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Europol, the investigation of ‘European crimes’ and police cooperation: do we need a EU’s Agency with executive powers?

On the arrest of the former vice president of the European Parliament and the ‘Qatargate’

Gema Pérez Souto¹

ABSTRACT: On 9 December, several arrests were made in Brussels as a result of a joint operation by Belgian, Italian and Greek police, including, among others, the then Vice-President of the European Parliament, Eva Kaili, who remains in pre-trial detention at the time of writing this paper. The investigation is ongoing and the case involves alleged offences of membership of a criminal organisation, money laundering and corruption in relation to the network that allegedly received large payments from Qatar and Morocco for both political and lucrative benefits in the EU. Some voices were then raised calling for a Europol with European FBI-style powers but is this possible under the EU Treaties? Are Europol’s present powers sufficient to fight against serious transnational and organised crime? This paper seeks to answer these questions.

KEYWORDS: Europol – Police Cooperation – Executive Powers – European crimes - Eva Kaili

1. Introduction

1. The arrest in Brussels on 9 December of the then Vice-President of the European Parliament (EP), Ms Eva Kaili and her colleague Mr Francesco Giorgi, an adviser to the EP, together with the former MEP Mr Pier António Panzeri and others, took place as part of an extensive operation by the police and the Belgian, Italian and Greek authorities in connection with the alleged offences of membership of a criminal organisation. Pier António Panzeri and others charged as part of an extensive operation by Belgian, Italian and Greek police and authorities in connection with alleged offences of membership of a criminal organisation, money laundering and corruption in relation to a network that allegedly received payments of large sums of money and other financial favours from Qatar and Morocco for both political and lucrative benefits in the European Union. These funds were allegedly managed through the NGO *Fight Impunity* chaired by Panzeri. At the time of writing this paper, the defendants, including the now dismissed EP Vice-President, were still being held in pre-trial detention under court order².

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² Politico, *Eva Kaili to spend Christmas in jail court rules*, <https://www.politico.eu/article/eva-kaili-qatargate-scandal-corruption-lawyers-jail-electronic-tag/>

2. These events were immediately preceded by the intervention³ by Ms Eva Kaili, who was still in her vice-presidential office, in the debate of 21 November last in the European Parliament on the human rights situation in the context of the FIFA World Cup in Qatar. In this session, Kaili defended Qatar as a “model” in terms of “labour rights”, claiming that the World Cup was “proof of how sports diplomacy can bring about the historic transformation of a country, with reforms that inspire the Arab world”. She also criticised the stance of some MEPs, saying that Qatar continued to be “discriminated against”, adding that “they continue to take advantage of its gas and have their companies there with revenues in the millions”. The former Vice-President of the European Parliament concluded by saying that Europe could “defend its values”, although she stressed that it “lacks the moral courage to give lessons and get the attention of the media”.

3. In the light of the facts already known, while respecting the presumption of innocence in the context of the proceedings and considering that the Belgian Federal Public Prosecutor's Office has opened an investigation which is still in progress for the aforementioned alleged offences of money laundering, corruption and participation in a criminal organisation, the European Parliament would decide, in accordance with article 21 of its Rules of Procedure, to terminate the office of the former Vice-President of the European Parliament early by a vote of 625 votes in favour, one vote against and two abstentions (⁴).

4. Then, on 15 December, and reacting promptly, the European Parliament would also adopt a resolution on this issue, proposing immediate changes aimed at strengthening transparency and accountability in the European institutions in a practical way, to strengthen the integrity of the Parliament and confidence in the rule of law which is “fundamental to the functioning of European democracy (and to) ensure that democratic processes do not fall prey to private and external interests and that citizens' rights are fully respected”⁵.

5. In the same resolution, Parliament “emphasised the role of the European Public Prosecutor's Office, the European Union Agency for Criminal Judicial Cooperation (Eurojust), Europol and the European Anti-Fraud Office (OLAF) in the fight against corruption” and called for “further strengthening of the capacities of and cooperation between the European Public Prosecutor's Office and OLAF” and for “common anti-corruption rules applicable to Members and staff of EU bodies”⁶.

