

European Ombudsman inquiry - Complaint 2091/2023/AML
Views from Europol on the observations by the European Ombudsman

Overall considerations

- In line with the Europol Strategy¹, for the Agency to “*be the model EU organisation for law enforcement cooperation*”, Europol strives for continuous improvement and excellence, while being conscientious of innovation opportunities, efficiency and as well as Europol’s Values of Integrity and Accountability with a view to ensuring effective, fact-based compliance with regulatory requirements.
- Europol is grateful for the comprehensive approach of the European Ombudsman office during the inquiry which examined Europol’s handling of two authorisation cases concerning post-Europol occupational activities under Article 16 of the EU Staff Regulations (EUSR). Whilst the two administrative errors in these cases represented individual instances of inadvertent omissions in handling the authorisation requests and did not lead to a potential risk of a conflict of interest materialising, a systemic deficiency in the administrative handling of authorisations for post-Agency occupational activities was not ascertained.
- The Agency took prompt action, and the European Ombudsman inquiry has contributed to enhancing the respective administrative process (four-eyes review for ensuring the compliant implementation of all involved procedural steps etc.) and increased communication to safeguard thorough awareness of the involved actors as well as Europol staff, which is also highlighted in the mandatory newcomer course on ethics as well as in a dedicated session of Europol’s Leadership and Management Development (LMD) programme.
- Europol stringently applies the conflict of interest mitigation possibilities provided for in the EUSR and the Conditions of Employment of Other Servants (CEOS)² which however do *not provide for a legal basis* to remove a staff member from post, including corresponding restrictive measures for the remaining time of service in office, when requesting authorisation to engage in an occupational activity after having left the Agency, *unless* there are *factual indications* to either justify a transfer of the staff member under Article 7 of the EUSR or to suspect a breach of professional obligations.

Against this background, Europol has consistently made the proposal in the past to supervisory stakeholders for the current regulatory provisions of the EUSR on conflict of interest management be further strengthened, and Europol would welcome it if the European Ombudsman could support the Agency in this endeavour.

- On the way forward, Europol would like to ask for a constructive and balanced approach, bearing in mind also Europol’s role as a law enforcement authority in serving the security interests of EU citizens and victims of child sexual abuse online.

¹ <https://www.europol.europa.eu/publications-events/publications/europol-strategy-delivering-security-in-partnership>

² Available in the Official Journal of the EU (OJEU):
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20240101>

1. How Europol dealt with a risk of conflict of interest during service

"... *Europol did not conduct an assessment of whether this could constitute an actual conflict of interest while in service. ... My preliminary view is that this was not in line with the conflict of interest provisions of the Staff Regulations nor with Europol's Guidance on conflict of interest. ...*"³

Europol's reply

Europol does not share the preliminary findings of the European Ombudsman, for the following reasons:

- As provided for in Article 16 of the EU Staff Regulations (EUSR) and, in particular, Articles 20 and 21 of the European Commission implementing provisions⁴, Europol's dedicated notification form was made use of for the referred staff member, representing the key component for ensuring a correct handling to address a potential or actual conflict of interest situation. It required the involved actors (namely the staff member, the Human Resources Unit (HR), the Reporting Officer (RO), the Joint Committee (JC) and the Authority Authorised to Conclude Contracts (AACC) [i.e. the delegated decision-taker within Europol]) to ensure the assessment of the risk of conflict of interest.
- In the given case of the first staff member, the actors involved in the process, namely the RO⁵ and the JC⁶ did assess the risk of conflict of interest, stating in the filled-out form that they did not identify a conflict of interest.
- Further to no conflict of interest being identified, neither by the RO nor the JC, the RO recommended authorisation of the intended occupational activity with no conditions and the JC recommended conditional authorisation regarding commercial purposes⁷. As recorded in the form, no conflict of interest being recorded with respect to the future employment after leaving the Agency, there was consequently also no information indicated in the form that such conflict of interest was to be assumed while the staff member was still working at Europol for around two months (otherwise, such assessment would have been included in the authorisation form).
- It is important to highlight that the JC noted that it had assessed the relevant criteria⁸ established in the European Commission decision applicable at Europol. Accordingly, the assessment was not limited to commercial interests.

