

STOPPING THE UNFETTERED EXPANSION OF EUROPOL'S DIGITAL SURVEILLANCE POWERS AGAINST MIGRANTS

A position paper on the European Commission's proposal for a Regulation to enhance Europol's support in 'preventing and fighting migrant smuggling'

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WHO WE ARE

#ProtectNotSurveil seeks a world where people can move freely and technology is used to contribute to safety and human thriving and not used to dehumanise and reinforce oppression of racialised communities and migrants. Our mission is to challenge the use of digital technologies at different levels and advocate for the ability of people to move¹ and to seek safety and opportunity without risking harm, surveillance, criminalisation or discrimination. Our advocacy aims to hold accountable the EU, Member States and private companies profiting from human rights violations at and within the EU borders. We focus specifically on technology and its intersection with security, policing and migration. We do so by connecting digital rights, migrant rights and racial justice movements to challenge dangerous, techno-solutionist approaches in legislation, policy and practice; and promoting accountability that centres the experience and perspective of directly affected communities.

Credit: Petra Molnar



¹ This paper adopts the term 'people on the move' to encompass all migrants, regardless of their residence status. This includes individuals seeking protection, as well as those migrating for other reasons such as livelihood opportunities. We acknowledge that this term is limited, as the reality is much more complex and nuanced. Additionally, we include individuals who, while not currently migrating, reside or have resided in the EU for extended periods with precarious or no residence status.

EXECUTIVE SUMMARY

In November 2023, the European Commission proposed a new legislative package 'to prevent and combat migrant smuggling'.² The package contains (i) an update of the 20-year-old legislative framework (the 2002 facilitation package) under a single Directive, (ii) a reform of the mandate of the EU law enforcement cooperation agency, Europol, and (iii) an international 'alliance' to enrol third countries in tackling 'migrant smuggling' globally.

The #ProtectNotSurveil coalition understands the Facilitators Package as a further expansion of a digital surveillance regime that is based on the criminalisation and punishment of people on the move, as well as of those who provide humanitarian assistance to them. We share the serious concerns already expressed by other civil society actors in the sector³ that the chosen approach will not provide the care and protection people need, but only aggravate the criminalisation and dehumanisation of people on the move.

This position paper focuses primarily on the Europol Regulation, which proposes a significant expansion of powers, especially when it comes to its digital surveillance capabilities.

We argue that the European Commission is working under an unproven and non-credible assumption that increased police powers and large-scale data processing will somehow protect migrants, refugees and asylum-seekers from 'smugglers'.

The result is a law that will create more harm and discrimination for migrants and humanitarian actors at the hands of EU and national law enforcement and border authorities, whilst failing to counter the business model of organised smuggling networks. The expansion of Europol's powers can therefore be understood instead as a power-grab that is cynically and retroactively justified by feigned concern for people on the move.

² European Commission, 'Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework', 28 November 2023 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6081

³ PICUM, How the New EU Facilitation Directive Furthers the Criminalisation of Migrants and Human Rights Defenders, June 2024, https://picum.org/wp-content/uploads/2024/06/How-the-New-EU-Facilitation-Directive-Furthers-the-Criminalisation-of-Migrants-and-Human-Rights-Defenders_EN.pdf; Equinox Initiative for Racial Justice, Towards a safer migration system: Ending the Criminalisation of migration and Solidarity, November 2024, <https://www.equinox-eu.com/towards-a-safer-migration-ending-the-criminalisation-of-migration-and-solidarity/>;

Border Violence Monitoring Network (BVMN), Facilitation Directive: Feedback provided to the European Commission by the Border Violence Monitoring Network, 2024, https://borderviolence.eu/app/uploads/BVMN-Analysis-_Proposed-Facilitation-Directive-1.pdf



The #ProtectNotSurveil coalition urges the full rejection of the Europol Regulation.

We argue that:

- **The legislative package**, including the Europol Regulation, fails in its objective to target smuggling networks, reduce border deaths, or protect migrants;
- **We reject** the European Commission's premise that increased police powers and large-scale data processing will protect migrants, refugees and asylum-seekers. The result is not increased safety, but more dangerous routes and more persecution, discrimination and violence by authorities. Without providing adequate regular pathways to migration, smugglers will be able to continue their business model, while violent policing and unlawful data collection will be concentrated on the migrants the law is supposed to protect;
- **The Europol Regulation** fails to meet the EU's Better Regulation and legality requirements;
- **The European Commission** has failed to conduct an impact assessment, and its analytical document does not substantiate the necessity and proportionality of the proposed measures and their interference with fundamental rights. Doubts about the necessity and proportionality of the proposal were not only raised by civil society, but by Member States themselves;⁴
- **The Europol Regulation** unlawfully expands the EU's digital surveillance infrastructure without appropriate safeguards;
- **This is particularly important** in the context of biometrics, because the processing of biometric data constitutes a serious interference with the right to privacy and the protection of personal data and requires to be compliant with the principles of legality, necessity and proportionality;
- **The expansion of powers**, budget and resources to Europol through this Regulation circumvents the democratic process on budget allocation; and
- **We fear** that this proposal purporting to tackle criminal activities of migrant smuggling may in fact be a trojan horse for the actual purpose of providing Europol with increased budget, equipment and staff. It should rather be publicly debated as part of the upcoming discussions on the next EU Multi-Annual Financial Framework and weighted against other non-security, alternative approaches.

⁴ Statewatch, New powers for Europol: proposal gets frosty reception from member states, 12 February 2024, <https://www.statewatch.org/news/2024/february/new-powers-for-europol-proposal-gets-frosty-reception-from-member-states/>

We demand the full rejection of this reform and call on the EU to take responsibility for its own role in forcing migrants into life-threatening situations with no choice but to resort to 'smuggling' networks. To effectively end smuggling, we need an urgent shift in logic, starting with changing the EU's hostile border and migration policies and punitive digital borders.

INTRODUCTION

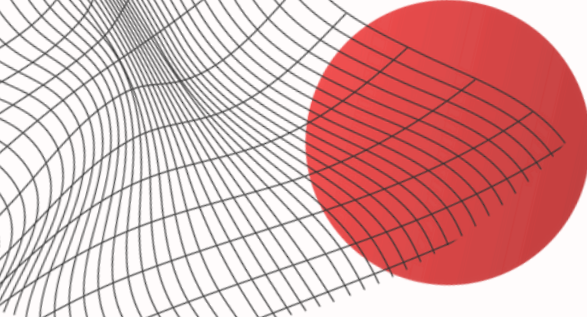
On 28 November 2023, the European Commission published a package comprised of a Directive on preventing and countering the facilitation of unauthorised entry, transit and stay in the EU (hereafter: the Directive)⁵; a Regulation to reinforce Europol's role in the 'fight against migrant smuggling and trafficking in human beings' (hereafter: the proposal)⁶; and a 'Global Alliance to Counter Migrant Smuggling'.⁷

The unforeseen publication of the legislative package and its manufactured urgency must be understood in the context of the 2024 European elections and immigration control as a leading election topic in recent years. Neither of the legislative proposals were part of the Commission's 2023 work plan, and no legislative initiative had been foreseen in the EU action plan against migrant smuggling covering the years 2021-2025. Worryingly, the Commission's rushed approach led to the circumvention of important democratic safeguards, such as the consultation of a diversity of stakeholders, the collection of proper evidence, the consideration of dissenting views and the production of an impact assessment with regards to fundamental rights (see Chapter 2).

⁵ Proposal for a directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0755>

⁶ Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0754>

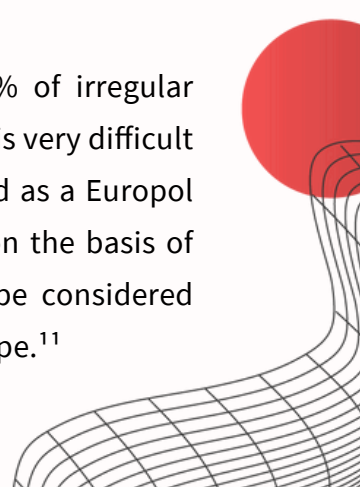
⁷ https://home-affairs.ec.europa.eu/document/download/60f6cc08-c7ee-46db-bee5-689562d34436_en?filename=Call-to-action-global-alliance-to-counter-migrant-smuggling_en_1.pdf The Global Alliance can be understood as an effort by the EU to push its agenda on migrant smuggling at the international level, encouraging third countries to adopt stronger border management, migration deterrence and anti-migrant smuggling policies and measures.



Over the past three decades, EU competences on migration policy have gradually grown. The EU has developed and implemented a body of harsh migration and border policies, based on the continent's colonial history and racial ideologies,⁸ establishing what is now labelled by many as 'Fortress Europe'.⁹ These policies reflect the criminalisation of and structural discrimination against migrants, seek to build deterrence and deportation regimes, and legitimise extreme forms of violence against people seeking to enter Europe. Surveillance technologies are part of the large arsenal of means and resources deployed to implement the EU's migration control agenda. As such, numerous and grave human rights violations, including of digital rights such as privacy and data protection, are documented at the borders and in migratory contexts at large.

In this context, the European Commission uses 'migrant smuggling' as a scapegoat, accusing 'smugglers' of being the sole culprits of human rights violations and migrant deaths. By doing so, the EU shifts the blame away from its own culpability in pushing migrants into life-threatening situations, de facto forcing them to resort to external help to move across borders. It also denies, minimises and deliberately obfuscates its direct and indirect participation in such acts of violence.