6. In European political circles, numerous declarations were made in relation to these events, with a particular reaction in the Portuguese national sphere from the *Assembleia da República* deputy (and former MEP), Mr. Rui Tavares (Livre), who defended a “European Union's police agency with executive powers” because, he pointed out, the alleged crimes “are not Greek, Italian or Belgian, they are European crimes”.

7. The arguments put forward by Mr Tavares in connection with the events described above serve as a backdrop to our position on the matter and, in this paper, to analyse the questions which have arisen in the light of these events: is it currently possible, in accordance with the Treaties of the European Union, to set up Europol along the lines of a ‘European FBI’ and increase its powers? And if not, is Europol's current legal framework sufficient to

³ “Madam President, so today, the World Cup in Qatar is proof, actually, of how sports diplomacy can achieve a historical transformation of a country with reforms that inspired the Arab world. I alone said that Qatar is a frontrunner in labour rights, abolishing kafala and reducing minimum wage. Despite the challenges that even European companies are denying to enforce these laws, they committed to a vision by choice, and they opened to the world. Still, some here are calling to discriminate them. They bully them and they accuse everyone that talks to them or engages of corruption. But still, they take their gas. Still, they have their companies profiting billions there. I have been lectured as a Greek and I remind us all that we have thousands of deaths because of our failure for legal ways of migration in Europe. We can promote our values, but we do not have the moral right for lectures to get cheap media attention. And we do not impose our way, we respect them, even without LNG. They are a new generation of intelligent, high-educated people. They helped us to reduce the tension with Turkey. They helped us with Afghanistan to save activists, children, women. They helped us. And they are peace negotiators. They are good neighbours and partners. We can help each other to overcome the shortcomings. They achieved the impossible already”. European Parliament, Intervention of Eva Kaili (S&D) on Situation of human rights in the context of the FIFA world cup in Qatar (debate), 21/11/2022, https://www.europarl.europa.eu/doceo/document/CRE-9-2022-11-21-INT-1-137-0000_EN.html

⁴ European Parliament, Early termination of the term of office of a Vice-President (Eva Kaili), 13 December 2022, https://www.europarl.europa.eu/doceo/document/CRE-9-2022-12-13-ITM-008-01_EN.html

⁵ European Parliament, Resolution of 15 December 2022 on suspicions of corruption from Qatar and the broader need for transparency and accountability in the European institutions (2022/3012(RSP), par. C, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0448_EN.html

⁶ *Ibidem*, par. 21.

combat crimes such as corruption, money laundering or organised crime, which are part of the fight against serious transnational crime in the European Union?⁷

2. Criminal investigations and police cooperation - the present role of Europol. Is there a future 'European FBI' on the horizon?

8. First of all, when analysing the question raised as to whether it is currently possible under the Treaties to establish a Europol in the style of a "European FBI" by extending its powers, it is necessary to recall the legal framework in which Europol is situated within the Treaties, considering the general framework of the distribution of the competences of the Member States and the EU. A consideration of such a nature as the need to establish an "EU's own investigative agency"⁸ must always be interpreted in the light of the EU Treaties by virtue of the principle of conferral⁹. According to this principle, Member States confer certain competences on the Union to achieve their common objectives¹⁰. This means that the EU can act only within the limits that the States have conferred on it in the Treaties and, consequently, any competence not conferred on the EU in the Treaties remain with the Member States, as established in Article 5.2 of the Treaty on European Union (TEU)¹¹. As we can see, therefore, in observance of this principle, there is a *presumption* of attribution of competences to the Member States contained in the Treaties and also consolidated in article 4.1 of the TEU, which establishes that: "In accordance with the provisions of Article 5, any competence not conferred upon the Union in the Treaties remain with the Member States".

9. In the matter under consideration, the European Union constitutes an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States as set out in Article 67(1) of the Treaty on the Functioning of the European Union (TFEU). Only by always bearing in mind the framework of Judicial cooperation in criminal matters and police cooperation¹² in the area of freedom, security and justice of the Treaties¹³ and the Charter of Fundamental Rights of the European Union (CFREU)¹⁴, the international law and international conventions to which the Member States or the European Union are party, and more specifi-

⁷ "(...) the threats to peace [for Europe] are not limited to the traditional form of external attack, but are spreading through our societies with terrorism and computer warfare", *Vid.*, Edgar Morin and Mario Ceruti, *Nuestra Europa, ¿Qué podemos esperar? ¿Qué podemos hacer?* (Barcelona: Ed. Espasa Libros, Colección Paidós Estado y Sociedad, 2013), p. 62.