³ Footnote references not shown in the above quote

⁴ European Commission Decision of 29 June 2018 on outside activities and assignments and on occupational activities after leaving the service (Europol file reference #977197), put in force with effect from 1 January 2019 by the decision of the Europol Management Board (MB) of 14 December 2018 (Europol file reference #1009554)

⁵ The question addressed to the Reporting Officer (RO) in the form read: "*In light of the duties carried out by the staff member in the last three years of service, could the notified activity lead to a conflict with the legitimate interests of a European Union institution or body, in particular Europol?*" The answer to this question was filled in with "No", based on information provided by the RO in the respective section that was filled in the form by the RO.

⁶ The opinion of the Joint Committee (JC) in the form read: "*... The Joint Committee considered that the planned occupational activity would not conflict with Europol's legitimate interests. ...*"

⁷ "*... The Joint Committee recommends that the notified activity be allowed, provided that any contacts with Europol and other law enforcement authorities should not be for commercial purposes. ...*"

⁸ "*The Joint Committee considered the notification ... taking into account the Article 16 of the EUSR and the factors defined in Article 21(1-2) of Commission Decision C(2018) 4048 and using information from open sources, ...*" Accordingly, as no conflict of interest was identified by the Joint Committee (JC), restrictive measures under Article 21(3) of the Commission Decision were not considered.

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- The form (made use of at the time, as well as in the current version of the form) specifies that *lobbying or advocacy activities are prohibited*⁹.
- In terms of the applicable regulatory provisions, as highlighted by Europol at several instances (including in the present European Ombudsman inquiry), it is observed that:
 - a) The provisions of Article 16 of the EUSR and the applicable implementing provisions of the European Commission¹⁰ regulate the authorisation process for *post-Agency employment*, but do *not* contain a specific legal basis to (i) either subject the staff member to mitigation measures for the *remaining time in service*, or (ii) to *monitor the activities* of a staff member after *having left the service of the Agency*, in compliance with the data protection requirements under Regulation (EU) 2018/1725. Moreover, Article 16 of the EUSR requires the *staff member* to notify the intended occupational activity after leaving the service, but does *not* provide for *unilateral action by the AACC to prevent conflict of interest situation for the remaining time in service*.
 - b) While Article 11a of the EUSR stipulates the requirements for dealing with conflict of interest situations *while in service*, it *relies*, as it is the case for Article 16 of the EUSR referred to above, on action *by the staff member* to report a conflict of interest situation, *upon which the AACC* then takes the appropriate mitigation measure(s). In the given case, neither the staff member in question, nor the RO, nor the JC reported or identified a potential or actual conflict of interest situation, as provided for in Europol's implementing guidance on handling conflict of interest situations¹¹. More specifically, Europol's implementation guidance on handling conflict of interest, which also supports the Europol's Values of Integrity and Accountability, highlights the responsibilities established under Articles 11a of the EUSR by staff members, including to report a suspected breach of professional obligations under Article 22a of the EUSR (also referred to as 'whistle-blowing'). The challenge in identifying a breach of professional obligations in terms of a conflict of interest is however compounded by that fact that all the relevant provisions in the EUSR are *relying on the trust into the staff member concerned* to raise a potential or actual conflict of interest situation.
 - c) A transfer to another post or position, in terms of a *unilateral action by the Agency*, in the *interest of the service according to Article 7 of the EUSR* to prevent a conflict of interest situation, which could, inter alia, include measures to restrict access to relevant information, would *have required factual indications* that the independence of the staff member was impaired for the *remainder of the service* of around two months at Europol.

The established case law of the General Court of the Court of Justice of the European Union (CJEU) provides that, whilst the application of Article 7 gives a wide margin of discretion to the AACC, it must be balanced with the rights of the staff member, hence a decision to transfer a staff member cannot be based on assumptions or perceptions, but needs to *be founded on sufficient evidence*

⁹ Please refer to the introduction section of the respective Europol form to request the authorisation of post-Europol occupational activities, page 1 and page 4 which contains the following question: "Will your new activity entail activities of lobbying or advocacy vis-à-vis staff of Europol for your business, clients or employers on matters for which you were responsible during your last three years in service?"

¹⁰ Please refer to footnote 3 for the documentation reference.

¹¹ https://www.europol.europa.eu/cms/sites/default/files/documents/guidance_to_europol_staff_-_conflict_of_interest_2.pdf

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including an objective underlying reasoning for the decision to be proportionate¹².

In the given case, on the contrary, the RO stated in the form that "... *he will become an excellent contact point between Thorn and the EU law enforcement community, which will benefit from the services and support provided by the organization in fighting child sexual exploitation. ...*".

