



Directorate-General Internal Policies
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Citizens Rights and Constitutional Affairs

**Integrating the Europol convention into the European Treaties
and its potential transpillarisation.**

BRIEFING PAPER

Abstract: (Times new roman - text size 11 - maximum 15 lines)

Since 2002 it was agreed that the procedure for amendment of the Europol convention should be simplified. Several options have been elaborated. At this moment there is no political consensus on a final decision in how integrating the Europol convention into the European Treaties and its potential transpillarisation, nor on the procedure, neither on its scope. In the short term and without changing the current legal framework it is necessary to urgently implement the three agreed protocols and Europol will need to prepare for the time when these protocols amending the Convention will enter into force. The Hague program has created a new momentum for increased cooperation in the area of freedom, security and justice, and for Europol. A conscientious outlook to future challenges of EU law enforcement cooperation must recognise that it should become easier to adapt Europol's institutional set up. But in the absence of the Constitutional treaty, some Member States are of the opinion that the legal basis for Europol, including the modalities for changing it, should stay as they are. But it is also clear that other Member States show the willingness to at least explore new modalities and legal frameworks. So the two fundamental questions are:- the legal options of how to amend/replace the Europol convention, and the relationship of any such amendment with the Constitutional Treaty.

IP/C/LIBE/FWC/2005-xx

This note was requested by: The European Parliament's committee on Civil Liberties, Justice and Home Affairs.

This paper is published in the following languages: EN, FR.

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Manuscript completed 30 July 2006

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Brussels, European Parliament

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Integrating the Europol convention into the European Treaties and its potential transpillarisation.

1. Introduction

Since 2002 it was agreed that the procedure for amendment of the Europol convention should be simplified. Several options have been elaborated. At this moment there is no political consensus on a final decision in how integrating the Europol convention into the European Treaties and its potential transpillarisation, nor on the procedure, neither on its scope.

Today we have several hundred decisions, framework decisions and conventions that prove the livelihood of third-pillar cooperation. In the course of time, the EC has created a number of agencies¹ which now carry out more or less independently some duties, more particularly with reference to information management and inspections. Most of these organs, bodies or organisations have different legal status and different working procedures and regulations.

In matters of law enforcement, Europol stood in 1995 alone as an institutional player within the EU and Europol is the only organisation, also within the framework of the third pillar, having been created on the basis of a convention. Eurojust is in the process of establishing itself as a partner in the field of judicial cooperation. Sitcen was created to support political decision making in the arena of counter-terrorism. With Cefpol a new EU-organisation was set up with the aim of helping Member States in the training of their law enforcement staff. And, finally Frontex will help Member States in their efforts to effectively secure the EU's external borders. Olaf (first pillar organisation) was given the role to deal with irregular activities having an impact on the EU's financial interests.

Integration the Europol convention into the European treaties is a realistic but difficult option; its potential transpillarisation is a problematic, maybe unrealistic objective.

2. Europol and its partner organisations now

Europol was founded on the basis of article K1.9 of the Treaty of Maastricht. The Treaty of Amsterdam (art 30, par. 2) gave Europol a privileged position in the exchange of information between police forces. Within five years after the Treaty of Amsterdam had entered into force, Europol had to be enabled to facilitate and support the specific investigative actions of the competent authorities and to facilitate the co-ordination, also of operational actions of joint teams in which representatives of Europol play a supporting role.

The Treaty of Nice states in art. 40 par. 2(b) that the Council shall encourage cooperation through Eurojust by promoting support by "Eurojust "for criminal investigations in cases of serious cross-border

¹ European agencies working across Europe for you, European Commission, Office for official publications of the European Communities, 2004.

crime, particularly in the case of organised crime, taking account, in particular, of analysis carried out by Europol.

The (consolidated version of the) Treaty of the European Union (hereafter, TEU)² addresses the role of Europol as part of police and judicial cooperation in criminal matters. The role of Europol is further elaborated in art. 30 of the TEU.

Europol has been established on the basis of the Europol convention³. From the start, Europol had an informative, supporting and analytical role. This becomes clear from the declaration on the police which is annex to the convention, and which mainly talks about databases, support of the national investigations, analysis of information and the development of preventive strategies⁴.

The Europol convention has in the meantime been subject of relevant changes, giving rise to three additional protocols⁵:

- Protocol of 30 November 2000, amending article 2 and the annex of the Europol convention;
- Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol of 28 November 2002;
- Protocol of 28 November 2002 amending the Europol convention (providing the legal basis for the active participation of Europol's officials in joint investigation teams).