For a detailed analysis of the threats facing the European Union from serious organised crime, *Vid.*, Europol's timely 2021 EU SOCTA report (European Union Serious and Organised Crime Threat Assessment), *A corrupting influence: the infiltration and undermining of europe's economy and society by organised crime*, https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf.

⁸ An idea that had previously been explored by Mr Antonio Tajani, former President of the European Parliament, after the terrorist attacks in Barcelona in 2017, *Diário de Notícias, Presidente do Parlamento Europeu propõe um "FBI europeu"*, <https://www.dn.pt/mundo/presidente-do-parlamento-europeu-propoe-um-fbi-europeu-8724907.html>

⁹ For a succinct analysis of the principle of conferral in the Treaties of the European Union, *Vid.*, Gemma Pérez Souto, "Princípio da Atribuição" in *Enciclopédia da União Europeia*, coords. Ana Paula Brandão, Francisco Pereira Coutinho, Isabel Camisã e Joana Covelos de Abreu (Lisbon: Petrony Editora, 2017), pp. 300-302.

¹⁰ Article 1 of the Treaty on European Union (TEU), "By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common".

¹¹ Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

¹² Articles 82-86 and 87-89 TFEU.

¹³ Articles 3, 4, 5 TEU and Title V TFEU.

¹⁴ Article 6.1: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". Publication and explanations: OJ C 326, 26.10.2012, p. 391-407; OJ C 303, 14.12.2007, p. 17-35.

cally the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁵ it is possible to frame Europol's functions. The Europol agency is therefore understood, in its genesis, within the Union's efforts included in the Treaties to guarantee a high level of security, specifically in Title V of the TFEU on the area of freedom, security and justice, where the aforementioned Article 67 is included. Paragraph 3 stipulates that these efforts are also ensured "through measures of coordination and cooperation between authorities between law enforcement and judicial authorities and other competent authorities, as well as through the mutual recognition of judicial decisions in criminal matters and, where necessary, through the approximation of criminal laws". In support of these efforts, we also recall that it is for the European Council¹⁶ to define the strategic guidelines for legislative and operational programming in the area of freedom, security and justice¹⁷.

10. Of particular importance in the general genesis of the legal framework in this area is the fundamental Article 83 TFEU, which provides for areas of legislative approximation according to which the European Parliament and the Council, through the ordinary legislative process, may establish minimum rules relating to the definition of criminal offences and sanctions in areas of crime which are particularly serious and have a cross-border dimension resulting from the nature or impact of such offences or from a particular need to combat them on a common basis. These areas of crime (without prejudice to those which may be identified by the Council in the light of developments in criminality) include, according to the TFEU, money laundering, corruption and organised crime with a cross-border dimension.

11. As is well known, the area of freedom, security and justice is among the so-called shared competences between the Union and the Member States¹⁸. Europol, for its part, is included in Chapter 5 of the aforementioned Title V, in the decisive Article 88 of the TFEU. Without needing to go into further considerations, this article in itself contains sufficient legal argumentation for it to be possible to conclude today that, in accordance with the Treaties, a "European Union's police agency with executive powers" along the lines of the American FBI would not be possible. Indeed, the aforementioned Article 88 establishes in its first paragraph that: "1. Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services 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", and ends in paragraph 3 with the following: "3. Any operational action by Europol shall 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". In other words, the fundamental point of opposition to considering the possibility of Europol as an "European Union's police agency with executive powers" is precisely that the coercive measures and functions are always retained in the hands of the Member States and, therefore, not of Europol, which lacks attributions or "executive powers"¹⁹. This is not to say that Europol's functions as currently designed do not

¹⁵ Article 6.3 TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". *Vid.*, Article 53 of the Charter of Fundamental Rights of the European Union (CFREU), "Level of protection. Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

¹⁶ In this area, it should also be recalled that Article 71 TFEU provides for the creation within the Council of a standing committee to ensure the promotion and strengthening of operational cooperation in the field of internal security within the Union. Without prejudice to Article 240, this committee will promote the coordination of the action of the competent authorities of the Member States.

