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### Europol's international cooperation between 'past present' and 'present future': reshaping the external dimension of EU police cooperation

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# Europol's international cooperation between 'past present' and 'present future': reshaping the external dimension of EU police cooperation

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## 1. Introduction

EU agencies<sup>1</sup> are interacting in various ways with actors outside the EU and they are becoming arguably more and more visible on the international arena. Increasingly reflected in their own legal framework and practice,<sup>2</sup> the international dimension of EU agencies entails, among other things,<sup>3</sup> providing assistance and support to the Commission, the Council and the Member States with regard to aspects of various EU external actions and initiatives, as well as establishing more or less autonomously formal and informal relations with international organizations

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1 This article is based on the author's PhD dissertation: Florin Coman-Kund, *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (PhD dissertation, Universitaire Pers Maastricht 2015). A revised version of this study will be published as a monograph as follows: Florin Coman-Kund 'European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol' (Routledge 2018, forthcoming). For the purpose of this paper, the category of EU agencies covers what the Common Approach on EU agencies designates as 'decentralized agencies' encompassing both the 'regulatory' or former 'Community' agencies and the former 'third pillar' agencies – see Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies of 19 July 2012 (referred to hereafter as the 'Common Approach on EU agencies') <[http://europa.eu/about-eu/agencies/overhaul/index\\_en.htm](http://europa.eu/about-eu/agencies/overhaul/index_en.htm)>.

2 Andrea Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield between European and International Law' (2008) 13 EFAR 515, 518.

3 See Florin Coman-Kund, 'Assessing the Role of EU Agencies in the Enlargement Process: the Case of the European Aviation Safety Agency' (2012) 8 CYELP 335, 339–40.

and third countries. The development of this dimension of EU agencies' profiles can be explained by the progressive extension of the globalization phenomenon leading to an amplification of trans-boundary issues and triggering a focus on external aspects in various EU policy fields.<sup>4</sup> In these circumstances, engaging in international cooperation activities has arguably become a 'must' for the EU agencies in order to enhance their effectiveness.<sup>5</sup> The need for EU agencies to boost their autonomy and legitimacy has also been advanced as a reason for the proliferation of international cooperation activities by these bodies.<sup>6</sup>

Recently, scholars have begun to pay more attention to various aspects of EU agencies' international dimension. Existing studies range from exploring the forms and consequences of interactions between EU agencies and international institutions,<sup>7</sup> to more horizontal studies mapping out the external relations of these bodies and pointing to legal problems and tensions this may cause,<sup>8</sup> or addressing the legal status of EU agencies on the international plane,<sup>9</sup> to studies covering various facets of the international dimension of specific EU agencies.<sup>10</sup>

From a legal perspective, EU agencies' evolving international dimension poses complex problems regarding the legal nature of their

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4 See also Martijn Groenleer and Simone Gabbi, 'Regulatory Agencies of the European Union as International Actors: Legal Framework, Development over Time and Strategic Motives in the Case of the European Food Safety Authority' (2013) 4 EJRR 479, 481–2.

5 Martijn Groenleer, 'Linking up Levels of Governance: Agencies of the European Union and their Interaction with International Organisations' in Oriol Costa and Knud Erik Jørgensen (eds), *The Influence of International Institutions on the European Union* (Palgrave Macmillan 2012) 144.

6 Groenleer and Gabbi (n 4) 482–3.

7 Groenleer (n 5) 135–54.

8 Ott (n 2); Andrea Ott, Ellen Vos and Florin Coman-Kund, 'EU Agencies on the Global Scene: EU and International Law Perspectives' in Michelle Everson, Cosimo Monda and Ellen Vos (eds), *European Agencies in-between Institutions and Member States* (Kluwer Law International 2014) 87–122.

9 Gregor Schusterschitz, 'European Agencies as Subjects of International Law' (2004) 1 IOLR 1 (2004) 163.

10 See, for instance, Conny Rijken, 'Legal and Technical Aspects of Co-operation between Europol, Third States, and Interpol' in Vincent Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (Asser Press 2001) 577–603; Dick Heimans, 'The External Relations of Europol – Political, Legal and Operational Considerations' in Berndt Martenczuk and Servaas van Thiel (eds), *Justice, Liberty and Security: New Challenges for EU External Relations* (VUBPRESS 2008) 367–89; Laura Surano, 'L'Action Extérieure d'Eurojust' in Marianne Dony (ed), *La Dimension Externe de l'Espace de Liberté, Sécurité et de Justice au Lendemain de Lisbonne et de Stockholm: un Bilan à mi-Parcours* (Éditions de l'Université de Bruxelles 2012) 211–19; Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns regarding Technical Relationships' (2012) 28 Utrecht J Int'l & Eur L 20; Coman-Kund (n 3) on the European Aviation Safety Agency (EASA); Groenleer and Gabbi (n 4) on the European Food Safety Authority (EFSA); Juan Santos Vara, 'The External Activities of AFSJ Agencies: the Weakness of Democratic and Judicial Controls' (2015) 20 EFAR 115.

