin Dr. Jenny Lederer, Essen
- RA Prof. Dr. Bernd Müssig, Bonn
- RA Dr. Ali B. Norouzi, Berlin
- RAin Dr. Anna Oehmichen, Mainz (Rapporteur)
- RAin Gül Pinar, Hamburg
- RA Michael Rosenthal, Karlsruhe
- RA Martin Rubbert, Berlin
- RA Dr. Heide Sandkuhl, Potsdam

In charge in the Berlin office

- RAin Tanja Brexl

Contact in Brussels:

- RAin Eva Schriever, LL.M.

Deutscher Anwaltverein
Littenstraße 11, 10179 Berlin
Tel.: +49 30 726152-0
Fax: +49 30 726152-190
E-Mail: dav@anwaltverein.de

Büro Brüssel
Rue Joseph II 40, Boîte 7B
1000 Brüssel, Belgien
Tel.: +32 2 28028-12
Fax: +32 2 28028-13
E-Mail: bruessel@eu.anwaltverein.de
EU-Transparency Register ID number:
87980341522-66

www.anwaltverein.de

Mailing List

Europe

- European Commission
  - Directorate General on Migration and Home Affairs
  - Directorate General on Justice and Consumers
- European Parliament
  - Committee on Civil Liberties, Justice and Home Affairs
- Council of the European Union
- Permanent Representation of the Federal Republic of Germany to the European Union
- Officers of the Länder
- Council of Bars and Law Societies of Europe (CCBE)
- Bundesverband der Freien Berufe
- European Criminal Bar Association (ECBA)
- European Digital Rights (EDRi)

Germany

- Bundesministerium des Innern
- Bundesministerium der Justiz und für Verbraucherschutz
- Rechts- und Verbraucherschutzausschuss, Innenausschuss des Deutschen Bundestages
- Vorsitzenden des Rechts- und Verbraucherschutzausschusses des Deutschen Bundestages
- Vorsitzenden des Innenausschusses des Deutschen Bundestages
- Landesjustizministerien
- Rechts- und Innenausschüsse der Landtage
- Bundesgerichtshof
- Bundesanwaltschaft

- Vorstand des Deutschen Anwaltvereins
- Landesverbände des Deutschen Anwaltvereins
- Vorsitzende der Gesetzgebungsausschüsse des Deutschen Anwaltvereins
- Strafrechtsausschuss des Deutschen Anwaltvereins
- Geschäftsführender Ausschuss der Arbeitsgemeinschaft Strafrecht des Deutschen Anwaltvereins
- Strafrechtsausschuss der Bundesrechtsanwaltskammer
- Vorsitzende des Strafrechtsausschusses des KAV, BAV
- Vorsitzende des FORUM Junge Anwaltschaft des DAV

- Deutscher Strafverteidiger e. V.
- Regionale Strafverteidigervereinigungen

- Organisationsbüro der Strafverteidigervereinigungen und -initiativen
- Arbeitskreise Recht der im Bundestag vertretenen Parteien
- Deutscher Richterbund
- Bund Deutscher Kriminalbeamter

- Strafverteidiger-Forum (StraFo) Neue Zeitschrift für Strafrecht, NStZ
- Strafverteidiger
- Juris
- KriPoZ Kriminalpolitische Zeitschrift

- Prof. Dr. Jürgen Wolter, Universität Mannheim
- ver.di, Bereich Recht und Rechtspolitik
- Deutscher Juristentag (Präsident und Generalsekretär)
- Prof. Dr. Schöch, LMU München

The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 62.000 German lawyers and lawyer-notaries in 252 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level.

---

1. Summary

The European Commission proposed a regulation for a new Europol mandate in December 2020 (**Proposal amending Regulation (EU) 2016/794**[1]). While the DAV acknowledges the importance of international police cooperation to combat cross-border crime, the planned amendments aimed at extending Europol's mandate cause great concerns as they will likely infringe human rights, circumvent judicial and constitutional safeguards and raise serious privacy and data protection issues.

The DAV therefore fully supports the CCBE's position paper on Europol's mandate. The present position paper aims at complementing the CCBE's position and focussing on the most pressing issues.

The Commission proposal has the objective of extending Europol's competences. Amongst others, the proposal seeks to **strengthen Europol's mandate by:**

- enabling Europol to **directly exchange data with private parties** (Article 26) by being "*able to receive personal data from private parties, inform such private parties of missing information, and ask Member States to request other private parties to share further additional information. These rules also introduce the possibility for Europol to act as a technical channel for exchanges between Member States and private parties.*"[2];
- enabling Europol to support Member States and their investigations through **big data analysis** (Article 18) by "*assisting in processing large and complex datasets*

[1]Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794 as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation (hereinafter: Proposal amending Regulation (EU) 2016/794), COM(2020) 796 final.
[2] Proposal amending Regulation (EU) 2016/794, p.12; see also *Riehle,* eucrim News "Commission Proposes Europol Reform", 12.2.2021.

to support their criminal investigations with cross-border leads. This would include techniques of digital forensics to identify the necessary information and detect links with crimes and criminals in other Member States."[3] **("big data challenge")**

- enabling the agency to **enter data into the Schengen Information System (SIS)** on the suspected involvement of a third-country national in an offence in respect of which Europol is competent (Article 4; see also **Proposal amending Regulation (EU) 2018/1862** (Schengen Information System)[4];
- clarifying that **Europol may request**, in specific cases where Europol considers that a criminal investigation should be initiated, **the competent authorities of a Member State to initiate, conduct or coordinate an investigation** of a crime that affects a common interest covered by a Union policy, **without the requirement for a cross-border dimension** of the crime concerned (Article 6).