Unfortunately these protocols are not yet ratified by all EU Member States.

Eurojust was established in 2002 by Council decision⁶ in conformity with art. 41 (4) of the TEU as a body of the EU with legal personality and financed from the general budget of the EU, except as regards the salaries and involvements of the national members and assisting persons.

CEPOL was established by Council decision of 22 December 2000⁷.

In 2004, the Council has adopted a new multi-annual program in the area of “freedom, security and justice”: the Hague Program⁸. Within this program the European Council urges the Member States to enable Europol in cooperation with Eurojust to play a key role in the fight against serious cross-border (organised) crime and terrorism by:

- ratifying and effectively implementing the necessary legal instruments by the end of 2004;
- providing all necessary high quality information to Europol in good time;
- encouraging good cooperation between their national authorities and Europol.

² OJC 325, 24.12.2002, p.1

³ Council Act July 26th 1995 on the Convention based on article K.3 of the Treaty on the establishment of a European police office, *PB. C.* November 27th 1995, afl. 316

⁴ W. Bruggeman, “Policing in Europe: a new wave?”, in M. Den Boer, *The implementation of Schengen*, Maastricht, European Institute of Public Administration, 1997, 111-128

⁵ Europol protocols: the protocol amending art. 2 and the annex to the Europol Convention of November 2000, OJC 358 13.12.2000, p.1, the Protocol on the privileges and immunities of Europol, the members of its organs, its Deputy Directors and its members of 28 November 2002, OJC 312 16.12.2002, p. 1 and the Protocol amending the Europol Convention of 27 November, 2003, OJC 2 6.1.2004, p.3. The Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States, OJC 197, 12.7.2000, p.1 and its accompanying Protocol of 16 October 2001, OJC 326, 21.11.2001, p.2 and Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams, OJL 162, 20.6.2002, p.1.

⁶ Council decision of 28 February 2002, amended by Council decision 18 June 2003 with a view to reinforcing the fight against organised crime.

⁷ Now Council decision 20 December 2005 (OJ 01 October 2005), bringing the structure of Europol in line with the procedure of general budget of the EU and of the staff regulations of the officials of the European Communities and the conditions of employment of other sectors of the European Communities.

⁸ Council of Europe 13993/04: European Commission, November 5th 2004, 14292/04

The drawback of the in comparison “old” age of Europol is that its legal basis, a Convention, does not reflect state of the art legislations as it is possible under the current TEU. As a result, changing provisions of even minor importance has proven to last five years and longer. Particularly in comparison younger organisations like Eurojust or Cefpol this becomes an obvious and unnecessary disadvantage. With a view to the required level of preparedness for future demands at the EU level, the time frame for changing the Europol legal framework is generally considered to be unacceptable. A delay of more than five years for putting a minor change to Europol’s mandate into effect is clearly not tolerable, although this does not mean that the legal ratification procedures and its consequent delays are on themselves not justified taking into account the actual legal framework and democratic processes in place.

3. A new legal basis

Often the need for a new legal basis for Europol has been subject of concrete proposals and initiatives. Already in 2002, when the three protocols amending the Europol convention have been agreed, a study was launched on the possibility to substitute the Europol convention by another legal instrument.

The Hague program states that the Council should adopt the European Law on Europol, provided for in the art. III-276 of the Constitutional Treaty, as soon as possible after the entry into force of the Constitutional Treaty and no later than 1 January 2008, taking account of all tasks conferred upon to Europol.

The June 2006 **JHA** Council (conclusions on the future of Europol) was requesting the Commission, the Member States, Europol, as well as competent Council and Europol bodies to prepare as far as possible the entry into force of the three Protocols amending the Europol Convention in order for them to be fully applicable as shortly as possible after their entry into force.

In addition it is stated that the incoming Presidency should, through competent Council bodies, explore in which way the Europol convention could be abrogated in case it is replaced by a Council decision. Notably the question whether a protocol abrogating the Convention is a legal prerequisite or not, needs to be resolved. The Finnish Presidency should report on the result of this debate in December 2006.

Creating such a new legal basis is possible or following the Europol convention logic, or opting for a new mechanism.