A figure put forward in the recent Commission's proposals is that over '90% of irregular migrants who reach the EU make use of the services of smugglers'.¹⁰ However, it is very difficult to find more information on the source of this figure, which is vaguely indicated as a Europol estimate. It is reported that this figure is based on data collected by Frontex on the basis of around 1,500 debriefing interviews with migrants, which the Council of Europe considered methodologically insufficient to draw conclusions on all irregular arrivals to Europe.¹¹



8 EUobserver, republished by EDRI, 'The colonial biometric legacy at heart of new EU asylum system' by Laurence Meyer and Chloé Berthélémy, 17 April 2024, <https://edri.org/our-work/the-colonial-biometric-legacy-at-heart-of-new-eu-asylum-system/>

Weaving Liberation, A vision for digital justice organising in Europe, February 2024, <https://weavingliberation.org/wp-content/uploads/2024/02/A-vision-for-digital-justice-organising-in-Europe.pdf>

9 Equinox, Ending Fortress Europe Recommendations for a racial justice approach to EU migration policy, 2022, <https://www.equinox-eu.com/wp-content/uploads/2022/06/Ending-Fortress-Europe.pdf>

10 Proposal for a directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0755>

11 Council of Europe Parliamentary Assembly Committee on Migration, Refugees and Displaced Persons, A shared European approach to address migrant smuggling, September 2024 <https://pace.coe.int/en/files/33713/html> (para 35)

Violence towards migrants enacted by 'smugglers' pales in comparison with that of EU and national law enforcement authorities, including police, military, immigration officers, border guards and government officials.¹² Until EU institutions and Member States acknowledge this reality, and enact fundamental changes to their model of responding to migration, the spiral of violence, death and rights violations will continue.

“The rise in people smuggling is a symptom of the EU’s inhumane approach to migration. EU lawmakers have almost decimated safe and legal routes for migrants, refugees and asylum seekers. The proposed Europol reform is a cynical political manoeuvre to deflect from the EU’s own human rights violations against migrants. By funding and prioritising the criminalisation of migrants and NGOs, the EU is fuelling violent and exploitative practices that scapegoat migrants rather than targeting organised crime. The Europol reform must be rejected; and the EU should shift and reallocate funding towards care and protection rather than law enforcement, detention centres, and surveillance.”

Stefi Richani, Advocacy Lead, Equinox Initiative for Racial Justice

1. THE EUROPOL REGULATION FAILS TO COMBAT MIGRANT SMUGGLERS, AND CRIMINALISES MIGRANTS AND SOLIDARITY INITIATIVES INSTEAD

The Commission's renewed EU action plan against migrant smuggling (2021-2025) is framed as a humanitarian intervention to reduce exploitation and deaths along migratory routes.¹³ However, ample evidence already shows how so-called anti-smuggling policies are often used against migrants themselves.¹⁴ By adding them to the mix of ever stricter migration and asylum policies (such as the EU Migration Pact), the EU continues to generate more violence and danger on migratory routes and at borders.¹⁵ Any policy response to the issue of smuggling must therefore reverse the harmful criminalisation of migration embedded in the Facilitators Package approach, and instead explore avenues to address the root causes of harm in migration routes.¹⁶

12 Human Rights Watch, Frontex Failing to Protect People at EU Borders, 23 June 2021, <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>;

LightHouse Reports, Frontex, the EU Pushback Agency, 6 May 2022, <https://www.lighthousereports.com/investigation/frontex-the-eu-pushback-agency/>;

Doctors without Borders, In plain sight: the human cost of migration policies and violent practices at Greek sea borders, 2 November 2023, <https://www.msf.org/plain-sight-migration-policies-greek-sea-borders>

13 European Commission, COMMUNICATION, A renewed EU action plan against migrant smuggling (2021-2025), COM(2021) 591 final, 29 September 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0591>

14 Borderline Europe, As Long As You Can Still Listen: The Criminalization of Migrant Boat Drivers in 2022, 10 January 2023, <https://www.borderline-europe.de/unsere-arbeit/long-you-can-still-listen-criminalization-migrant-boat-drivers-2022>;

15 Ibid and see footnote 2

16 Idem



Credit: Petra Molnar

A recent joint United Nations (UN) report found that 'smugglers' are not the main perpetrators of violence towards people migrating along the central Mediterranean route.¹⁷ On the contrary, law enforcement authorities, including police, military, immigration officers, border guards and government officials, are to a considerable extent responsible for the violence committed.¹⁸ The Europol Regulation's proposed expansion of police powers for Europol and Frontex therefore opens the floodgates of violence and impunity enacted against migrants and legitimises existing unlawful practices of the EU's police and border agencies.

Additionally, the EU has for years supported and boosted security forces in **Libya, Morocco, Niger, Egypt, Mauritania, Tunisia** and elsewhere, despite documented breaches of human rights in these countries.¹⁹ The Europol Regulation's commitment to increasing data-sharing and operational activities with third countries is a clear disregard for the human rights violations they have already committed against people on the move, and actively risks increasing their likelihood further.

While the Commission cites data from the International Organization for Migration (IOM) that over 20,000 people have died attempting to cross the Mediterranean since 2014²⁰ on its own webpage, IOM itself attributes this to 'gaps in search-and-rescue capacity and restrictions on the life-saving work of NGOs'.²¹

The legislative package that includes the Europol Regulation also takes aim at humanitarian actors, including search-and-rescue organisations, and criminalises them in the same breath as smugglers. The Facilitator's Directive includes a vague charge of 'public instigation' against aid organisations who provide life-saving aid to migrants in any form, risking their criminalisation and a quantifiable reduction in their capacity to provide assistance. Instead of targeting the business model of smugglers, or increasing the availability of safe migration pathways, the legislation only curtails the already small space in which humanitarian organisations can operate.

17 Based on interviews with almost 32,000 people over three years. International Organization for Migration (IOM), Mixed Migration Centre (MMC), Office of the United Nations High Commissioner for Refugees (UNHCR) (2024). 'On This Journey, No One Cares if You Live or Die: Abuse, Protection and Justice along Routes between East and West Africa and Africa's Mediterranean Coast.' Volume 2. IOM, MMC, UNHCR, Geneva, <https://www.unhcr.org/media/abuse-protection-and-justice-along-routes-between-east-and-west-africa-and-africa-ca-s>

18 Ibid

19 Refugees Platform in Egypt (RPE), EU funding for the Egyptian Coast Guard (Strengthening a Partnership That Violates Human Rights), 27 October 2022, <https://rpegy.org/en/editions/eu-funding-for-the-egyptian-coast-guard-strengthening-a-partnership-that-violates-human-rights/>

20 Ibid. page 3

21 Number of missing migrants recorded in Europe since 2014: <https://missingmigrants.iom.int/region/europe>

Against this background and under the aegis of the European Commission,²² Europol has seen its powers steadily increase since its establishment as an EU agency in 2009, with two substantial reforms in 2016 and 2022. This is despite sustained criticism of its data handling practices.²³ By proposing increased surveillance powers for Europol without appropriate impact assessment, this proposal risks justifying the violations of migrants' personal data and privacy rights, and increasing their unfair criminalisation. The European Data Protection Supervisor (EDPS) has already documented that in previous years, Europol has been woefully unequipped to process large amounts of sensitive data,²⁴ making the Commission's proposal of expanded data collection powers for Europol even more concerning.

The 2023 proposal again pushes for more data exchanges through Europol and gives the agency more data processing capabilities. This is put forward even though Europol is already engaged in some of the proposed activities in the regulation, such as the European Migrant Smuggling Centre (established in 2016)²⁵ and operational task forces (introduced in 2018)²⁶. As repeatedly observed with past reforms of Europol,²⁷ this seriously undermines respect for the rule of law. Informal and experimental projects are carried out without any public debate or scrutiny, with barely any oversight process, and only later codified formally in law when it can no longer be undone.

“The proposed regulation to reinforce Europol’s powers in the fight against migrant smuggling and trafficking is part of a sustained effort by the EU to increase the agency’s power, budget and access to personal data.”

Antonella Napolitano, Advocacy Advisor, Hermes Center

Credit: Petra Molnar

- 22 President Von der Leyen stated: 'I will propose to make Europol a truly operational police agency and more than double its staff over time. This should come with a strengthened oversight and mandate. We must bolster its capacity to support national law enforcement agencies.' https://neighbourhood-enlargement.ec.europa.eu/news/statement-european-parliament-plenary-president-ursula-von-der-leyen-candidate-second-mandate-2024-2024-07-18_en
- 23 EDRI, Europol's ever-increasing mandate: European Parliament failed to stand up for fundamental rights, 5 May 2022, <https://edri.org/our-work/europol-s-ever-increasing-mandate-european-parliament-failed-to-stand-up-for-fundamental-rights/>
- 24 EDPS, EDPS orders Europol to erase data concerning individuals with no established link to a criminal activity, 10 January 2022, https://www.edps.europa.eu/press-publications/press-news/press-releases/2022/edps-orders-europol-erase-data-concerning_en
- 25 Europol European Migrant Smuggling Centre – EMSC website: <https://www.europol.europa.eu/about-europol/european-serious-and-organised-crime-centre-esocc/european-migrant-smuggling-centre-emsc>
- 26 European Commission, Analytical document, SWD(2024) 94 final, 15 April 2024, page 11, <https://www.statewatch.org/media/4347/eu-com-europol-smuggling-proposal-swd-2024-94.pdf>
- 27 EDPS orders Europol to erase data concerning individuals with no established link to a criminal activity, January 2022, https://www.edps.europa.eu/data-protection/our-work/publications/investigations/edps-orders-europol-erase-data-concerning_en



The new regulation would also **strengthen collaboration between Europol and Frontex**, the EU's Border and Coast Guard Agency, bolstering the powers of both. Frontex has been found complicit in human rights violations committed by national border guards, such as pushbacks, at the EU's external borders.²⁸ We therefore find it hypocritical for the European Commission to attribute the responsibility of migrant deaths, especially at sea, to 'migrant smugglers,'²⁹ and to exploit the reform to increase Frontex's operational capacities, as well to legalise their unlawful data sharing practices with Europol.³⁰

Years of research consistently show that criminalising movement forces people away from their social networks and along riskier routes to evade detection, thereby increasing deaths and disappearances.³¹ **The lack of adequate visa regimes, travel permits, and generally of safe passage into the EU only exacerbates this problem and pushes people to rely on external support to move across borders.**³²

Instead of building alternatives, with this package the EU commits itself to false solutions and shadowy power grabs for its agencies operating in obscurity. It uses the protection of migrants as politicised pretext for doubling-down on a migration and asylum system, while leaving migrants to their continued fate of pushbacks, criminalisation, violence and death, and bolstering the demand for the organised business model of smugglers.