¹⁷ Article 68 of the Treaty on the Functioning of the European Union (TFEU)

¹⁸ Article 4.4 j) TFEU. *Vid.*, also Article 2.2 TFEU, "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

¹⁹ For a critical view of the work on the Europol Regulation, see the interesting commentary by Emilio de Capitani, "The new Europol: no more European FBI, not yet European NSA", European Area of Freedom Security & Justice Blog, 06/12/2015, <https://free-group.eu/2015/12/06/the-new-europol-no-more-european-fbi-not-yet-european-nsa/>.

serve the purposes of fulfilling its aims of effectively combating serious transnational crime²⁰. This will be discussed further in the development and conclusions of this paper.

12. Let us see, then, what Europol's current legal architecture is and whether it is sufficient to fulfil its function of combating serious transnational crime and, therefore, crimes such as corruption, money laundering or organised crime.

14. Both the normative framework and the capabilities covered by the various legal instruments that have regulated or regulate Europol have evolved over the years. In a concise overview of Europol²¹ of the various instruments up to the present Regulation governing it, we can begin by pointing out that Europol was created to give a *European* dimension to the investigation of crimes with a *European* scope²², which means that it was not established to investigate less serious or minor crimes or crimes with a strictly national scope. It was set up under Council Decision 2009/371/JHA²³ to support and strengthen the action of the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States. Decision 2009/371/JHA would replace the previous Convention, based on Article K.3 of the Treaty on European Union, establishing a European Police Office (Europol Convention)²⁴. In 2010, the "Stockholm Programme - An open and secure Europe serving and protecting citizens"²⁵ called for Europol to evolve to become "a hub for the exchange of information between Member States' law enforcement authorities, a service provider and a platform for police services". Subsequently, and in order to comply with Article 88(2) TFEU, which states that: "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and powers", Decision 2009/371/JHA was replaced by Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Police Cooperation (Europol)²⁶. Europol would evolve in parallel in its capabilities to meet the specificity of the new challenges posed by the fight against serious transnational crime.

15. The 2016 Regulation gives expression to the aforementioned Article 88. 1 TFEU, which states that Europol's role is to support and strengthen the action of the police authorities and other law enforcement services of the Member States (...). In other words, Europol's tasks continue with the Regulation, being to support and strengthen the action of the Member States and their cooperation in preventing and combating serious crime affecting two or more Member States²⁷. Article 1 states that Europol established by the Regulation replaces and succeeds Europol established by Decision 2009/371/JHA, creating the European Union Agency for Police Cooperation (Europol) to *support cooperation between law enforcement authorities in the Union*.²⁸ It should be noted that "of the forms of crime for which Europol is competent, organised crime will continue to fall within the scope of Europol's main objectives as, given its scale, importance and consequences, it also requires common action by the Member States because of its scope, seriousness and consequences"²⁹, not forgetting terrorism, where Europol should assist the EU Member States

²⁰ "Europol is the EU's law enforcement agency and it assists the Member States in their fight against serious international crime and terrorism. Established in 2000, Europol is at the heart of the European security architecture and offers a unique range of services. Europol is a support centre for law enforcement operations, a hub for information on criminal activities, and a focal point for law enforcement expertise. Analysis is central to Europol's activities. To give its partners deeper insights into the crimes they are tackling, Europol produces regular assessments offering comprehensive, forward-looking analyses of crime and terrorism in the EU", *Vid.*, Europol, *EU SOCTA (European Union Serious and Organised Crime Threat Assessment)*, *A corrupting influence: the infiltration...*, cit.

²¹ For an extensive and insightful analysis of Europol's legal framework over the years, *Vid.*, Alexandra De Moor & Gert Vermeulen, "Shaping the competence of Europol. An FBI perspective" January 2010, available on https://www.researchgate.net/publication/265184261_Shaping_the_competence_of_Europol_An_FBI_perspective

²² *Vid.*, André Klip, *European Criminal Law: an integrative approach*, Antwerp, Oxford, Portland: Intersentia, 4th edition, 2021.

²³ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) (OJ L 121, 15.5.2009, p. 37).

²⁴ OJ C 316, 27.11.1995, p. 1.

²⁵ OJ C 115, 4.5.2010, p. 1.

²⁶ Replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).