The fact that the former staff member worked in a related area within Europol before joining Thorn was thus not assessed by Europol as constituting a risk of conflict of interest. The former staff member also did not hold a middle management post, nor was appointed to perform duties as financial Authorising Officer (AO), i.e. could not take commitments for the organisation, including in terms of a financial budget expenditure, or, for instance, decide on procurement related matters.

This notwithstanding, even if a transfer to different position in the interest of the service under Article 7 of the EUSR would have been considered, in order for such assignment to different tasks to be *effective*, also relevant access to information of the previous position (email content, documentation etc.) would have had to be removed, as otherwise, the staff member could still have had access and make use of relevant contacts and information even if assigned to a new tasks and responsibilities¹³.

Such mitigation measures, i.e. removing access to previous work related information, represent a significant impact on the rights of the individual and must thus be based on strong and evident factual indications to prevent a conflict of interest.

Beyond the scope of Article 7 of the EUSR, such measures could be enacted only in cases where a suspension under Article 23 of Annex IX of the EUSR is decided by the AACC (in the case of the first staff member, for the remainder of around two months in service). Including in view of the presumption of innocence and the right of defence, such measures by the AACC would have required the existence of *prima facie* factual circumstances that the first staff member was suspected of a breach of professional obligations in terms of a conflict of interest situation prohibited by the EUSR or the Financial Regulation (FR) applicable to Europol. However, in the given case, a breach of professional obligations was neither identified nor suspected, to the present day.

- Against the background of the above, the recommended conditional authorisation by the JC with a view to preventing commercial contacts with Europol was an *extra precaution* to address a potential conflict of interest situation from a commercial perspective *in future*, although such a conflict of interest was not recorded in the given case by the JC (not other involved actors in the process). The condition recommended by JC did *not include restrictions for the remaining period at Europol*, which represented an acceptable risk, where the *benefits for the Agency and victims of child sexual abuse, outweighed a potential risk for a conflict of interest situation*.
- While the recommended condition from the JC was not reflected in the decision of the delegated AACC (and the grounds for the decision were not documented in the form), which Europol acknowledges was the result of a human error by the AACC, this circumstance did *not lead to a potential risk of conflict of interest materialising*,

¹² T-805/21, *NS v EP*, 25 January 2023 (appeal rejected C-218/23 P), T-597/16 REC, *OW v EASA*, 14 September 2018 et altera

¹³ Please refer to page 4 of the confidential annex of the European Ombudsman inquiry report (2091/2023/AML) of 31 July 2024 (Europol file reference #1399054).

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despite the corresponding risk scenario assumptions insinuated by the complainant¹⁴, especially given that:

- a) as outlined in the European Ombudsman inquiry report, Europol did not, and has not, to the present day, purchased any product from Thorn;
 - b) no factual indications are available that the former staff member engaged in undue activities, such as lobbying or advocacy after having left Europol.
- Against the background of the above, Europol's analysis is, in summary, that preventive conflict of interest measures for the remaining time in service to be *initiated unilaterally by the Agency* itself, *in the absence* of a conflict of interest raised by the concerned staff member, the RO or factual indications for a corresponding breach of professional obligations, *require* to be based on a *distinct legal basis represented by Article 7 of the EUSR*, giving due regard to the merits of the individual case which must at least point to factual indications for a need to reassign a staff member in the interest of the service. In the given case, as outlined above, a conflict of interest was neither reported nor identified by the staff member, the RO, nor the JC, hence there was no ground for Europol to take such measures. In hindsight, there are also no factual indications that a conflict of interest occurred after the staff member had left the Agency.

As also outlined during the present European Ombudsman inquiry¹⁵, Europol has consistently made the proposal to supervisory stakeholders in the past years for the *current regulatory provisions of the EUSR to be further strengthened*. Notably, this would concern Articles 11a and 16 of the EUSR, for giving the AACC a default competence to monitor the activities of staff after leaving the service and to take respective action, as well as a distinct legal basis in these provisions to impose stringent precautionary actions for the remaining time of such staff in service in the Agency, beyond the generic possibilities provided for in Article 7 of the EUSR.

Against this background, while Europol assures the European Ombudsman of a consistent and strict application of the respective provisions of the EUSR, in particular with respect to Articles 7, 11a, 16 of the EUSR depending on the case at hand, Europol would welcome it if the *European Ombudsman could support* the Agency in this endeavour.