28 Lighthouse Reports, Frontex Complicit in Pushbacks, 23 October 2020, <https://www.lighthousereports.com/investigation/frontex-chapter-ii-complicit-in-pushbacks>

29 See pages 1-2 of the Commission's Explanatory Memorandum

30 EDPS, EDPS reprimands Frontex for non-compliance with Regulation (EU) 2019/1896, 8 January 2025

31 Ibid, footnote 6

32 Ibid, page 27

2. THE LEGISLATIVE PROPOSAL FAILS TO MEET BETTER REGULATION AND LEGALITY REQUIREMENTS

When it released its legislative proposal, **the European Commission failed to provide at the same time an impact assessment.** In view of the new data processing powers entailed by the extension of Europol's mandate and the resulting acute risk of fundamental rights interferences, an impact assessment is imperatively required, as it is the case for all 'Commission initiatives that are likely to have significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options' in accordance with the Better Regulation Guidelines of 2021.³³ In case C 482/17, the Court of Justice of the European Union established that 'the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if a legislative initiative is liable to have such implications'.³⁴

This failure to publish an impact assessment was pointed out by the UN Special Rapporteur on human rights defenders. She called it '[...] a shocking omission given the potential impact of the proposed legislation on fundamental rights protected under EU and international law'.³⁵ The European Data Protection Supervisor (EDPS) described it as 'deeply worrying given the nature of the personal data at stake (sensitive biometric data) and that vulnerable people may be involved (migrants)' and stated that 'the lack of Impact Assessment makes the assessment of necessity and proportionality more difficult'.³⁶

Indeed, **impact assessments form a key part of the Commission's better regulation agenda,**³⁷ which seeks to design and evaluate EU policies and laws so that they achieve their objectives in the most efficient and effective way. This was confirmed in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making which acknowledged the 'positive contribution of impact assessments in improving the quality of Union legislation' by '[helping] the three Institutions [to] reach well-informed decisions'.³⁸

33 European Commission, COMMISSION STAFF WORKING DOCUMENT Better Regulation Guidelines, SWD(2021) 305 final, https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd_2021_305_en.pdf

34 Judgment of the Court (Grand Chamber) of 3 December 2019. Czech Republic v European Parliament and Council of the European Union, C-482/17, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62017CJ0482>

35 UN Special Rapporteur on the situation of human rights defenders, Response to the proposal by the European Commission for a Directive to update the Facilitators Package, February 2024, <https://srdefenders.org/resource/position-paper-on-the-eu-commissions-proposed-directive-to-update-the-eu-legal-framework-on-people-smuggling/>

36 EDPS, Opinion 4/2024, 23 January 2024, https://www.edps.europa.eu/system/files/2024-01/2023-1247_d0187_opinion_en.pdf

37 European Commission, Better Regulation: why and how, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en

38 European Parliament, Council of the European Union, European Commission, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, 13 April 2016, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L._2016.123.01.0001.01.ENG

Four and a half months after releasing its proposal, **the Commission eventually published an 'analytical document'** in place of the missing impact assessment.³⁹

This document, which does not replace a proper impact assessment, raises further concerns which **call into question the claimed urgency of the proposal and the absence of an impact assessment:**

The absence of an impact assessment remains unjustified: First, the Commission had justified the lack of impact assessment at the time of the proposal's publication based on 'urgent operational needs'⁴⁰. However, **the subsequent analytical document does not provide any information to support this claim.** The Commission document explains at length the alleged need for more data exchange through Europol, but it does not provide any evidence to prove that the new activities are linked to the stated objective. Moreover, the lack of documented evidence means that **the supposed urgency of the reform is unsubstantiated**, despite the urgency being invoked to bypass a process designed to guarantee that EU law-making is evidence-based and transparent. As a result, the democratic quality of the Commission's legislative proposal is severely undermined.

The evidence collected and relied upon is insufficient and biased: Second, the analytical document relies primarily on the European Court of Auditors (ECA) 2021 Special Report on Europol's support to fight migrant smuggling,⁴¹ as well as alleged 'targeted stakeholders consultation' which are not accompanied by any resource. Specifically, the ECA Special Report **is very limited in its scope and objectives.** It only measured Europol's performance and addressed neither the impacts on fundamental rights of Europol's current activities in the field of migrant smuggling nor the future impacts of the proposed policy option, i.e. the expansion of Europol's capacities and operational powers for all categories of offences for which the agency is competent. These sources cannot be considered to amount to a proper evidence collection and constitute an incomplete impact assessment with regard to the quality standards defined in the Better Regulation guidelines.

39 European Commission, Analytical document, SWD(2024) 94 final, 15 April 2024, <https://www.statewatch.org/media/4347/eu-com-europol-smuggling-proposal-swd-2024-94.pdf>

40 European Commission, COMMISSION STAFF WORKING DOCUMENT Better Regulation Guidelines, SWD(2021) 305 final, https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd_2021_305_en.pdf

41 European Court of Auditors, Special Report, Europol support to fight migrant smuggling: a valued partner, but insufficient use of data sources and result measurement, 2021, https://www.eca.europa.eu/Lists/ECADocuments/SR21_19/SR_migrant_smuggling_EN.pdf



HUMAN RIGHTS GRAVEYARD

Credit: Petra Molnar

No alternative policy options are proposed: Third, the analytical document does not meet the requirement under the 2016 Interinstitutional Agreement that 'impact assessments shall be presented in such a way as to facilitate the consideration by the European Parliament and the Council of the choices made by the Commission' (para 14). It is even more important to provide an assessment of the different policy options considered by the Commission given the strong criticism expressed during the past consultations, human rights interferences at stake as well as Member States' international obligations in the field of migration and asylum.

The proposal largely relies on one-sided sources: Fourth, there is no diversity in the type of sources cited to support the proposal assumptions and way forward. Some limited exceptions aside, all sources come from Europol and Frontex themselves. Much reference is made to the ECA report, although the proposal fails to mention that the report itself pointed to the lack of evidence that Europol's data processing activities are effectively supporting the fight against migrant smuggling ('the results of Europol's support are difficult to verify, as it does not measure them comprehensively'), and it calls for more public transparency and internal documentation.⁴² The proposal fails also to specify who were the stakeholders involved in the consultation. This lack of transparency makes it impossible to assess if relevant voices were left out from the consultation process, such as digital and migrant rights organisations.

The most dangerous implications are hidden in the annexed financial statement: Fifth, many of the most concerning aspects of the proposal do not emerge from the legal text, but from the annexed financial statement. The budgetary implications of the new Regulation include 50 additional staff members as well as an increase of 50 million euros to the agency's budget in the Multiannual Financial Framework (MFF) period (2021-2027). Already the MFF foresaw an additional 160 agents for the agency with an associated cost of 114 million euros, and a total additional contribution of 178 million euros to the Europol budget.⁴³ **The highest budget line (over 21 million euros over three years)⁴⁴ is for the development of biometric systems and the upgrade of SIENA hardware and software,** which again indicates an extensive focus on the collection and exchange of data. By contrast, the word 'biometric' appears only once in the legal text (for more details, see Chapter 3.3). It should be noted that the financial statement does not include any increase in staff or budget for Europol's supervisory authority (the EDPS) or for any other oversight mechanism.

The proposal fails to respect the principle of legality as defined by the CJEU: Finally, many provisions in the proposal are too vague to be able to sufficiently assess the impacts on fundamental rights or even to understand the scope of the new powers for Europol. The proposal fails to provide clarity on how the new Europol functions interact with existing cooperation mechanisms (see Chapter 3.5). This is in direct contrast with the obligation to comply with the requirements of clarity and precision as enshrined in Articles 7, 8 and Article 52(1) of the Charter of Fundamental Rights of the EU, which are necessary to ensure the protection of the fundamental rights.

43 European Commission, footnote 4

44 Ibid, page 21

In its reply to our complaint, sent on 3 September 2024,⁴⁵ the European Commission seems to justify the absence of a fundamental rights impact assessment partly by the work of Europol's Fundamental Rights Officer (FRO). It states that 'the FRO is responsible for supporting Europol in safeguarding the respect for fundamental rights in all its activities as the Agency executes its mandate. The FRO's tasks have a particular emphasis on the Agency's operational work and activities.' Arguing that the existence of the FRO can be an effective replacement and a satisfactory safeguard is grossly inappropriate – especially because the role of the FRO was created only in 2022 and has very little experience and few working methods in place yet⁴⁶.

A fundamental rights impact assessment of the policy options drawn from the ECA Special Report by the Commission is therefore crucially missing. Considering the public concerns raised with regards to Europol's recent mandate reform,⁴⁷ a further expansion of its capacities without any comprehensive and substantiated fundamental rights impact assessment and an assessment of subsidiarity and proportionality seriously undermines core EU principles and democratic values, notably transparency, participation, human rights and efficient decision-making.

“Counter-smuggling policies that focus on cracking down on smuggling through more policing are often based on limited empirical data and several misconceptions. The proposed Europol Regulation is no exception. Proposing such measures without a fundamental rights impact assessment is irresponsible and short-sighted, as it neglects the risk of discriminatory surveillance of people crossing borders and the realities of migration.”

Silvia Carta, Advocacy Officer, PICUM

45 European Commission, 'DG HOME reply EDRI', 3 September 2024, <https://edri.org/wp-content/uploads/2024/10/DG-HOME-reply-EDRI-Facilitation-Package-Impact-Assessment-Complaint.pdf>

46 The 2023 FRO Annual Report notes in that regard: 'Given that the role of the Europol FRO was created in 2022, it had to be developed from scratch.' <https://www.europol.europa.eu/cms/sites/default/files/documents/2023%20Annual%20Report%20of%20the%20Fundamental%20Rights%20Officer%20at%20Europol.pdf>

47 Fair Trials, Europol's expanding mandate: European Parliament must stand against unaccountable and discriminatory policing, 28 April 2022, <https://www.fairtrials.org/articles/news/europols-expanding-mandate-european-parliament-must-stand-against-unaccountable-and-discriminatory-policing/>

3. HOW THE REGULATION SEEKS TO EXPAND THE EU'S DIGITAL SURVEILLANCE INFRASTRUCTURE AGAINST MIGRANTS

The Europol Regulation proposal represents a dangerous step further in the expansion of the digital surveillance infrastructure underpinning the EU's draconian data-driven migration and policing regimes. This chapter seeks to unpack the main elements of the Regulation, looking in particular at the digital surveillance capacities that the Commission envisions to entrust Europol, namely the role of Europol's European Centre Against Migrant Smuggling (3.1), the increase in data sharing via SIENA (3.2), the processing of biometric data (3.3), the reinforced relationship between Europol and Frontex on unlawful data collection (3.4), the new Europol investigative powers over Member States (3.5), and the role of third-countries in bulk data collection and exchange with Europol (3.6).

