



**IRCP**

Institute for International Research on Criminal Policy  
Ghent University

Criminal Justice Cooperation Conference – Canberra, Australia - Tuesday, 5th October 2010

---

# **Go West! Political, legal and operational aspects of cooperation between Europol and the United States**

Alexandra De Moor  
IRCP - Ghent University, Belgium



## Introduction

---

- > PhD in Law
  - > Europol, *quo vadis*? Critical analysis and evaluation of the development of the European Police Office
    - > European criminal law – European criminal policy
- > PhD on papers
  - > Deliberate choice (cfr. model for analysis and evaluation)
  - > Paper = illustration
- > Methodology
  - > Legal and social science research methods



## Introduction

---

- > **Europol**
  - > EU law enforcement organisation
  - > Council Decision of 6 April 2009 establishing the European Police Office
    - > Transforms Europol from an intergovernmental organisation into an agency of the EU
      - > As from 1 January 2010
    - > Not merely a copy of the Europol Convention, including all the amendments already incorporated in the three Protocols...
    - > Novelties?



## Europol's external relations

---

- > Europol “forced” to look outside and operate in the external dimension
  - > Numerous agreements with EU bodies, third States and international organisations
  
- > Europol's external relations are very specific
  - > (Relative) independence from Council structures
  - > Political, legal and data protection control?



## Europol's external relations

---

### > Legal aspects

#### > Europol Convention

##### > General cooperation rules

- > Art. 42 (2): relations with third states and third bodies
- > Art. 10 (4): receipt of information
- > Art. 18: transmission of personal data

##### > Implementing rules

- > Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies
- > Council Act of 3 November 1998 laying down the rules concerning the *receipt of information* by Europol from third parties
- > Council Act of 12 March 1999 adopting rules on the *transmission of personal data* by Europol to third states and bodies

## Europol's external relations

---

### > Legal aspects

#### > Europol Council Decision

##### > General cooperation rules:

- > Art. 23: Relations with third States and organisations
- > Art. 26: Implementing rules governing Europol's relations

##### > Implementing rules

- > Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information

## Europol's external relations

---

- > Legal aspects
  - > Europol Director vs. Council
  - > Receipt of information vs. transmission of personal data
  - > Transmission of personal data
    - > General rule
    - > Exceptional clause
      - > Absolutely necessary in order to safeguard the essential interests of the Member States concerned within the scope of Europol's objectives or in the interests of preventing imminent danger associated with crime or terrorist offences

## Europol's external relations

---

- > Political aspects
  - > Which third States and organisations?
    - > Considerations
      - > Human rights, data protection
      - > Operational benefit
    - > Criteria
    - > EU external relations policy?



## Europol's external relations

---

### > Political aspects

- > Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU-related bodies
  - > First list
    - > Including the United States (US)
  - > Further procedural safeguards
  - > Strategic vs. operational agreements
    - > Non-personal data vs. personal data

## Europol-US cooperation

---

**SUPPLEMENTAL AGREEMENT BETWEEN  
THE EUROPOL POLICE OFFICE AND  
THE UNITED STATES OF AMERICA  
ON THE EXCHANGE OF PERSONAL DATA  
AND RELATED INFORMATION**

The European Police Office (Europol) and the United States of America (“the Parties”);

Considering that the Agreement of 6 December 2001 between the United States of America and Europol (“2001 Agreement”) contemplates subsequent supplementation in order to address the exchange of personal data;

Considering that it is in their common interest to extend their cooperation to, inter alia, the exchange of personal data, with due regard to the rule of law and protection of individual rights and liberties;

Considering that the Council of the European Union has given Europol the authorization to enter into negotiations on a cooperation agreement including the exchange of personal data and to agree to the following provisions with the United States of America;

Considering the letters exchanged between the Parties, and the letter attached thereto, which amplify the meaning of this Agreement;

## Europol-US cooperation

---

- > Political aspects
  - > 9/11 as a catalyst
  - > Time pressure
    - > 28 september 2001: Europol Director decision (exceptional clause)
    - > 6 December 2001: strategic agreement
    - > 20 December 2002: operational agreement
  - > Very little (not to say: no) democratic scrutiny
    - > European Parliament
    - > National Parliaments



## Europol-US cooperation

---

- > Legal aspects
  - > Fundamental difficulties in the negotiations
    - > EU vs. US data protection philosophy
  - > Issues of concern
    - > No adequacy assessment
      - > No general restrictions on data exchange (Art. 5 (4))
    - > Purpose deviation vs. purpose limitation
      - > “deemed to include the prevention, detection, suppression, investigation and prosecution of *any* specific criminal offences and *any* specific analytical purposes” (Art. 5 (1))



## Europol-US cooperation

---

- > Wide range of US authorities
  - > Creating an unbalance
- > Exchange of sensitive data
- > Onward transmission of data
- > Oversight of implementation
- > Time to re-negotiate!
  - > Europol vs. US
  - > Adequacy assessment
  - > A future EU-US agreement on personal data protection and information sharing for law enforcement purposes
    - > Identification of "common principles" by HLCG
    - > Law enforcement: EU vs. VS

## Europol-US cooperation

---

- > Operational aspects
  - > How the Europol-US cooperation operates in practice?
  - > Europol the “one-stop-shop” for EU-US cooperation?
    - > “Any added value that Europol can provide is either not perceived or is deemed outweighed by the benefits to be derived from dealing with Member States directly” (Mutual evaluation of the cooperation agreements Europol-United States)
    - > Bilateral cooperation



## Europol-US cooperation

---

- > Operational aspects
  - > Facts and figures?
    - > Unilaterally collected by Europol
      - > Liaison Office Washington D.C.
    - > Europol makes a higher number of requests than it receives
    - > Drugs before terrorism
  - > Was it really needed?

## Europol-US cooperation

---

- > Very swift... SWIFT

VS - NUR FÜR DEN DIENSTGEBRAUCH

**Technical modalities for the Europol verification process with regard to the Agreement Between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of the Terrorist Finance Tracking Program (TFTP) ("Agreement")**



## Europol-US cooperation

---

- > Very swift... SWIFT
  - > Society for Worldwide Interbank Financial Telecommunication (SWIFT)
  - > After 9/11: US Treasury Department introduced its Terrorist Finance Tracking Program (TFTP)
    - > 2006: NY Times leaked secret transfer of SWIFT data
    - > Agreement on the processing and transfer of financial messaging data from the EU to the US for the purposes of the TFTP
  - > Power struggle between the Commission, the Council and the European Parliament
    - > February 2010: EP vetoed
    - > July 2010: EP swallowed, despite a very surprising role for Europol

## Europol-US cooperation

---

- > TFTP Agreement gives Europol the task of verifying whether requests of the US Treasury Department comply with the requirements
  - > ! Not in line with the negotiating mandate which called for independent judicial oversight
  - > ! Even less in line with the new Europol Council Decision
- > Hush-hush decision-making
  - > Hypothesis: Europol deliberately tries to improve its internal position
    - > Europol has specific interests in the exchange of SWIFT data
      - > TFTP Agreement also gives Europol the power to request information through the TFTP
      - > Hard to reconcile with verification task

- 
- > Thank you for your attention!
  - > Questions?
    - > Read more:
      - > DE MOOR, A. & VERMEULEN, G. (2010). The Europol Council Decision: Transforming Europol into an Agency of the European Union. *Common Market Law Review*, Volume 47, Issue 4.