2. How Europol assessed conflict of interest in relation to post-service activities

"... Europol puts a special emphasis on commercial considerations when assessing risks of conflict of interest related to post-service activity requests ... Europol applied the notion of conflict of interest in the post service-activity request of the first staff member too narrowly ... Had the assessment considered all existing risks, a lobbying cooling-off period should have been imposed ..."

¹⁴ Views by the complainant of 3 September 2024 on the inquiry report of the European Ombudsman (2091/2023/AML): *"... The first thing that strikes me from your meeting report is that when assessing potential conflicts of interest, Europol seems to focus only on direct commercial advantages the new employer may seek (particularly in procurement), and only on protecting Europol's own integrity. This is far too narrow an understanding. It fails to cover hiring former Europol officials for lobbying purposes, namely for influencing legislation and Commission decisions. ... If a former Europol official [sic - Europol does not employ officials] uses his internal knowledge and contacts, as well as his former position, to lobby Commission staff (who he may now personally) concerning legislative processes on behalf of a stakeholder with commercial interests, his is precisely what procedures need to prevent, at least for a cool-down period. ..."*

¹⁵ Please refer to page 6 of the European Ombudsman inquiry report (2091/2023/AML) of 31 July 2024 (Europol file reference #1399051), as well as the submission by Europol to the inquiry officer on 24 January 2024

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Europol's reply

Europol does not share the preliminary findings of the European Ombudsman, on the basis of the related comments by the complainant¹⁶, for the following reasons:

- Europol applies a broad assessment of conflict in interest risks which expands beyond commercial considerations.
- As demonstrated in the answer to Section 1 'How Europol dealt with a risk of conflict of interest during service' above, for the first staff member, the Joint Committee (JC) noted in the respective form that it had assessed the relevant criteria¹⁷ established in the European Commission decision applicable at Europol.
- This was also the case in the assessment by the JC for the second staff member¹⁸, where the Authority Authorised to Conclude Contracts (AACC) decided on distinctive conditions for the authorisation of the intended post-Europol activity¹⁹, and in case of the second staff member, the role as a Board member of Thorn (which was exercised as a spare time activity next to another professional activity, duly authorised following the service at Europol) ceased within one month after the conditional authorisation imposed by Europol (as reported during the European Ombudsman inquiry²⁰).
- The fact that the JC recommended restrictive conditions with a focus on commercial aspects, does not imply, as exhibited above, that other conflict of interest risks were not properly assessed by the JC.
- Finally, the form for the authorisation of post-Europol activities (which was made use of at the time, as well as in the current version of the form) specifies clearly describes that lobbying or advocacy activities are prohibited (please refer to the answer under Section 1 'How Europol dealt with a risk of conflict of interest during service' above).

3. How Europol processed post-service activity authorisation requests internally

"... Finally, my inquiry team detected a number of shortcomings in how both requests for post-service activities were handled by Europol. In the case of the first staff member, there was a contradiction between the opinion of the Joint Committee and that of the Appointing Authority, and Europol was not aware whether the then Appointing Authority

¹⁶ Please refer to the respective quotes under footnote 17 above.

¹⁷ "The Joint Committee considered the notification ... taking into account the Article 16 of the EUSR and the factors defined in Article 21(1-2) of Commission Decision C(2018) 4048 and using information from open sources, ..." Accordingly, as no conflict of interest was identified by the Joint Committee (JC), restrictive measures under Article 21(3) of the Commission Decision were not considered.

¹⁸ Please refer to page 10 of the filled in form for the second staff member (provided during the inquiry of the European Ombudsman).

¹⁹ Please refer to page 12 of the filled in form for the second staff member regarding the decision by the AACC: "... Open sources indicate that Thorn promotes the development of software products that could be of relevance to the core business of Europol in the area of the child sexual abuse, giving rise to the possibility of a conflict of interest situation. Against this background, the Thorn Board membership of the former staff member is authorised with the condition that there are no contacts with Europol by the former staff member in the capacity as Thorn Board member for commercial purposes with the Agency, and that any related contact with any other law enforcement authority in that context is not made with reference to Europol. Any other engagement or contact with Europol, e.g. for core business purposes, must follow the respective provisions of the amended Europol Regulation, and I wish to highlight that any potential advisory activity of the former staff member for policy or legislative initiatives at EU level may, in applying the key features of Europol's regulatory framework (including Europol's code of conduct), not be carried with regard to Europol as former employer. This will in particular serve the interest of Europol to uphold the impartiality and independence of the Agency, as required by the EU Staff and Financial Rules."