3.a. Europol's European Centre Against Migrant Smuggling seals the EU's criminalisation of migration and solidarity

The first objective of the proposal aims to codify in law the composition and tasks of the European Migrant Smuggling Centre (EMSC) (Chapter II of the Commission's proposal), which was already created in 2016.⁴⁸ The EMSC's primary objective is to increase collaboration between EU agencies⁴⁹ and Member States, especially at the level of operational data sharing and investigations. Moreover, the EMSC will assume the role of 'knowledge-producer', as it will be tasked with producing threat assessments and strategic analysis on migrant smuggling on the basis of the data collected.

While more legal clarity about the activities and powers of the EMSC could in theory be seen as positive step towards more transparency and oversight of Europol activities, this does not seem to be the aim of the proposal. The only clarification provided concerns the entities represented in the Centre,⁵⁰ whereas everything else is described in very broad terms.

Instead, it seems that **the legal codification of the EMSC seeks to increase the agency's budget and the number of its staff** (around EUR 50 million and around 50 additional posts by 2027), rather than anything else.

48 Europol European Migrant Smuggling Centre – EMSC website: <https://www.europol.europa.eu/about-europol/european-serious-and-organised-crime-centre-esocc/european-migrant-smuggling-centre-emsc> The new proposal rebrands it as 'European Center Against Migrant Smuggling'.

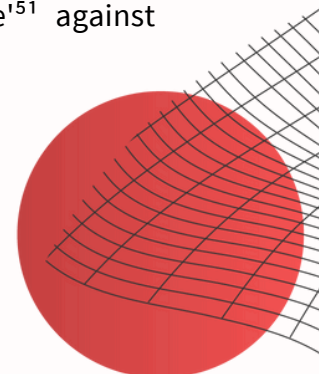
49 First and foremost Eurojust and Frontex, but also the European External Action Service and Common Security and Defense Policy

50 Article 4(1) of the proposal

In fact, according to the rules governing the Multiannual Financial Framework (MFF), EU agencies' budget allocations cannot be changed without a substantive legislative reform justifying increased financial needs. The codification into law of the role of the EMSC would serve to justify this unforeseen budget increase.

It is worth noting that the European Council, in its negotiating mandate, removed all provisions related to the role of the EMSC in a move to reaffirm the discretion of Europol's Management Board over the internal structures of the agency, which includes specialised centres such as the EMSC. Given that the Management board is composed of one representative from each Member State, the Council position must be interpreted as an intention to maintain an intergovernmental control over the way Europol operates internally and organises its services, in contradiction to the Commission's ambitions for increased independence for the agency.

In addition to these governance questions, **our central concern about the EMSC lies in Europol's active and independent role in cementing a repressive approach to the phenomenon of 'migrant smuggling'** and how it consolidates Europol's dangerous data-driven policing model, which was criticised as enabling 'NSA-style surveillance'⁵¹ against people on the move and those providing humanitarian assistance.



3.b. The reform feeds Europol's data black hole by introducing a data sharing obligation via SIENA

In recent years, Europol has been described as a 'data black hole' due to its aspirations towards and practices of mass data collection.⁵² **The agency promotes a policing model centred on data and intelligence to shape and inform law enforcement strategies and actions.** This model implies the collection of vast stores of personal data in a generalised manner and the subsequent analysis of these large datasets – using AI and other algorithms – to single out individuals who may be involved in criminal activities.

51 Chloé Berthélémy, How Europol's reform enables 'NSA-style' surveillance operations, Euractiv, 18 June 2021, <https://www.euractiv.com/section/data-protection/opinion/how-europols-reform-enables-nsa-style-surveillance-operations/>

52 Apostolis Fotiadis, Ludek Stavinoha, Giacomo Zandonini, Daniel Howden, A data 'black hole': Europol ordered to delete vast store of personal data, The Guardian, 10 January 2022, <https://www.theguardian.com/world/2022/jan/10/a-data-black-hole-europol-ordered-to-delete-vast-store-of-personal-data>

In other words, it is about mass surveillance of entire populations 'without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime', without regard for the inherent serious dangers and deficiencies in the data mining technologies, and in clear breach of EU law. It is a scandal on a par with the indiscriminate surveillance by the US agencies, exposed nearly a decade ago by Edward Snowden' ⁵³

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Despite repeated criticisms, the Commission has complained that not enough information related to migrant smuggling are provided to Europol⁵⁴ and, for this reason, the proposal **introduces an obligation for Member States to share any data related to migrant smuggling with Europol.**⁵⁵

To facilitate this, the Regulation foresees an **increased use of the Secure Information Exchange Network Application (SIENA)**,⁵⁶ a platform run and maintained by Europol, which enables Europol's staff, EU Member States' and third countries' officers to exchange operational and strategic crime-related information. The proposal expands significantly the amount of information that will be exchanged via SIENA in two main ways:

More authorities are to be connected to SIENA: The proposal requires more authorities to be connected to SIENA and empowered to exchange data. In particular, the proposal mandates Member States to designate specialised services for combating migrant smuggling and connect them to SIENA (Chapter III, Article 7). Secondly, Member States will also have to connect their immigration liaison officers posted in third countries to the application (see Chapter 3.6 on the role of third countries according to the proposal).

⁵³ Douwe Korff, The EU's own Snowden scandal, 17 January 2022, <https://www.ianbrown.tech/2022/01/17/the-eus-own-snowden-scandal/>

⁵⁴ The Commission points out that only about 10% of all SIENA messages with Europol as recipient concern migrant smuggling. European Commission, Analytical document, SWD(2024) 94 final, 15 April 2024, page 15

⁵⁵ Commission's proposal, Article 7, para. 2 and Article 8

⁵⁶ By analogy, SIENA is like the email exchange platform among law enforcement authorities and Europol

More data is to be exchanged via SIENA: As mentioned above, the proposal creates an obligation to share *any* information related to migrant smuggling with Europol and other Member State authorities. This represents an important shift from the 2016/794 Europol Regulation, under which only the information necessary for Europol to fulfil its objectives must be supplied,⁵⁷ which allows for Member States to determine what information is to be supplied as well as to decide to derogate from data sharing obligations under certain circumstances.⁵⁸ Instead, **the proposal effectively moves the decision about what information is deemed necessary and relevant from Member States to Europol.** This is likely to lead to serious consequences with adverse impacts on fundamental rights, as **it encourages authorities in and outside the EU to collect the personal data of any person they suspect to be involved in smuggling crimes**, including people in vulnerable situations. This not only risks breaching basic data protection safeguards but also exacerbates the criminalisation of migrant people.

Member States' reluctance to share data with the agency and other police forces has historically been the main pitfall of Europol's police cooperation ambitions. This explains the Council's cold reception of the Commission's proposal,⁵⁹ which would force their hand on that matter; its position deletes all provisions which would weaken their full, sovereign control over which data are exchanged, when and by whom.

3.c. The processing of biometric data increases Europol's mass surveillance capacities

Biometric surveillance creeps into the proposal in a conveniently ambiguous way. While the term 'biometric data' appears only once in the operative part of the text ('[Europol] *support Member States with the effective and efficient processing of biometric data*', Article 9, point 2 (v)), the **proposal's accompanying financial statement reveals that the development of Europol's biometric systems are the biggest line item**, with technical upgrades alone costing almost **22 million euros**.⁶⁰

57 Article 7(6)(a) of the Europol Regulation 2016/794 states that Member States shall supply information deemed to be necessary for Europol to fulfil its objectives. This is an already broad provision which already includes migrant-smuggling among other crime areas.

58 Article 7 (7) of the Europol Regulation 2016/794, Member States shall not be obliged to share data with Europol if it is contrary to the essential interests of its security, jeopardise an ongoing investigation or the safety of an individual or disclose secret information about intelligence activities in the field of national security

59 Statewatch, New powers for Europol: proposal gets frosty reception from member states, 12 February 2024,

<https://www.statewatch.org/news/2024/february/new-powers-for-europol-proposal-gets-frosty-reception-from-member-states/>

60 See Proposal Legislative Financial Statement, Chapter 3.2.2. 'Estimated impact on Europol's appropriations', Specific Objective No 3, 'Biometrics - development of systems & upgrade of SIENA (hardware, software, consultancy)'

By using the pretext of 'fighting migrant smuggling', **the Commission seems to be empowering Europol to test and expand its capacity to collect and process biometric data**, thus bypassing existing legal protections and case law, and strengthening Europol's autonomy to drive biometric developments.

From a fundamental rights perspective, biometric data collection and processing in the field of law enforcement bear enhanced risks of infringements. They interfere with numerous rights such as privacy, data protection, non-discrimination, fair trial and access to effective remedies, due process and the presumption of innocence, and therefore have consequences for the exercise of other freedoms (of movement, of assembly, of expression etc.). That is why in EU law biometric data is considered particularly sensitive and should benefit from a heightened level of protection.

Yet, many members of our coalition have observed general trends across the EU and beyond of biometric mass surveillance that is systematically impacting how people are able to exist in Europe.⁶¹ The number of biometric recognition applications and databases is growing at a rapid pace, affecting up to 10% of the population in some Member States (for example in France).⁶² Data are regularly unlawfully processed and retained for a disproportionate amount of time.⁶³

Biometric surveillance also reinforces systemic discrimination: it disproportionately impacts racialised people as they are 'systemically over-represented' in police databases across Europe.⁶⁴ That is especially the case for migrant people as many Member States' criminal databases contain data of asylum seekers and migrants.⁶⁵ For example, in the Netherlands, people are included in pseudo-criminal biometric databases solely for the 'crime' of being foreign.⁶⁶

Enhancing Europol's ability to massively collect and process biometric data from Member States' law enforcement authorities and third countries is thus far from neutral, as it extends and entrenches the deployment and use of biometric technologies by Member State authorities and reinforces state power in a context of systemic racism and discrimination.