Art. 43 of the Europol convention foresees that the Council in accordance with the procedure laid down in Title VI of the TEU, acting on a proposal from a Member State and after consulting the Management Board, decides unanimously on any amendments to the Convention. The question then arises as to whether it is legally possible to introduce in the Europol convention a procedure for amendment of some or all of its provisions by an act of the Council which would become effective upon its adoption and would not require adoption by the Member States in accordance with their respective constitutional requirements.

Conventions established by the Council pursuant to art. 34 TEU are in nature agreements of international law which become binding for the Member States only after they have expressed their consent to be bound by their provisions. The Vienna Treaty of Law of Treaties, which governs the rules applicable to international agreements concluded between States in written form and governed by international law whatever their particular designation establishes that "a treaty may be amended by "agreement between the parties" and that the rules on conclusion and entry into force apply to amendments "except in so far as the treaty may otherwise provide" (art. 39). Art 34 TEU only sets out the procedures for their establishment and the adoption of implementing measures and doesn't provide any specific rules on the procedure for amendments to such conventions.

Art. 34 TEU excludes that Council decisions can have direct effect. Member States should determine whether complementary implementing legislation is necessary in order to give effect to the Council decision. In future amendments of such a decision could however have to allow Member States a certain period of time to amend their national legislation (see in this respect also the Eurojust Council decision).

Art. 34 TEU provides that decisions implementing Council decisions are adopted by Council with qualified majority. Consequently all provisions presently requiring the Council to decide with unanimity should be brought in line. Equally should any reference to the procedure in Title VI be deleted, given that Title VI 34 TEU is applicable anyway.

Art. 35 TEU lays down rules on the competence of the Court of Justice which apply automatically to all Council decisions adopted on the basis of art. 34 TEU. Thus also to the Europol Convention in case it is replaced by a Council decision. The Protocol on the jurisdiction of the Court of Justice should therefore be abrogated.

In respect to the role of the European Parliament (EP) the point of reference is art. 39 TEU. It provides that the EP should be heard in respect to all implementing measures based on a Council decision as far as they are to be adopted by Council. This rule would also apply to a Europol Council decision. But the parliamentary control over Europol poses two separate questions:

- the control by national parliaments and the EP over the adoption of the Council decision and its future amendments does not have to be less compared to the control over the amendment of the Convention (protocol in need of ratification). The Member States need to discuss the way in which their National parliaments can be involved in the adoption and any future amendment of a Europol Council decision.

- the setting up of joint EP-national parliaments committee for the control over the activities of Europol might be an appropriate initiative.

In respect to the Europol budget, it should be underlined that art. 41 TEU allows that Europol also in the future continues to be financed directly by the Member States, if the Council unanimously so decides, thus excluding community financing and involvement of the budgetary authorities.

It would also be appropriate to consider replacing also the immunities protocol by a Council decision.

Already at its meeting of 28 February 2002 the Council agreed that the procedure for amendment of the Europol Convention should be simplified⁹. Different options were identified¹⁰:

- Option 1: Amendment of the Europol convention by Council decision. This option is the most simple, allowing the entire Europol convention to be amended by Council decision. Apart from art. 43 of the Europol convention, this option would not require any amendments to the text of the Europol convention.

- Option 2: Amendment of the Europol convention by Council decision but limited to certain articles of the convention. The difference with option 1 is that in option 2 the simplified procedure is limited to certain parts of the Convention (e.g. the articles of more technical nature), while other parts can only be amended by a protocol requiring ratification.

The use of two legal instruments could be the consequence of having two different procedures for amending the convention, each applicable to different parts of the convention. Needless to say that the combination of two procedures which differ substantively might create complicated legal problems.

- Option 3: Replacing the Europol convention by a Council decision. Although looking simple this is still the most controversial option. The Legal Service of the Council is of the opinion that the replacement of the Convention by a Council decision requires that the Convention be abrogated by an act in respect of which all Member States must indicate their consent, in compliance with the requirements of their constitutional rules to that effect.

In case option 3 would be chosen, a short term operation should be limited to those procedural amendments reflecting the nature of the instrument. Furthermore should it be considered to include amendments for joint teams, the instigation of investigations, money laundering (the protocol amending the Europol Convention).

In any case it is important to stress that all subsequent decisions based on the Europol convention (e.g. management board decisions based on and referring to an article of the Europol convention) will have to be revisited.