²⁰ As per Europol's written answers provided during the European Ombudsman inquiry on 30 April 2024 (Europol file reference #1381611, page 7)

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had in fact considered the opinion of the Joint Committee at all. In the case of the second staff member, some of the information provided by the staff member was not recorded in Europol's internal consultation process and the omission was detected only after the Appointing Authority had taken the final decision on the request. In both cases, the shortcomings arose during Europol's internal processing of the authorisation request forms. This internal processing seems vulnerable to human error. ..."

Europol's reply

Europol acknowledges the preliminary findings of the European Ombudsman and reviewed the two administrative errors in both cases, which did not cause the effect of a conflict of interest risk to materialise. During the European Ombudsman inquiry, mitigation actions were promptly initiated by Europol to ensure that the processing of authorisation requests for post-Europol employment under Article 16 of the EUSR is free from human error:

- Europol instigated an ex-post review from 2021 to 2024²¹, confirming that no other error regarding an inconsistency between, on the one hand, the opinion of the Reporting Officer (RO) and the Joint Committee (JC), and, on the other hand, the final decision taken by the Authority Authorised to Conclude Contracts (AACC)²² on the request for authorisation was identified. Accordingly, Europol is satisfied that the specific error in the case of the first staff member²³ represents a singular instance, and therefore was not of a systemic nature.
- In relation to error for the second staff member, where 2 sentences were not transferred from the authorisation request of the former staff member into the form for internal decision-making²⁴, this did not have an effect on the decision-making, given that this information was anyway known to the actors involved in the authorisation process, which was also confirmed by the AACC at Europol²⁵. Furthermore, comparable omissions regarding text transmissions were not identified in the above referred ex-post review from 2021 to 2024.
- Europol has refined the process for the processing of authorisation requests under Article 16 of the EUSR, by reinforcing the scrutiny of contributions of the different actors during the decision-making process. In this regard, Europol's Human Resources (HR) Unit, which is responsible for supporting the application of the overall process, introduced a four-eyes-review of the contributions received for completeness before these are moved to the next actor, and the applicant is requested to fill in the form in electronic format for subsequent insertion into the decision-making process involving the RO, the JC and the AACC.

Furthermore, awareness raising has increased (including by adjustments to the request form), with the result that all actors, in particular the Chairperson of the Joint

²¹ The result of which was shared with the European Ombudsman office on 13 June 2024 (Europol file reference #1395973)

²² I.e. the delegated decision-taker within Europol

²³ The AACC at Europol in 2021 did not record the reasoning for not imposing the additional preventive measure regarding commercial aspects proposed by the Joint Committee (JC). It must be noted that a conflict of interest situation was neither identified by the Reporting Officer (RO) nor the JC itself.

²⁴ The following information from the authorisation request of the former staff member was not transferred into the form for internal decision-making (as provided during the European Ombudsman inquiry "We invited them to participate in meeting focussed on protection children against child sexual exploitation" (in response to the question in the form on former direct or indirect relations) and "Could be I invited to participate in subject matter expert sessions, although this has not happened so far" (in response to the question whether in the requested activity, there would be could be direct or indirect links with a European Union Institution or body, in particular Europol). The key question in the form, namely whether the activity would entail activities of lobbying or advocacy, was correctly transferred with "No".

²⁵ As per Europol's written answers provided during the European Ombudsman inquiry on 30 April 2024 (Europol file reference #1381611, page 6)

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Committee (JC), are consistently reminded about the required level of assessment under the European Commission implementing provisions²⁶ and as well as necessary mitigation measures, including temporary and so-called cooling-off restrictions. Finally, although already part of the mandatory introduction course on Europol ethics as well as a dedicated session of Europol's Leadership and Management Development (LMD) programme, the need for authorisation during and after leaving the service of Europol for any aspect that could relate to a potential or actual conflict of interest is now particularly highlighted.

²⁶ Please refer to footnote 3 for the documentation reference, namely in particular Article 21(1) to (3) of the European Commission Decision on outside activities and assignments and on occupational activities after leaving the service (including in particular the restrictions referred to in Article 21(3) of the European Commission Decision).