61 European Digital Rights, The Rise and Rise of Biometric Mass Surveillance in the EU. A legal analysis of biometric mass surveillance practices in Germany, the Netherlands, and Poland, November 2021, https://edri.org/wp-content/uploads/2021/11/EDRI_RISE_REPORT.pdf

Algorithm Watch, Show Your Face and AI Tells Who You Are, 24 October 2024 <https://algorithmwatch.org/en/biometric-surveillance-explained/>

62 European Digital Rights (EDRI) network on the European Union's proposed Regulation on automated data exchange for police cooperation ('Prüm II'), October 2022, <https://edri.org/wp-content/uploads/2022/10/EDRI-position-paper-Respecting-fundamental-rights-in-the-cross-border-investigation-of-serious-crimes-7-September-2022.pdf>

63 Ibid

64 Equinox, 'Who Protects Us from the Police?' Structural Racism in Law Enforcement in the European Union, October 2021, <https://www.equinox-eu.com/wp-content/uploads/2021/10/Equinox-Who-Protects-Us-from-the-Police.pdf>

65 See footnote 57

66 See footnote 56, European Digital Rights, page 67

The financial statement foresees EU investment to upgrade or procure new biometric comparison tools, notably for fingerprints, DNA and facial images. The goal is to improve the already existing **Automated Fingerprint Identification System (AFIS)** and the new '**face recognition solution**' (**FACE**) in terms of speed, accuracy as well as to increase their functionalities and scale (in terms of size and volume of data).

It is expected that more users (Europol and national police staff) will make use of these tools – including when querying Europol's databases - and automate comparison processes. Furthermore, the financial statement includes hiring or contracting data scientists to 'create new models' to analyse biometric and other data pertaining to third-country nationals, **including in real time**. As a result, **the proposal seeks to make biometric data processing a routine data processing operation in Europol's work and systems functions**.

The proposal raises serious concerns as it contradicts existing EU law requirements in the field of data protection and the limits of Europol's mandate in the TFEU. It also creates an ambiguous overlap with the Prüm II and Interoperability Regulations.

i. The proposal contradicts existing EU law requirements x x x x x x

The Data Protection Law Enforcement Directive (LED) has a requirement of strict necessity for Member States' processing of sensitive personal data, including biometric data for unique identification, which has been interpreted by the Court of Justice of the European Union (CJEU) in cases C-205/21 and C-118/22.⁶⁷ **The case law requires strengthened conditions for lawful processing and strict observance of the principle of data minimisation**, which requires that 'personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed' (para. 122, C-205/21).⁶⁸ In particular, the purposes of processing biometric data cannot be indicated in terms that are too general. Moreover, biometric data cannot be collected in an indiscriminate, systematic and generalised manner.

67 In its written observations addressed to the Court, the European Commission pointed out that the strengthened condition of 'strict necessity' of the processing has been subsequently added by the EU legislature and was not part of the original legislative proposal (COM(2012) 10 final). This clearly underlines the intention of the legislators to increase the protection of sensitive data against unnecessary, routine processing by law enforcement authorities. See here: https://www.asktheeu.org/en/request/12792/response/44702/attach/3/C%2020205%2021%20Commission%20Observations%20FR%20Redacted.pdf?cookie_passthrough=1

68 Ministerstvo na vatreshnite raboti, C-205/21 (CJEU, 26 January 2023)

This means that that processing will only be necessary 'in a limited number of cases,'⁶⁹ cannot be part of routine data exchanges between authorities, and must be strictly assessed. The Court set the bar high as it specified that 'the mere fact that a person is accused of an intentional criminal offence subject to public prosecution cannot be regarded as a factor that in itself' would satisfy the requirement of strict necessity for the collection of biometric and genetic data (para. 130, *Ibid*). In other words, **being suspected of facilitating irregular entry, transit or stay in the EU cannot be in itself a sufficient reason for processing biometric data**, which is the proposal's intention.⁷⁰ Indeed, the financial statement clearly indicates intentions of mass data processing, notably extraction and analysis of large and complex data sets which would include biometric data collected outside the EU.⁷¹

However, **there are no provisions to ensure compliance with data protection requirements**. The proposal has no details about the envisaged processing of biometric data, which is particularly problematic since point (za)⁷² is not limited to tasks related to investigations of 'migrant smuggling' (but of all criminal offences for which the agency has competence) and Europol has access to biometric data from a variety of sources, including Member States, EU databases and third countries. Furthermore, **the purposes of processing biometric data are deliberately described in very general terms in the proposal**, which is fundamentally incompatible with the CJEU case law. Lastly, the financial statement clearly demonstrates that Europol would develop and operate a set of new functionalities for the processing of biometric data. **This will give Europol an independent role as data controller for processing biometric data on a substantial scale which likely goes beyond the remit of supporting Member States (as enshrined in the TFEU ⁷³).**

69 *Ibid*, para. 118

70 Page 8 of the Explanatory Memorandum of the proposal which references the special report from the European Court of Auditors (ECA) states the report suggested to 'enable Europol to use all relevant external sources of information, including biometric data, and to enhance data exchange with its partners'

71 Legislative Financial Statement 'Agencies', page 5: '*To increase the number of Forensics, Decryption and Data Specialists to ensure extraction and processing large and complex data sets collected from the countries of origin, transit and destination, including both member States and Third Countries. Real-time and high-quality data access and processing as well as the related data science expertise needs to be ensured to ensure the use of lawfully collected biometric data and to create new models for analysing complex data, which more often than before originate from outside the EU.*'

72 Article 9, point 2 (v) of the proposal

73 Article 88, Treaty on the Functioning of the European Union (TFEU)

ii. The proposal overlaps with existing regulations, specifically the Prüm II and Interoperability Regulations

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The biometric databases considered in that ECA Report whose expansion is envisaged in the proposal are the Member States' databases in the Prüm system⁷⁴ and the EU databases in the Common Identity Repository (CIR) (as part of the interoperability framework)⁷⁵.

While the **Prüm II Regulation** raises great concerns for fundamental rights and the respect of data protection principles,⁷⁶ it seems the proposal seeks to undermine the already few procedural requirements contained therein. For example, the search of facial images under Prüm II is limited to certain criminal offences.⁷⁷ However this limitation could be bypassed, as the Europol proposal's financial statement suggests that a new functionality to search biometric data will be developed into the already existing Europol Information System (EIS) and via QUEST (Querying Europol System), which allow Member States to search. This could therefore bypass the Prüm II Regulation.

Moreover, the proposal provides Europol access to **CIR databases** that contain biometric data which were collected for migration control purposes, not criminal ones.⁷⁸ The Regulations for the CIR⁷⁹ impose some limited restrictions for law enforcement which inherently conflict with the proposal's goal of using 'all relevant external sources of information',⁸⁰ including the purpose limitation principle. **Using these databases for law enforcement tasks involves further processing for a new purpose which raises serious data protection concerns.**

The overlap of the proposal with existing regulations regarding the processing of biometric data by Europol also **calls into question the necessity and proportionality principles**, and it seems to suggest the proposal is mainly geared towards facilitating the investment of a Europol-governed biometric analysis infrastructure.

73 Article 88, Treaty on the Functioning of the European Union (TFEU)

74 Regulation (EU) 2024/982 of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 (the Prüm II Regulation)

75 PICUM, Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status, August 2023, <https://picum.org/wp-content/uploads/2023/08/Data-Protection-Immigration-Enforcement-and-Fundamental-Rights-Full-Report-EN.pdf>

76 European Digital Rights (EDRI) network on the European Union's proposed Regulation on automated data exchange for police cooperation ('Prüm II'), October 2022, page 11, <https://edri.org/wp-content/uploads/2022/10/EDRI-position-paper-Respecting-fundamental-rights-in-the-cross-border-investigation-of-serious-crimes-7-September-2022.pdf>

77 Only for crimes punishable by a maximum term of imprisonment of at least one year under the law of the requesting Member State.

78 Migration-related information are not only included in EU databases part of the interoperability framework, but also in national databases connected to the Prüm system, which are theoretically only criminal or law enforcement ones. See Appendix 1 of EDRI, Respecting fundamental rights in the cross-border investigation of serious crimes, 7 September 2022, <https://edri.org/wp-content/uploads/2022/10/EDRI-position-paper-Respecting-fundamental-rights-in-the-cross-border-investigation-of-serious-crimes-7-September-2022.pdf>

79 The common identity repository is established by Article 17(1) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818

80 Page 8 of the Explanatory Memorandum. The ECA report also notes in paragraph 36 that Europol has access to the EURODAC system (under the previous legal framework), but in practice has never queried the system in relation to migrant smuggling due to legal constraints.

3.d. The cooperation between Europol and Frontex will lead to bulk unlawful data collection

With the aim of enhancing inter-agency cooperation to 'combat migrant smuggling', the proposal puts particular emphasis on the need to strengthen ties with the European Border and Coast Guard Agency (Frontex).

Concretely, the Commission's proposal foresees the involvement of a liaison officer representing Frontex in the European Centre Against Migrant Smuggling (EMSC),⁸¹ and it will allow for more Europol staff to be deployed in support of Frontex on the ground.⁸²

The closer collaboration between Europol and Frontex in this context carries serious human rights implications and will further consolidate the **criminalisation of migration and solidarity**, particularly by allowing for **unlawful bulk collection of the personal data of migrants, as well as human rights defenders, suspected to be involved in migrant smuggling**.

Under the flawed assumption that people who cross EU borders might be involved in smuggling-related crimes, the proposal will empower Frontex to massively extract personal data from migrants deemed to be 'suspects' as they reach European territory, and to transmit these data to Europol.