In case of a general overhaul of the Convention it is possible to adopt fairly quickly a protocol abrogating the Convention, while during its ratification the Council decision replacing the Convention can be prepared, finalised and adopted (given that it can anyway not enter into force before the protocol enters into force). The actual judicial actions relating to the introduction of a European arrest warrant are indicating that this more prudent approach has to be promoted as well for political as for legal reasons. A more risky alternative or parallel more fundamental approach will be discussed in chapter 5.

4. The Constitutional Treaty

The Constitutional Treaty has been adopted but will not be ratified in its actual format, acknowledging the fact that different Member States have rejected the Treaty via referenda. Nevertheless this Treaty can guide us in identifying possible future developments.

⁹ Europol 14, Brussels 06 March 2002

¹⁰ Europol 5, 2002; Europol 14, 2002

First the Treaty states (article III-275) that the Council of Ministers shall act unanimously after consulting the European Parliament when creating a European law or framework in order to establish measures concerning operational cooperation¹¹ between the Member States' authorities, including police, customs and other specialised law enforcement services. This means that, with reference to police co-operation, the rules for the co-operation between the competent authorities (art. III-275) reach as far as the competencies which are recorded in the current EU-Treaty.

The Treaty states in article III-276 that “ Europol’s mission is to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy. European laws shall determine Europol’s structure, operation, field of action and tasks. These tasks may include:

- the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the member states or third countries or bodies;
- the co-ordination, organisation and implementation of investigative and operational action carried out jointly with the member states’ competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.

European laws shall also lay down the procedures for scrutiny of Europol’s activities by the European Parliament, together with the Member States’ National parliaments. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the member states whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities”.

It is interesting to read this text together with article III-274 opening the possibility to establish a European Public Prosecutor’s Office from Eurojust.(...) The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in serious crimes affecting more than one member state and of offences against the Union’s financial interests (OLAF ?), as determined by the European law provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the member states in relation to such offences”. This shows the intention to opt for transnationalisation

In any case, the rules for the functioning of Europol are being changed. While article 32 of the current EU-Treaty states that every operational action of Europol has to be executed in consultation with the member states and that only the national authorities decide about the use of coercive measures, article III-276 reinforces the competencies of Europol. In case of serious crime affecting two or more member states, terrorism and forms of crime “which affect a common interest covered by a Union policy”, Europol has to support and strengthen action by the Member States’ police authorities and other law enforcement services. The application of coercive measures shall be the exclusive responsibility of the competent national authorities. The police co-operation is not - neither in the

¹¹ Measures such as the collection , storage processing, analyses, exchange of relevant information AND common investigation techniques.

constitutional treaty – covered by community law, although the way to harmonisation is kept open by enumerating the offences for which a European framework law can lay down minimum requirements.

Thus, the JAI co-operation should not only be subject to (geographical) expansion, but especially to deepening and there is apparently a major concern for effectiveness and legitimacy. The description of the task of Europol had to be replaced by a new treaty, in which the role of Europol in the international co-operation must be more clearly defined. Also, Europol will be connected more closely to Eurojust and vice versa.

But the fact remains that, as long as the Constitutional Treaty has not entered into force, the existing treaties contain the legal basis for the actions of the Council. With reference thereof, the Council of the EU is of the opinion that it is very important to elaborate adequate European legal instruments, to strengthen the practical and operational co-operation between the national authorities involved, and to execute the agreed measures in time. Thus, efforts have been made to set off the weaknesses of the existing co-operation, without affecting the principle of sovereignty by – where possible and needed – making adjustments.

So the intentions are clear but the question is what will happen now, acknowledging the fact that there is no political basis for ratifying the European Constitution in the coming years. The question is now to see how far the willingness of the Member States is reaching when translating the Hague Programme into concrete action without being grounded on the European Constitution itself.

5. What now?

In the short term and without changing the current legal framework it is necessary to urgently implement the three agreed protocols and Europol will need to prepare for the time when these protocols amending the Convention will enter into force. As the June 2006 Council conclusions on the future of Europol are requesting the Commission, the Member States, Europol, as well as competent Council and Europol bodies to prepare as far as possible the entry into force of the three Protocols amending the Europol Convention in order for them to be fully applicable as shortly as possible after their entry into force. This means that this track is still being considered as being the best short term approach¹².

Furthermore the Hague program has created a new momentum for increased cooperation in the area of freedom, security and justice, and for Europol. A conscientious outlook to future challenges of EU law enforcement cooperation must recognise that it should become easier to adapt Europol's institutional set up. It remains extremely important to explore which way the Europol convention could be abrogated in case it is replaced by a Council decision. Notably the question whether a protocol abrogating the Convention is a legal prerequisite or not, needs to be resolved.