²⁷ *Vid.*, (6) Regulation Europol 2016

²⁸ Article 1.1 and 1.2 Regulation

²⁹ *Vid.*, (6) Regulation Europol 2016

in tackling common challenges to the fight against terrorism. Europol should also support and reinforce actions and cooperation in the fight against forms of crime affecting the interests of the Union. Corruption, money laundering and organised crime (to continue the thread of the case) are also among the crimes for which Europol is competent to support cooperation between EU law enforcement authorities, as already mentioned. It should also be added that Europol should provide strategic analyses and threat assessments to assist the Council and the Commission in setting the Union's strategic and operational priorities in the fight against crime and in the operational implementation of these priorities.

16. We can therefore conclude that Europol is essentially, and according to the Regulation, an (henceforth called) "Agency", but whose mandate is to perform tasks of support, co-ordination and co-operation between the police authorities of the European Union.

17. In this context, the 2016 Regulation established an issue that would later lead to its amendment, which is currently in force since 2022 and which will be discussed below. Article 7 of Regulation 2016 deals with the National Units, stating that each Member State shall set up or designate a National Unit, which shall be the liaison body between Europol and the designated competent authorities of the Member States. Each Member State shall designate an officer as head of the National Unit. Paragraph 6(a) specifies that "Each Member State shall, via its national unit or, subject to paragraph 5, a competent authority, in particular: (a) supply Europol with the information necessary for it to fulfil its objectives, including information relating to forms of crime the prevention or combating of which is considered a priority by the Union".

18. Consequently, rather than sterile questions about whether or not Europol's "executive" powers are necessary, what is fundamentally at issue here is the necessary supply of information by the Member States to the Agency (and which is not always provided in a fluid or relevant manner) in order to fulfil the functions entrusted to it, since, let us remember, Europol has also been entrusted with the strategic analysis of the information to be provided through these channels and for which it has precious instruments at its disposal. Although the Regulation establishes that Member States, through their national unit or a competent authority: "shall supply" the necessary information; and "shall ensure" effective communication and cooperation with Europol", the fact is that it is the direct responsibility of the national authorities to carry out this exchange of information, and in this legal framework, there is no "coercive" capacity of Europol to demand this information, for the reasons already explained³⁰.

19. On the other hand, in the 2016 Regulation, the exchange of personal data with private entities³¹ (a matter that is essential for the analysis of the information that allows Europol to fulfil the functions we have already detailed), indicated that the processing of personal data from private entities should always be done through a national unit (or through the contact point of a third country or an international organisation with which Europol has a co-operation agreement that allows the exchange of personal data³²). In short, Europol was forbidden to exchange data with private parties except in the cases referred to in Article 26(5) of the Regulation.³³

20. Europol argued the need to, inter alia, be able to directly exchange personal data with private parties. The Council, on 2 December 2019, in its conclusions on Europol's cooperation with Private Parties - Council conclusions (2 December 2019) corroborated Europol's arguments by stating that 'they play a growing role in preventing and countering cyberenabled crimes' and there is need for 'legal certainty if they are to transfer personal data to Europol'. This is all the more necessary in cases of datasets that are non-attributable, which means that the relevant jurisdiction

³⁰ *Vid.*, De Moor & Vermeulen, "Shaping the competence of Europol...", *cit.* p. 75 and 76.

³¹ Article 26 Regulation 2016.

³² In accordance with Article 23 of Decision 2009/371/JHA

³³ Article 26(5) Regulation 2016: '5. Europol may not transfer personal data to private parties except where, on a case-by-case basis, where it is strictly necessary and subject to any possible restrictions that may be stipulated pursuant to Article 19(2) or (3) and without prejudice to Article 67: (a) the transfer is of undoubted interest to the data subject and the data subject has given his or her consent, or the circumstances are such that such consent may be unambiguously presumed; or (b) the transfer is absolutely necessary to prevent the imminent commission of a criminal offence, including terrorism, for which Europol is competent; or (c) the transfer of personal data which are publicly available, is strictly necessary to carry out the task referred to in Article 4(1)(m), and the following conditions are met: (i) the transfer relates to a particular and specific case; and (ii) the fundamental rights and freedoms of the data subject concerned do not override the public interest necessitating the transfer in question.