This practice is not new, but it builds on the Frontex-led 'Personal Data for Risk Analysis' (PeDRA) project (see Box 1), under which the border management agency transmitted in bulk information gathered in the context of 'debriefing interviews' conducted with newly arrived migrants to Europol.

Frontex is legally prohibited from collecting personal data about migrants for law enforcement purposes⁸³ and transferring the information in an indiscriminate manner to Europol, as recalled by the EDPS's audit on PeDRA.⁸⁴ However, this rule has already been weakened by the recent reforms of both the Frontex and Europol Regulations, in a way that could work as a circumvention of these data processing restrictions. On the one hand, the Frontex Regulation allows for Europol to be deployed to a Member State, in the context of migration management support teams, to Frontex.

81 Article 5, European Commission, Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, COM(2023) 754 final 2023/0438 (COD), 28 November 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?>

82 Article 9 (Article 5b) of the proposal

83 Exceptions permitting data processing by Frontex in relation to the prevention, detection and investigation of criminal offences are possible only when the purpose is to support other EU agencies or national authorities, i.e. when it concerns people (i.e. suspects of cross-border crimes) about whom Europol, Eurojust and Member State competent authorities are allowed to process personal data to perform their tasks.

84 EDPS, Audit Report on the European Border and Coast Guard Agency (Frontex), 24 May 2023, https://www.edps.europa.eu/system/files/2023-05/edps_-_23-05-24_audit_report_frontex_executive_summary_en.pdf

On the other hand, the Europol reform of 2022 already granted the agency with new data-mining powers, as it can now exceptionally receive large data sets⁸⁵ containing categories of personal data about data subjects that go beyond the original limits of its mandate⁸⁶ and conduct pre-analysis⁸⁷ for 18 months (possibly longer) to establish possible connections with Europol's existing databases.

Since the proposal could multiply Europol staff deployments to assist Frontex on the ground and legitimise the practice of debriefing interviews (new Article 5b⁸⁸), this creates the legal basis for Europol and Frontex to collect information in bulk on any person suspected of being associated with migrant smuggling by one of the two agencies.

The fact of **being classified in Europol's databases as potential suspects of migrant smuggling or human trafficking expose people to wide-ranging risks** (e.g. denial of asylum or residence permit application, higher exposure to police stop and search). In addition, this will likely impact NGOs and solidarity movements who could be deemed associated to 'migrant smuggling' activities and be subject to surveillance in Europol's databases, as it already happened in the PeDRA case.⁸⁹

Box 1: The 'Processing of Personal Data for Risk Analysis' (PeDRA) programme

The PeDRA programme started in 2016 as a way for Frontex and Europol to exchange data collected during various types of operations at the borders and through debriefing interviews carried out by Frontex and Member States to generate risk analysis and to share information related to 'suspects of cross border crime' with Europol.

Debriefing interviews are conducted with people who arrived on EU territory and aim 'to identify the skipper and others involved in the 'organisation' of irregular travel, which often simply entails those steering the boat, those in charge of the GPS or the petrol. To do that, officers conduct covert interrogations with one or two potential witnesses as well as the suspect that will be then referred to the national authorities. Interviews take place in the utmost opacity: there is no paper trail, no records of Frontex referrals to national authorities, no privacy and no lawyer is present'.⁹⁰

85 Article 18a, Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794

86 Annex II of the Europol Regulation limits processing of personal data by Europol to individuals with a link to criminal activity (suspects, potential future criminals, witnesses, victims, contacts and associates or informants),

87 Pre-analysis means that the data is not analysed for operational purposes yet, but analysed to determine whether it falls within Europol's mandate by cross-checking it with data already stored in Europol's databases.

88 Article 9(3) of the Commission's proposal

89 EUObserver, NGOs appear in over 1,000 Frontex smuggling documents, 2 April 2023, <https://euobserver.com/migration/156891>

90 Cova Bachiller López and Fran Morenilla, Questioning the interviewers: Frontex's covert interrogations at the Spanish southern border, Statewatch, 3 August 2022, <https://www.statewatch.org/observatories/frontex/document-collection-frontex-and-operational-personal-data/>

Finally, **the proposal blurs the line between border management and law enforcement activities**. Frontex is not a law enforcement agency but a border management one. By strengthening the cooperation with Europol, the reform not only legitimises the operation of an agency with a rich track-record of human rights violations, but also consolidates its policing function, paving the way for Frontex to acquire new powers. Moreover, it solidifies the dangerous assumption that migration is a criminal matter.

3.e. The proposal grants Europol greater operational and investigative capacities: the case of the Operational Task Forces and non-coercive investigative measures

The proposal codifies in law two measures that will grant Europol greater operational and investigative capacities: the **operational task forces** (OTFs) (Article 5a) and the **'non-coercive investigative measures'** (Article 4, paragraph 5).

On the one hand, **OTFs** are a concept already implemented by Europol since 2018 and are supposed to facilitate cross-border coordination on 'high-value targets' which represent 'the highest risk of serious and organised crime'.⁹⁵ Since their inception in 2018, 90 OTFs have been set up to facilitate 'complex and high-profile resource-intensive investigations' among Member States, mainly in the areas of organised crime, financial and economic crime, cyber-crime, and terrorism.⁹⁶ However, the Commission complains that existing OTFs do not sufficiently target 'migrant smuggling' and 'human trafficking', which is why the proposal seeks to significantly increase the number of dedicated OTFs in Member States along with Europol personnel.⁹⁷

On the other hand, the proposal formalises Europol's power to execute 'non-coercive investigative measures', including in the context of Joint Investigation Teams (JITs)⁹⁸ and OTFs. These measures 'relate to data processing like providing forensic and analytical support to investigations', according to the proposal, but it offers no further details about the concrete actions this entails.⁹⁹ The Commission's analytical document specifies that this is already common practice. The same document indicates as example activities open-source intelligence and social media monitoring, social network analysis, digital forensics, decryption, data extraction, processing of large and complex data sets and financial asset tracing.¹⁰⁰ Europol's overall budget for operational activities is set to increase by 6.5 million euros per year.¹⁰¹

95 European Commission, Analytical document, SWD(2024) 94 final, 15 April 2024, page 11, <https://www.statewatch.org/media/4347/eu-com-europol-smuggling-proposal-swd-2024-94.pdf>

96 Ibid, page 34

97 Ibid

98 Article 5 of the Europol Regulation, Regulation (EU) 2016/794

99 Statewatch, 'Expansive new police powers hidden behind EU's migrant smuggling proposals', 12 December 2023, <https://www.statewatch.org/news/2023/december/expansive-new-police-powers-hidden-behind-eu-s-migrant-smuggling-proposals/>

100 European Commission, Analytical document, SWD(2024) 94 final, 15 April 2024, <https://www.statewatch.org/media/4347/eu-com-europol-smuggling-proposal-swd-2024-94.pdf>

101 Idem, page 35

These new operational and investigative capacities raise several concerns:

The proposal lacks clarity on the difference between the OTFs and the existing JITs, which already foresee the role of Europol in joint cross-border investigations

The main differences between OTFs and JITs seem to consist of the following:

Scope: OTFs appear to have a broader scope, as **they can deal with criminal intelligence activities besides investigations** – whereas JITs can only be set up as part of an official investigation;

Minimum conditions and safeguards: In comparison to JITs, conditions for setting up OTFs are less stringent, as they do not have to be necessarily linked to a specific investigation (as per Recital 16 of the proposal). JITs require a formal agreement that identifies the case, the legal basis and defines the period of time, composition, purpose and location in which the JIT will operate. It appears that OTFs are specifically designed to eliminate some of these requirements in order to offer a more informal setting for data collection and exchange to participating authorities;

Automatic data sharing with Europol: Information obtained by Europol staff while being part of a JIT can only be subsequently processed by Europol with the consent of the Member State which provided the information [Article 5(4) of the Europol Regulation]. The proposed rules for OTFs, explicitly require participating Member States to provide all relevant information to Europol [Article 5a(6)(a)].

Considering the existing fundamental rights issues at stake with JITs (see Box 2), there are serious grounds to believe that the new OTFs will exacerbate these issues due to weaker supervision by independent authorities (if not none), less transparency and fewer opportunities to access effective remedies in case of violations.

i. OTFs will remain opaque and unaccountable data collection and exchange fora

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Europol's Management Board (MB) will define the concrete terms and conditions for launching and running an OTF.

Given the secrecy surrounding Europol Management Board decision-making,¹⁰² we are concerned that this delegation of responsibility as to how OTFs will work in practice is another step towards granting opacity around Europol's initiatives and fails to increase transparency, foreseeability and clarity expected by a codification in law. The Council's negotiating mandate does not help to achieve further legal clarity as its amendments emphasise the temporary and 'flexible' (i.e. informal) nature of OTFs.

ii. OTFs pose data controllership issues



The proposal does not address pertinent issues about data controllership in OTFs. Because the mandatory data sharing between OTF members, it is unclear whether the members of the task force must be considered joint controllers together with Europol and which legal framework governs the initial data collection. Presumably this is the national transposition of the LED in the

Member States where the personal data is collected. However, third countries can also be invited

to participate in OTFs, including ones which do not have an essentially equivalent level of data protection as in the EU.

Furthermore, the legal uncertainty about controllership risks impacting the exercise of data subjects' rights, such as the right to access. The mandatory exchange of information impacts how the responsibility for data processing is distributed. Associated with the lack of clarity of the type of information that will be shared, it means that data subjects will face additional barriers when trying to obtain redress in case the information shared is incorrect or unlawful.

iii. Third countries can participate in OTFs



Articles 5a(4) and 5a(6)(e) open OTFs up to third countries officials and Member States' liaison officers posted abroad ('immigration liaison officers'). This aspect will be further discussed in the next section (see section 3.6. 'The 'cooperation' with third countries circumvents data protection principles and further globalises the war against migrants').

iiii. The undefined 'non-coercive investigative measures' represent a dangerous grey zone



This paves the way for Europol to gain independent investigative powers over Member States' authorities.

102 For example, the Management Board rarely discloses minutes of its meetings, and when it does, they are heavily redacted.