The DAV severely criticises the scope of the proposed amendments to the mandate of Europol and is concerned about the high impact on fundamental rights and judicial and constitutional safeguards. The proposed amendments go beyond the limits imposed by Art. 88 TFEU which stipulates that Europol's mandate consists only in supporting and strengthening the action of the Member States' law enforcement authorities. Competences exceeding these limits such as those in the current proposal must be rejected.

Allowing Europol to approach private parties and to request information poses a serious risk for information to be transmitted that are otherwise protected by lawyer-client privilege and data protection laws. Lawyer-client privilege constitutes a fundamental pillar of the rule of law and is a necessary pre-requisite to guarantee access to justice. This may under no circumstances be circumvented. Also, as private parties are in no position to check the legality of such requests, the proposed system circumvents indispensable judicial safeguards.

[3] Proposal amending Regulation (EU) 2016/794, p.7.
[4] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1862 on the establishment, operation and use of the SIS in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol, COM(2020) 791 final.

With regard to big data analysis, the envisaged processing of personal data of non-suspects is incompatible with the jurisprudence of the ECtHR and the CJEU according to which the use of personal data is allowed only within the limits of what is strictly necessary.[5] The proposed amendments do not provide for sufficient judicial safeguards in this respect.

As concerns the proposed possibility for Europol to enter data of third country nationals in the SIS and to request Member States to initiate an investigation without requiring a cross-border element, such competences are not covered by Art. 88 TFEU and must therefore not be attributed to Europol.

2. Direct data exchange with private parties is incompatible with fundamental rights

The most controversial of these proposed amendments is the idea to allow Europol to directly exchange personal data with private parties: This suggestion raises serious human rights concerns.

On 14 May 2020, the Commission launched a public consultation on the inception impact assessment. The European Parliament Research Service, which analysed the outcome of that assessment, summarised the concerns as follows:

It should be pointed out that several contributors insist that ***evidence of the lack of effectiveness*** *of operational cooperation due to limitations present in Europol's current mandate should have been considered in the context of a full evaluation. Private sector contributors deem it necessary to consider the* ***negotiations on the e-Evidence proposal as a priority, before updating Europol's scope*** *and capability in requesting direct access to data from private parties. NGOs furthermore express the concern that enabling Europol to directly exchange personal data with private parties* ***would allow circumventing national procedural safeguards and accountability mechanisms****, while also being* ***incompatible with the EU Charter and national constitutional provisions****. In general, both the private sector and NGO contributors question whether*

[5] See also CCBE Position paper, p. 2, with further references.

allowing Europol to directly exchange personal data with private parties would be ***compatible with Article 88 TFEU and Article 6 of the Europol Regulation*** *(Europol is not entitled to taking coercive action or to starting investigations on its own initiative).”*[6]

These issues were also raised by Statewatch in their statement from 8.7.2020.[7] Similarly, the CCBE stresses the importance of prior judicial authorisation, independent control and effective remedies; all guarantees which will be circumvented if Europol accesses directly the data of private parties. The DAV shares these concerns.

If Europol would start to directly approach private parties with information requests, there would be no judicial review to check the legality of such requests. There is no guarantee that private parties would respect lawyer-client privilege and privacy and data protection regulations when they are approached by an international police organisation and requested to pass on data. German constitutional law provides important safeguards to privacy. Therefore, certain covert investigation measures request a court order, and telecommunication tapping or online searches that impact the core area of a person’s private life, e.g. medical data, (the Federal Constitutional Court speaks of the “*Kernbereich privater Lebensgestaltung*”) are inadmissible. If Europol was authorised to contact telecommunication service providers to request telecommunication correspondence, e-mails, whatsapps or the like from their customers, these telecommunication service providers would be in no position to check the legality of such request, or to filter the data provided in order to ensure that lawyer-client privileged information would be excluded, and that the core area of a person’s private life is not concerned. Similar to the proposals regarding e-evidence[8], such a request would circumvent all available judicial safeguards and could eventually lead to a European wide abolition of the lawyer-client privilege, a privilege recognised by European Courts.[9]

[6] *European Parliament Research Service*, Briefing “Revision of the Europol Regulation”, January 2021, p.8.
[7] *Statewatch*, Submission to the European Commission’s consultation on revising Europol’s mandate, 8 July 2020, https://www.statewatch.org/media/1215/eu-europol-consultation-submission-8-7-20.pdf.
[8] Proposal for a Regulation of the European Parliament and of the Council of European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final.
[9] Cf. ECtHR, U v. Ukraine, judgment of 11.03.2021, application no. 33040/08, para. 37 ff.; CJEU, decision of 04.02.1981 - 155/79, ECLI:EU:C:1982:157.