is unclear, or multi-jurisdictional, whereby the datasets contain information relevant to many jurisdictions”³⁴ This position is also supported in the Home Affairs Ministers’ Declaration of 21 October 2020 which states that: “Europol must therefore be enabled to cooperate effectively with private parties, in accordance with the needs of the Member States and respecting their national legislation”. Also, a 2020 study on the exchange of data between Europol and private parties indicated that: “Europol receives only a minority of the personal data that private parties transfer to the national law enforcement authorities, even though this data relates or could relate to a crime within Europol’s mandate. On the one hand, national law enforcement authorities may not always transfer personal data to ENUs for various reasons, for example because the file must clearly suggest that the crime in question is within Europol’s mandate or because the national authorities lose clear visibility of the steps taken by ENUs. Importantly, ENUs are not always sharing data they received from private parties with Europol to a sufficient degree, but it is acknowledged that there might be legal reasons for not doing so.”³⁵ In relation to direct exchanges, “the study found that the system of referrals operates well and the system of Europol receiving personal data from private parties via an intermediary, typically national law enforcement authorities, is commonly used. As for private parties sharing personal data directly with Europol outside the context of referrals, the study found shortcomings, as proactive sharing is rarely used, because it is perceived to be a complex, complicated and slow process. Consequently, the study recommended the revision of the Europol Regulation to enable direct exchanges of personal data between Europol and private parties, and to empower Europol with a more extensive data processing mandate”³⁶.

21. As a result, Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 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 in research and innovation would finally be adopted³⁷

22. With this change in 2022, the aim was to respond to the increased volume and complexity of data collected in the framework of criminal investigations transmitted by Member States to Europol and requesting their operational analysis in order to identify links with crimes other than the one under investigation in the context of which they were collected and with offenders in other Member States and outside the Union. Therefore, “and since Europol can detect such cross-border links more effectively than the Member States through their own analysis of the data, Europol should be able to support Member States’ criminal investigations by processing large and complex data sets to identify such cross-border links provided that the strict requirements and safeguards set out in this Regulation are complied with. Where necessary to support an ongoing specific criminal investigation in a Member State effectively, Europol should be able to process investigative data that the competent authorities of the Member States are authorised to process in that specific criminal investigation (...)”³⁸. Consequently, Europol’s mandate has been reinforced

³⁴ Council, ‘Declaration of the Home Affairs Ministers’, 21st October 2020, (n 6) pt 8.

³⁵ Milieu Consulting, “Study on the Practice of Direct Exchanges of Personal Data between Europol and Private Parties”, September 2020, Final report HOME/2018/ISFP/FW/EVAL/0077

³⁶ *Vid.*, Niovi Vavoula & Valsamis Mitsilegas, Strengthening Europol’s mandate: A legal assessment of the Commission’s proposal to amend the Europol Regulation, STUDY Requested by the LIBE committee, European Parliament, 2021, p. 28.

³⁷ OJEU of 27.6.2022, L 169/1

³⁸ (22) Regulation 2022

with new tasks³⁹ and its ability to collect and process information has been strengthened⁴⁰, including Europol's new ability to be able to receive data *directly* from private parties, and in specific cases, where necessary and proportionate, to exchange personal data with such private parties.

23. Finally, we recall this essential point: police cooperation must always be understood in conjunction with judicial cooperation. This is made concrete by the fact that Europol is linked in the framework of the treaties with Eurojust⁴¹ (Art. 85 TFEU), according to which Eurojust's role is to support and strengthen coordination and cooperation between the national authorities responsible for investigating and prosecuting serious crime affecting two or more Member States or requiring prosecution on a common basis, on the basis of operations carried out and information provided by the authorities of the Member States and by Europol". Regulation 2022 also strengthens relations with the European Public Prosecutor's Office⁴² which is responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol⁴³, the perpetrators of, and accomplices in, offences against the

³⁹ *Vid.*, Article 4 (z) Regulation 2022. "(z) cooperate, in accordance with Article 12 of Directive (EU) 2019/1153 of the European Parliament and of the Council (**), with the financial intelligence units (FIUs) established in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council (***), through the relevant Europol national unit or, if permitted by the Member State concerned, through direct contact with FIUs, in particular by exchanging information and providing analysis to Member States to support cross-border investigations of money laundering activities of transnational criminal organisations and terrorist financing activities;

(*) Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU (OJ L 312, 7.12.2018, p. 56).