Furthermore, the definition of ‘coercive’ provided in the Commission’s analytical document appears overly restrictive as it only encompasses measures that ‘impose a specific constraint’ on a person such as their arrest or performing a house search.¹⁰³ However, data extraction and analysis from seized mobile devices performed by Europol’s staff are equally intrusive and can be compared to a house search (arguably even more considering the amount and intimate nature of information stored on smartphones which may reveal more details about a person’s thoughts, preferences, opinions and private life), especially in light of the concrete consequences for the individuals concerned (arrest, prosecution, discriminatory treatment, etc.).

Box 2: Fundamental rights issues with Joint Investigations Teams (JITs)

'A joint investigation team is an international cooperation tool based on an agreement between competent authorities – both judicial (judges, prosecutors, investigative judges...) and law enforcement – of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations [and coordinate criminal proceedings] in one or more of the involved States.'¹⁰⁴ One of its most notable features is the direct sharing of information between members.

The rules to set up and regulate activities in JITs are defined by the national law of the participating countries. They are likely to conclude secret agreements¹⁰⁵ regarding the terms for accessing personal data or other evidence and for repurposing data obtained in joint investigations. Judicial control and oversight is not mandatory (it depends on the Member State's domestic law).

Moreover, JITs provide a framework for unsupervised cross-border access to personal data, notably by 'forum shopping'.¹⁰⁶ Forum shopping means that law enforcement authorities are taking advantage of existing differences among national laws (especially in terms of access to data, surveillance and interception measures) by relying on foreign counterparts to do what they are legally prevented from doing themselves, thus bypassing their own domestic legal framework.

103 European Commission, Analytical document, SWD(2024) 94 final, 15 April 2024, footnote 67, <https://www.statewatch.org/media/4347/eu-com-europol-smuggling-proposal-swd-2024-94.pdf>

104 Europol, Joint Investigation Teams – JITs, <https://www.europol.europa.eu/partners-collaboration/joint-investigation-teams>

105 Joint investigation teams are set up with the mutual agreement of the involved law enforcement authorities. The mutual agreement also covers confidentiality provisions the operation and the information obtained (see e.g. Article 12(2) of the Second Additional Protocol to the CoE Cybercrime Convention, CETS 224). Providing information about the investigation in response to a freedom of information request, or even a request from a defence lawyer, could require consent of other States.

106 See examples of EncroChat and SkyECC operations in EDRI and al., Joint Civil Society written submission to the High Level Group 'Going Dark', March 2023, page 18, <https://edri.org/wp-content/uploads/2024/03/Joint-Civil-Society-Written-Submission-HLG-Going-Dark.pdf>

Recent JIT cases illustrating multiple fundamental rights concerns are operations EncroChat and SkyECC, in which the French police indiscriminately targeted all users of two online communication services through bulk equipment interference (planting trojans on all devices). The JITs composed of Dutch, French and Belgian¹⁰⁷ law enforcement authorities obtained the communications of all network users, including a large number of users outside the jurisdiction of France, Belgium and the Netherlands. This probably included persons whose communication is protected by immunities and privileges under the domestic laws of the State where they reside.¹⁰⁸

Already today, JITs are used in a way that undermine protections in domestic laws by capitalising on exceptionally intrusive and indiscriminate investigative measures permitted in one participating Member State.



Credit: Petra Molnar

3.f. The 'cooperation' with third countries circumvents data protection principles and further globalises the war against migrants

The proposal seeks to enhance **information sharing with third countries, including the sharing of personal data**. The special report from the ECA points to the **lack of international agreements between the EU and third countries**¹⁰⁹ as a limitation for sharing operational data, since the third country cannot systematically receive information containing personal data from Europol in return for the information it provides. The Commission envisions four main ways in which third countries will play an increasingly active role in the EU's 'fight against migrant smuggling':

107 Belgium only in the SkyECC case

108 Investigative journalist Rebecca Tidy mentions in her piece that she occasionally used Encrochat to speak to contacts wishing to maintain anonymity, see <https://www.aljazeera.com/features/2021/5/20/the-child-victims-of-the-uks-encrochat-house-raids> Abbas Nawrozzadeh also mentions in his piece that "there will be lawyers who have used Encrophones to communicate with their clients", see <https://www.aljazeera.com/opinions/2020/7/25/the-encrochat-police-hacking-sets-a-dangerous-precedent> This is confirmed by another article which reports that lawyers in Sweden used EncroChat, see <https://www.svt.se/nyheter/har-lacker-advokaterna-hemlig-information-till-varbynatverket> (in Swedish).

109 Europol Regulation, Article 25(1)(b)

Europol will be able to deploy its staff to third countries: According to Article 5b,¹¹⁰ Europol may deploy its own staff to countries with which it cooperates on the basis of an adequacy decision, an international agreement or a cooperation agreement concluded before the adoption of the Europol Regulation,¹¹¹ in order to provide operational and investigative support. Eligible and relevant countries in the migration context are Albania, Bosnia & Herzegovina, Georgia, Moldova, Montenegro, North Macedonia, Serbia and Ukraine (they have cooperation agreements with Europol concluded before 1 May 2017);

Member States shall engage their immigration liaison officers deployed in third countries: According to Article 5a(6)(e)¹¹² and Article 8(5), Member States are expected to instruct their immigration liaison officers to collect and share relevant information on migrant smuggling and supply this information to Europol using SIENA, as well as to engage them in OTFs;

Europol should increase its exchange of personal data with third countries, even in absence of a legal basis: Article 6(h) of the proposal provides that personal data might be exchanged with third countries even in the absence of a legal basis (see Box 3), should the European Centre Against Migrant Smuggling deem it necessary to identify suspects of migrant smuggling. Europol's Executive Director is strongly encouraged to make use of their derogation powers under Article 25(5) of the Europol Regulation;

Third-countries can join Operational Task Forces: According to Articles 5a(4) and 5a(6)(e)¹¹³, third-countries will also have the possibility to join OTFs.

The provisions aiming to enhance cooperation with third countries are problematic on several levels, specifically:

i. They circumvent data protection safeguards and reinforce the use of Europol's derogative powers



It is highly concerning that recital 8 of the proposal envisages an **increased use of derogations in Article 25(5) of the Europol Regulation in order to transfer personal data to third countries not covered by Article 25(1).**

110 Article 9(3) of the proposal

111 Europol, Agreements & Working Arrangements : <https://www.europol.europa.eu/partners-collaboration/agreements>

112 Article 9(3) of the proposal

113 Idem

Recital 8, in combination with the overall intention of increased information sharing with third countries, creates **a risk that derogations will be used on a de facto systematic basis** (even though is not permitted by the Europol Regulation) with detrimental impact on the fundamental rights of people in these third countries.

Furthermore, Europol's staff deployment in third countries raises questions regarding data controllership and the applicable legal framework for data collection as Europol will be operating in a country not subject to EU law. If Europol staff operate in accordance with the national law of the non-EU country where the deployment takes place (as proposed by the Council in its mandate position), **personal data could be collected by (for) Europol in contravention of EU law.**



ii. They permit data exchange with third countries with a track record of human rights violations

In line with existing EU migration and external policies, the proposal seeks to increase cooperation with countries that are either countries of origin or transit. The eight priority non-EU countries Europol has identified to strengthen cooperation through international agreements are Turkey, Morocco, Algeria, Tunisia, Egypt, Jordan, Israel and Lebanon. These eight priority countries have (varying degrees of) rule of law problems and human rights abuses¹¹⁴, which makes it very difficult, if not outright impossible, to ensure an essentially equivalent level of data protection, as required by EU primary law. This form of cooperation risks to support and legitimise illegal policing and security practices committed by dictatorships, authoritarian regimes and regimes committing the crime of apartheid.

114 See for example:
RPE and al., Joint Report on the Human Rights Situation in Egypt, 20 January 2025, <https://rpegy.org/en/editions/joint-report-on-the-human-rights-situation-in-egypt/>
UN Human Rights Committee, Concluding observations on the second periodic report of Türkiye, 7 November 2024, <https://arrestedlawyers.org/2024/11/09/the-un-report-exposes-turkeys-dire-human-rights-record/>
UN High Commissioner for Human Rights, Morocco: UN human rights expert decries clampdown on human rights defenders, 01 July 2021, <https://www.ohchr.org/en/press-releases/2021/07/morocco-un-human-rights-expert-decries-clampdown-human-rights-defenders>
UN Committee against Torture, UN Committee against Torture publishes findings on Cameroon, Jordan, Kuwait, Mongolia, Namibia and Thailand, 22 November 2024, <https://www.ohchr.org/en/press-releases/2024/11/un-committee-against-torture-publishes-findings-cameroon-jordan-kuwait>
Statewatch, Outsourcing borders: Monitoring EU externalisation policy, <https://www.statewatch.org/outsourcing-borders-monitoring-eu-externalisation-policy/>
Fair Trials, Dismantling the tools of oppression, Ending the misuse of INTERPOL, 2018, <https://www.fairtrials.org/articles/publications/dismantling-the-tools-of-oppression/>

iii. They globalise the war against migrants and further the externalisation of EU borders



Due to the professed aim of increasing data sharing with third countries, the proposal must be understood as part of the broader EU strategy to externalise migration control beyond its territories,¹¹⁵ and global trends to expand international policing capacities and cooperation against migrants, journalists and human rights defenders living in exile.¹¹⁶

Box 3: Europol's rules on data exchange with third countries

According to the Europol Regulation (Article 25(1)), Europol is supposed to be able to exchange personal data only with countries with which the European Commission has reached an adequacy decision (point a)¹¹⁷, or the Union has concluded an international agreement (point b)¹¹⁸, or Europol itself has concluded a cooperation agreement before 1 May 2017 (point c).¹¹⁹

An adequacy decision is a formal decision made by the EU recognising that another country, territory, sector or international organisation provides an equivalent level of protection for personal data as the EU does.¹²⁰ The Commission is responsible to carry out a full assessment of third countries' rule of law, respect for human rights and fundamental freedoms, laws in the areas of public security, defence, national security and criminal law, their implementation and systems in place for protecting personal data to base its decision. For now, only New Zealand and the UK exchange personal data with Europol on the basis of an adequacy decision or international agreement.¹²¹

Before the adoption of the 2016 Europol Regulation, Europol could conclude cooperation agreements with third countries allowing for the exchange of personal data. Since the application of the Regulation on 1 May 2017, Europol can no longer conclude any agreements which provide legal basis for the exchange of personal data but can still conclude 'working arrangements' involving only the exchange of intelligence and other non-personal data.