It would threaten not only the privacy of suspects and criminals, but also of any other innocent third party who was by coincidence involved in the requested communication.

Besides these devastating consequences, the proposal must also be rejected as it goes beyond the clear mandate of Europol as stipulated in Art. 88 TFEU. Europol's mandate is limited to supporting and strengthening "*action by the Member States' police authorities and other law enforcement services*". The treaty does not authorise Europol to replace and carry out genuine law enforcement authorities' action.

3. Big data analysis jeopardises fundamental rights not only of suspects

Pursuant to p. 10 of the Proposal amending Regulation (EU) 2016/794, Europol needs to *"ensure full compliance with **fundamental rights** as enshrined in the Charter of Fundamental Rights, and notably the **rights to the protection of personal data and to respect for private life**."* However, the big data analysis foreseen does not foresee any previous judicial authorisation, nor any judicial review. The risk of human rights violations of such big data analysis is therefore imminent.

The proposal aims at even extending Europol's current practice of processing personal data of suspects, but also of non-suspects. This practice as such is not compatible with European human rights, European data protection standards and therefore needs to cease. The proposed big data analysis may entail the potentially unlawful processing of personal data of vast **numbers of innocent people.**

The DAV can only reiterate the CCBE's statement in this regard:

Any direct or indirect access to personal data of the citizens undertaken by the States should fall within the bounds of the rule of law and, given that it would constitute an interference with fundamental rights, it must be kept to a minimum as regard to the scope of surveillance and period of data retention.[10]
And, based on the jurisprudence of the ECtHR and the CJEU, access, retention and further use of personal data by public authorities, such as Law enforcement authorities,

[10] CCBE Position paper, p. 1.

within the remit of surveillance measures must not exceed the limits of what is strictly necessary, assessed in the light of the Charter, in order to be justified within a democratic society.[11]

In addition, the proposed big data analysis has not only implications on the privacy of EU citizens, but also jeopardizes the **professional secrecy or legal professional privilege** given that lawyer-client correspondence is not excluded from this big data analysis.

4. Entering of data into SIS surpasses Europol's competences under Art. 88 TFEU

At present, Europol has the right to search the SIS, but is not allowed to issue alerts. In practical terms, the new category is intended to enable police and border officials to check whether a particular person is suspected of having committed a criminal offence that falls within Europol's competence. In the event of a hit, a report is then made to Europol describing when and where the person concerned was encountered and checked. Further action against this person is then the responsibility of the national authorities.

However, the active entering of data into the SIS constitutes a qualitative difference to the present system as it entails operational powers. The entering of data of third-country nationals into the Schengen Information System also surpasses the competences provided to Europol under Art. 88 TFEU. Entering data means setting the conditions for arrest of the concerned third-country national. Europol has no competence to make such a decision because Europol is not a prosecution authority and has no own prosecutorial or law enforcement powers. Hence, if Europol starts entering data into SIS based on information from third countries, there is no way to verify this information. Experience with Interpol has shown that red notices with third countries are too often used abusively. A recent report from Freedom House demonstrated that red notices are

[11] CCBE Position paper, p. 2.

used systematically by some States to silence political opponents in exile.[12] While Interpol has at least established a Commission on the Control of Interpol's Files (CCF), such a Commission does not exist at Europol, so there is no body to control the veracity and reliability of the data provided to Europol by Member States and third countries. The data collected at Europol, instead, is based on mutual trust between the Member States. Mutual trust does not exist vis-à-vis third countries. Moreover, giving the agency a role in entering data received from third countries into the SIS, or cross-checking data received from third countries with the Prüm system, may amount to 'data laundering' if that data is received from countries that cannot guarantee a sufficient level of human rights protection. It is for these reasons that Europol's competences cannot and should not become operational.

5. Request Member States to open investigations is incompatible with Art. 88 TFEU

Of course, Europol may have information which could be used to open criminal investigations in certain Member States, but this, again, would go beyond Europol's competence if it concerns offences without a cross-border dimension. Art. 88 TFEU limits Europol's competence explicitly to serious crimes "*affecting <u>two or more</u> Member States, terrorism and forms of crime which affect a common interest covered by a Union policy*". Moreover, to give such competence to a European agency like Europol would not be proportionate and significantly hamper Europol's efficiency as it would distract from more urgent tasks.

[12] *Freedom House*, Out of Sight, Not Out of Reach, https://freedomhouse.org/sites/default/files/2021-02/Complete_FH_TransnationalRepressionReport2021_rev020221.pdf.