(**) Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules to facilitate the use of financial and other information for the prevention, detection, investigation or prosecution of criminal offences and repealing Council Decision 2000/642/JHA (OJ L 186, 11.7.2019, p. 122).

(***) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 1). No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73); EN 27.6.2022 Official Journal of the European Union L 169/15"

⁴⁰ "The purposes for which Europol can process personal data are extended - this includes the possibility for Europol to publish information on the most wanted fugitives, thus legalizing past practice; The new rules define situations in which Europol is exempted from its duty to allocate personal data to categories as defined in Annex II of the Europol Regulation. These rules mainly reply to the phenomenon that Europol has increasingly received large and complex data sets where a categorization is hardly feasible. The new rules are accompanied by several procedural safeguards. The situations in which data can be processed without data subject categorisation defined in the amended Regulation include: Processing of personal data received for the purposes of research and innovation projects; Processing of personal data that support specific criminal investigations and that were submitted by Member States, the EPPO, Eurojust or a third country requesting Europol's support - in this case, Europol can process the investigative data "for as long as it supports the ongoing specific criminal investigation for which the investigative data were provided" (new Art. 18a(1a)); Europol's possibility to request the initiation of criminal investigations is extended (Art. 6 of the Europol Regulation); The purposes for which Europol can process personal data are extended; The scope of Europol to cooperate with third countries is extended (...)", *Vid.*, Thomas Wahl, "Amended Europol Regulation in Force – Criticism Remains", *Eucrim*, 2 (2022): p. 99.

⁴¹ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138-183). Article 49 (Relations with Europol). Preamble: "56. To enhance operational cooperation between Eurojust and Europol (...) Eurojust should enable Europol to have access, on the basis of a hit/no-hit system, to data held by Eurojust. Eurojust and Europol should ensure that the necessary arrangements are established to optimise their operational cooperation, taking due account of their respective mandates and any restrictions provided by the Member States. These working arrangements should ensure access to, and the possibility of searching, all information that has been provided to Europol for the purpose of cross-checking in accordance with the specific safeguards and data protection guarantees provided for in this Regulation".

⁴² Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). Article 26a of Regulation (EU) 2022/991 (amending Europol regulation) rules on relations between Europol and the EPPO. (...) Europol should work closely with the EPPO and actively support investigations of the EPPO upon request by it, including by providing analytical support and relevant information. Europol should also cooperate with the EPPO from the moment a suspected offence is reported to the EPPO until the moment the EPPO determines whether to prosecute or otherwise dispose of the case. Europol should, without undue delay, report to the EPPO any criminal conduct in respect of which the EPPO could exercise its competence (...)"

⁴³ Article 102 of Regulation (EU) 2018/1727 provides that "the EPPO shall establish and maintain a close relationship with Europol" that "to that end, they shall conclude a working arrangement setting out the modalities of their cooperation" and that "Where necessary for the purpose of its investigations, the EPPO shall be able to obtain, at its request, any relevant information held by Europol, concerning any offence within its competence, and may also ask Europol to provide analytical support to a specific investigation conducted by the EPPO".

Union's financial interests⁴⁴ and with OLAF⁴⁵. In conclusion, in the case of the European Parliament and in the light of the role of the European Public Prosecutor's Office, for example, it will be necessary to see the evolution of the subsequent legal classification of the facts by the courts and to determine the possible competence of the EPPO if it were to fall under its jurisdiction if they were considered as criminal offences affecting the financial interests of the European Union.

3. FINAL REMARKS

24. Following the above overview of Europol's legal framework, and taking up the initial issue of the recent events surrounding the former Vice-President of the European Parliament, which has served as a backdrop to analyse whether it would be possible (and possibly necessary) within the current legal framework of the European Union to turn Europol into an "European Union's police agency with executive powers" the following conclusions can be drawn:

25. Consideration of making Europol an "European Union's police agency with executive powers" is, for the reasons set out in this paper, incompatible with the current legal architecture of the European Union Treaties. Consequently, only with a profound amendment of the Treaties themselves would it be possible to envisage such a scenario. This option would mean setting in motion the Union's institutional mechanism to carry out such an alteration, an issue that we do not consider realistic or institutionally sustainable at the current juncture, with the long and painstaking process of studying proposals, negotiations and final concretisations with the Member States.