115 Statewatch, Outsourcing borders: Monitoring EU externalisation policy, <https://www.statewatch.org/outsourcing-borders-monitoring-eu-externalisation-policy/>

116 Fair Trials, Dismantling the tools of oppression, Ending the misuse of INTERPOL, 2018, <https://www.fairtrials.org/articles/publications/dismantling-the-tools-of-oppression/>

117 Europol, EU Agreements on Europol cooperation/Adequacy Decisions, <https://www.europol.europa.eu/partners-collaboration/agreements/eu-agreements-europol-cooperation-adequacy-decisions>

118 On the basis of Article 218 of the Treaty on the Functioning of the European Union

119 Europol, Operational Agreements, <https://www.europol.europa.eu/partners-collaboration/agreements/operational-agreements>

120 In accordance with Article 36 of Directive (EU) 2016/680

121 Europol, EU Agreements on Europol cooperation/Adequacy Decisions, <https://www.europol.europa.eu/partners-collaboration/agreements/eu-agreements-europol-cooperation-adequacy-decisions>

The amendments to the Europol Regulation adopted in 2022 loosened the limitations on international data transfers substantially. They grant Europol's Management Board the power to authorise transfers of personal data to third states in the absence of an adequacy decision where Europol itself has assessed 'that appropriate safeguards exist with regard to the protection of personal data'.¹²² However, 'given the agency's track record on data protection issues, its ability to reach that conclusion should be called into question.'¹²³ The 2022 reform also broadens the Executive Director's application of the derogation from data protection requirements.¹²⁴

4. THE CRIMINALISATION OF 'PUBLIC INSTIGATION' IN THE FACILITATION DIRECTIVE AND ITS INTERCONNECTION WITH EUROPOL'S ACTIVITIES

The proposed Facilitation Directive ¹²⁵ contains one worrying provision that aims to restrict freedoms of migrants and of people supporting migrants rights in the digital sphere. According to its Article 3(2), complemented by recital 6, Member States will be obliged to make the act of 'publicly instigating third country nationals to enter, or transit across, or stay within the territory of any Member State in breach of [applicable laws]' a **criminal offence under national law**. Recital 6 specifies that such 'instigation' may take place 'through the internet'.

Recital 25 specifies that **online content that could instigate or facilitate irregular movements should be considered as 'illegal content'**. This content should then be subjected to the Digital Service Act (DSA)¹²⁶ content regulation measures. ¹²⁷

Article 3(2) should be **fully deleted** for the following reasons:

4.a. The definition of 'public instigation' is too broad

Although Recital 6 specifies that 'providing objective information or advice to third country nationals on the conditions for the legal entry and stay' should not be considered 'public instigation', the definition remains too wide in scope and risks leading to abusive content removals on social media and censorship.

122 Article 24(18)(c), Regulation (EU) 2022/991 of 8 June 2022

123 Statewatch, Empowering the police, removing protections: the new Europol Regulation, 10 November 2022, <https://www.statewatch.org/media/3615/empowering-the-police-removing-protections-new-europol-regulation.pdf>

124 Article 24(18)(d), Regulation (EU) 2022/991 of 8 June 2022

125 European Commission, Proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, 2023/0439 (COD), 28 November 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0755>

126 Regulation (EU) 2022/2065

127 Access Now, The Digital Services Act: your guide to the EU's new content moderation rules, 6 July 2022, <https://www.accessnow.org/digital-services-act-eu-content-moderation-rules-guide/>

With such a vaguely defined provision, solidarity statements, information of public interest about safer routes or even (dissenting) political opinions on government's migration policies could fall within scope. It would also worsen the criminalisation of migrants themselves when they are documenting their journeys on social media and sharing testimonies, for example. The criminalisation of speech acts, whether online or offline, should be reserved for serious cases where criminal nature can be proven beyond reasonable doubt. The proposed definition in Article 3 (read in conjunction with recital 6) does not comply with principles of proportionality, legality and necessity. Therefore such restriction of freedom of expression and freedom to receive and impart information cannot be considered as legitimate.

4.b. It incentivises social media platforms to censor legitimate content

Where large social media platforms are potentially liable for vaguely defined illegal content, they tend to **over-remove legitimate speech**.¹²⁸ This provision therefore undermines the careful and rights-respecting approach the DSA has created. In fact, the DSA establishes an accountability mechanism for the societal risks and negative effects on fundamental rights posed by platforms' systems and processes instead of singling out a concrete category of illegal content and demanding its swift removal under the threat of liability.¹²⁹ In this vein, the proposed Article 3(2) is against the essence of the horizontal DSA legal framework.

4.c. This new 'public instigation' crime will likely aggravate the ongoing fundamental rights violations by the Europol's Internal Referral Unit (IRU)¹³⁰ as it conducts its work of monitoring and reporting content online

The impact of the IRU on online expression related to migration is currently unclear. The latest IRU report, covering activities in 2022, mentioned that the IRU sent referrals 'related to migrant smuggling' 'on an ad hoc basis and at the request of EU Member States'.¹³¹ However, no concrete figure was provided. The IRU does not possess the competence to assess the legality of online content itself. It can merely report content to companies as illegal or incompatible with their contractual content policies via informal and often opaque channels.

128 Access Now, Regulating online platforms: how EU Member States are undermining the Digital Services Act, 22 April 2021, <https://www.accessnow.org/regulating-online-platforms-eu-digital-services-act/>

129 Martin Husovec, Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules, 7 November 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4598426

130 The Europol Internet Referral Unit (IRU) is tasked to monitor the internet and look for content that is likely to be 'incompatible' with the terms of service of online service providers like Facebook, so that the latter can 'voluntarily consider' whether to delete it or not.

131 Europol, 2022 EU Internet Referral Unit Transparency Report, 2024, https://www.europol.europa.eu/cms/sites/default/files/documents/EU_IRU_Transparency_Report_2022_EN.pdf

Even though companies do not have legal obligation to remove such content, these informal requests are highly effective in getting the reported content swiftly removed.¹³² Article 3(2) concern presumably illegal content online that is subject to reporting measures defined by the Digital Services Act and requires legal assessment whether it meets the threshold of illegality. It has been well-documented over the years by experts among academia and civil society organisations that referrals impose pressure on companies to over-remove legitimate content without accountability or transparency safeguards and this way, undermine the principle of legal certainty and legality.¹³³ **This mechanism clearly violates the EU Charter's** requirement that restrictions (on freedom of expression in this case) of fundamental rights must be 'provided for by law', not based on opaque 'cooperation' between law enforcement authorities and private companies. **The criminalisation of 'public instigation' will only incentivise Europol to restrict more legitimate expression through referrals. It should be imperatively ruled out.**

There is an imminent risk here of **criminalising work done by and curtailing freedom of expression of individuals and organisations defending migrants rights in the EU. If adopted, this measure will lead to silencing of marginalised groups as well as organisation that advocate and fight for their protection. Furthermore, it will unjustifiably restrict adequate access to information that for many communities at risk, is a lifeline. Such fundamental rights abuse will reinforce the EU securitisation narrative of migration policies.**

'Given the absence of a clear and mandatory clause to prevent the criminalisation of solidarity with migrants, as well as existing patterns of criminalisation of human rights defenders in EU Member States, there is a serious risk that the proposed novel offence of 'public instigation' will be used to criminalise human rights defenders and deter people and groups from sharing information concerning migration to the EU'

UN Special Rapporteur on Human Rights Defenders. ¹³⁴

132 Big Brother Watch, Ministry of Truth: The secretive governments units spying on your speech, January 2023, <https://bigbrotherwatch.org.uk/wp-content/uploads/2023/01/Ministry-of-Truth-Big-Brother-Watch-290123.pdf>; see also the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), Social media platforms and challenges for democracy, rule of law and fundamental rights, April 2023, [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743400/IPOL_STU\(2023\)743400_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743400/IPOL_STU(2023)743400_EN.pdf)

133 Naomi Appelman, Paddy Leerssen, On "Trusted" Flaggers, 2022, https://law.yale.edu/sites/default/files/area/center/isp/documents/trustedflaggers_ispessayseries_2022.pdf

134 UN Special Rapporteur on the situation of human rights defenders, Response to the proposal by the European Commission for a Directive to update the Facilitators Package, February 2024, <https://srdefenders.org/resource/position-paper-on-the-eu-commissions-proposed-directive-to-update-the-eu-legal-framework-on-people-smuggling/>

CONCLUSION

At the time of writing (February 2025), the Council has already adopted its General Approach, which largely endorses the Commission's proposal and narrative on migrant-smuggling. Changes to the Commission's proposal were only made to secure Member States' autonomy.¹³⁵

We thus call on the European Union lawmakers to see this regulation for what it is: a further criminalisation of migration and the exploitation of migration policies to strengthen Europol's data processing and other powers, and therefore to **reject the proposal in its entirety**. As highlighted in this position paper, **the Facilitators Package in general and the Europol Regulation in particular, amounts to a significant and unjustified expansion of digital surveillance regime based on the criminalisation and punishment of people on the move, as well as of those who provide humanitarian assistance to them**. Not only does this proposal fail to meet European Union regulatory and procedural standards, it fails to meet its own stated purpose and ushers in a myriad of fundamental rights violations.

We further call on the EU to take responsibility for its own role in forcing migrants into life-threatening situations and resorting to 'smuggling' and urge lawmakers to reorient the policy approach away from criminalisation and surveillance and toward protection of people most in need. To effectively end smuggling, we need an urgent shift in approach, starting with changing the EU's hostile border and migration policies.

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¹³⁵ On 19 June 2024, EU member state representatives (Coreper) agreed on the Council's negotiating mandate for a regulation to enhance the role of Europol in the fight against migrant smuggling <https://data.consilium.europa.eu/doc/document/ST-16204-2023-INIT/en/pdf>

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