The Finnish EU-Presidency¹³ has stated recently that the improvement of the regulatory framework of Europol, development of Europol's work and the furthering of co-operation between Europol and Eurojust are of utmost importance.

¹² Europol 49, 6 June 2006

¹³ Cats 129, 26 June 2006

But in the absence of the Constitutional treaty, some Member States are of the opinion that the legal basis for Europol, including the modalities for changing it, should stay as they are. But it is also clear that other Member States show the willingness to at least explore new modalities and legal frameworks. So the two fundamental questions are:

- the legal options of how to amend/replace the Europol convention, and
- the relationship of any such amendment with the Constitutional Treaty.

Different strategies are possible, what brings us to the following recommendations.

Recommendation 1.

In the absence of the Constitutional treaty, it is recommendable to adopt and follow option 3 as designed in chapter 2 above. Repealing the current convention and replacing it with a third pillar decision à la Eurojust. This may cause some delay in Member States abrogating the current convention, but legally it would provide a fresh start.

If option 3 is followed, two approaches are possible:

- *Replacement of the convention by Council decision, but limited to the Europol legal acquis so far (Europol Convention + agreed Protocols) what in fact means the mere implementation of the Hague Programme without further structural interventions, nor changing the mission of Europol.*

- *An alternative approach to this scenario would be possibility to also consolidate provisions on data protection and international agreements and the exploration of adjusted¹⁴/new responsibilities¹⁵ for Europol – but within the framework of the European constitution acquis.*

If option 3 is considered insufficient two scenarios are possible:

- scenario 1 : Opting for a general overhaul, aligning all or part of the instruments creating third pillar organisations or agencies, as far as their legal status, areas of responsibility, financing system (budget), decision making authorities and procedures, staff regulations, accountability and control (judicial, other) are concerned. It would then also be preferable to harmonise the (staff) regulations with those of the EU.

¹⁴ The current mandate is considered by Europol itself to be too narrow to address all forms of international crime and to assist with national investigations. Member States suggested two different options for phrasing the mandate of Europol:

- "Europol's objective shall be to support and strengthen action by Member States' competent authorities and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy", or

- "Europol's objective shall be to support and strengthen action by the Member States' competent authorities and their mutual cooperation in preventing and combating serious international crime and terrorist offences affecting two or more Member States.

Europol would also profit from a more clear distinction between its objective, competences and tasks. Another option would be to omit in art. 2 of the Convention the words "there are factual indications that an organised criminal structure is involved and". This would broaden the radius for Europol to deal with serious international crime, committed by individuals for example, but with an impact on two or more Member states. The mandate would also cover for example child pornography without the precondition that organised crime groups are involved.

¹⁵ In this case the following questions have to be answered:

- do the Member States see Europol purely as an organisation gathering, analysing and distributing information?

- should Europol, in addition to an intelligence agency, also be an operational coordinator and a platform for new initiatives?

- do the Member States want Europol to deal with serious crime only, or should Europol take upon all law enforcement tasks, such as public order?

- scenario 2: The developing of a genuine European Institute, where someday all European components of police co-operation are gathered (Europol, OLAF, Cefpol, Eurojust, Frontex, Sitcen, Schengen), whether or not steered and led by the European Police Chiefs Task Force.

Recommendation 2

It is advisable to develop a short term strategy based on scenario 1, and to parallel develop a long term strategy by inviting all Member States', the Commission and the European Parliament to explore to what extend there is enough clarity and willingness for new initiatives as designed in option 1 and 2.

Nevertheless the second scenario is the most ambitious but less realistic one. This scenario would facilitate possibilities for using the passerelle provisions to transfer some elements of the third to the first pillar first or for a more fundamental transpillarisation of Europol and the readjusting of the mandate of each organisation focussing on security and law enforcement activities. This idea on itself is very attractive but without a new European Treaty basis it could create a boomerang effect when starting already now new discussions based on such a fundamental change.

To conclude, each initiative and the assessment of the likelihood of any option, solution or scenario have to be assessed from a governance perspective, and in particular measure its expected effectiveness, efficiency, legitimacy and/or democratic control.

- do Member States want Europol to be a mainly police organisation, or should other services such as customs and intelligence services also be included?