26. The latest reform of the Europol Regulation, which has entered into force in 2022, has strengthened Europol's capabilities by allowing it, among other modifications, to directly exchange information with private entities, and in essence, Europol's ability to process data from various sources (subject to the requirements set out in the aforementioned amendment) to fulfil its tasks has been considerably extended. In our opinion, this extension gives Europol sufficient capacity to be effective in preventing and combating serious transnational crime in the European Union, bearing in mind that Europol's mandate is always intended to support and strengthen the action of the competent authorities of the Member States, with the Member States always retaining the power to apply coercive measures for themselves. In order to be able to fulfil its tasks, and from a practical perspective, Europol will need to be adequately supported financially and special emphasis will need to be placed on continuing to support the work of Europol's own experts, who are largely responsible for analysing the information processed by the Agency. If we refer to the case that has arisen in the European Parliament, the financial framework that shows the initiation of the investigations process points to the need for national authorities in similar cases to call on Europol's capacity and expertise to support the action of the competent authorities.

27. Police cooperation in the European Union must always be understood in conjunction with judicial cooperation. Europol must therefore work in coordination with the European Public Prosecutor's Office (in the powers conferred on the EPPO to investigate offences against the Union's financial interests, to carry out criminal prosecutions and to prosecute before the competent courts in the Member States), with Eurojust and with OLAF (in the latter's own sphere). The plurality and profusion of legal operators that currently exist in the EU, which have developed in tandem with the institutional progress of the Union and in response to the new and serious challenges posed by serious transnational crime, are in our opinion sufficient to deal with them and duplication or overlapping in their

⁴⁴ Article 86 TFEU. For the purposes of the Regulation 2018/1727 'financial interests of the Union' means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them. The EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law (fraud, as defined in article 3 and other criminal offences, including corruption, as provided for in article 4).

⁴⁵ OLAF was established by the Commission Decision of 28 April 1999 (Official Journal L 136, 31/05/1999 P. 0020 - 0022), OLAF exercises the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions (article 2). Regulation (EU, EURATOM) 883/2013 of the European Parliament and of the Council of 11 September 2013 establishes the legal framework of administrative investigations conducted by OLAF. The latest amendments provide for close cooperation with the EPPO based on complementarity, exchange of information and non-duplication of efforts (more information in https://anti-fraud.ec.europa.eu/about-us/legal-background_en). EPPO regulation (article 101), Eurojust regulation (article 51) and Europol regulation (article 21) provide for close cooperation between these entities and OLAF.

work should be avoided. It is also necessary to maximise coordination between all of them, carrying out an adequate processing and analysis of information (both judicial and police) and that the judges, prosecutors and police of the Member States who have to relate to these agencies and institutions have adequate training in this area which, due to its complexity, requires specific training from professionals who are experts in the field. In the case of the former Vice-President of the European Parliament, which serves as a guiding thread, let us remember that it has been necessary to coordinate both the arrests and the judicial orders for the entry, search and seizure of different computers, documents and other elements in Belgium, Italy and Greece simultaneously, for the time being. This is a clear example that judicial and police coordination and cooperation in the European Union works in practice and is effective.

28. Finally, the reinforcement of Europol's powers in the 2022 amendment together with the direct access and processing of a large volume of data to which it is empowered to do so, requires that special attention be paid to the respect, guarantees and democratic control mechanisms of Europol's tasks, ensuring that they are carried out in accordance with the rights enshrined in particular in the Charter of Fundamental Rights of the European Union, particularly in relation to the right to respect for private and family life and the right to the protection of personal data, in Articles 7 and 8 thereof, as well as in Article 16 TFEU which provides in its paragraph 1 that everyone has the right to the protection of personal data concerning him or her. In particular, the 2022 amendment already provides for a strengthening of the powers of the European Data Protection Supervisor (EDPS) over Europol's activities in this area, as well as the creation of a new post of Fundamental Rights Officer within Europol, to be appointed by its Management Board upon a proposal of the Executive Director, so we will have to be attentive to its forthcoming development and implementation of its functions in the field of Fundamental Rights.