activities, their status as global actors and the scope and limits of their international cooperation. First, the international dimension of the European agencies raises important legal questions in terms of institutional balance and the *Meroni* doctrine of delegation of powers, as well as with regard to the distribution of competences and tasks in the field of EU external relations. In this respect it is important to clarify how far and under which conditions EU agencies are allowed to pursue international cooperation under the EU constitutional framework, and how the international dimension of EU agencies links to the roles of the main EU external action actors. Second, the external actions of EU agencies also trigger effects from an international law perspective. This requires examining European agencies through the lens of international law in order to clarify the legal nature and implications of their actions, in particular their treaty-like cooperation instruments concluded with third countries and international organizations. Addressing these issues is of utmost importance as this may lead to a reappraisal of the position of agencies within the EU constitutional framework, revealing clashes between EU and international law, and enhancing scrutiny and accountability of EU agencies' international activities. Whilst legal scholarship has dealt with these aspects in a sparing and fragmented manner, recently a more comprehensive legal-analytical framework featuring EU and international law parameters has been proposed to tackle them.<sup>11</sup> This article builds upon this legal-analytical framework in examining the above-mentioned legal aspects with regard to Europol's international dimension.

Europol is the embodiment of an agency with a strong international profile, being one of the few EU agencies whose international cooperation record consists of formal 'agreements' concluded with third countries and international organizations.<sup>12</sup> As such, Europol could be seen as an 'exemplary' case for the outer limits of EU agencies' international cooperation powers. At the same time, Europol is a rather peculiar EU agency, acting within a specific legal-policy environment<sup>13</sup> and having the 'pedigree' of an intergovernmental body established

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11 Coman-Kund (n 1) 85–176; see also Florin Coman-Kund, 'The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon' (2018) 23 *EFAR* 97.

12 Usually, EU agencies' legal framework and practice features international cooperation instruments labelled 'arrangements' or 'memoranda of understanding'.

13 Police cooperation for the purpose of preventing and combatting crime is a particularly sensitive operational field in which Member States displayed reluctance over time towards more 'communitarization', and in which cooperation with national police and enforcement authorities is essential.

by the Member States via a convention.<sup>14</sup> This ‘intergovernmental pedigree’ had also been reflected in the legal framework based on Council Decision 2009/371/JHA (Europol Council Decision)<sup>15</sup> as regards the agency’s international cooperation. The new Europol Regulation,<sup>16</sup> applicable as of 1 May 2017, redesigns the agency’s international cooperation framework arguably in order to fully align it with the post-Lisbon constitutional framework and the Common Approach on EU agencies. One important change concerns Europol’s international cooperation instruments, in that the agency will conclude in the future working and administrative arrangements instead of cooperation agreements as provided by the former Europol Council Decision. However, the new Europol Regulation ensures partly the ‘survival’ of the agency’s legal framework based on the Europol Council Decision<sup>17</sup> and, importantly, it also preserves the validity of Europol’s cooperation agreements concluded before 1 May 2017.<sup>18</sup>

Against this background the aim of this article is two-fold. First, to provide an assessment of Europol’s international dimension based on its former legal framework and its international cooperation practice.<sup>19</sup> This is motivated not only by the fact that Europol’s international cooperation instruments under the former legal framework remain valid bases for cooperation, but also by the fact that the new Europol Regulation amends the agency’s international dimension in response to perceived legal problems and shortcomings rooted in the Europol Council Decision. Second, it gives a fresh appraisal of Europol’s redesigned international dimension based on the new Europol Regulation with a view to mapping prospectively its legal effects and potential problems regarding Europol’s operation as a global actor, and

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14 Convention based on Article K.3 of the Treaty on the European Union of 27 November 1995, on the establishment of a European Police Office (Europol Convention) [1995] OJ C 316/1.

15 Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L 131/37.

16 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53.

17 According to Article 76 of Regulation (EU) 2016/794, ‘rules and measures adopted by the Management Board on the basis of Decision 2009/371/JHA shall remain in force after 1 May 2017, unless otherwise decided by the Management Board in the application of this Regulation’.

18 Article 71(2) of Regulation (EU) 2016/794.

19 Some aspects of the analysis of Europol’s international cooperation practice draw on two semi-structured interviews conducted with Europol officials involved in international cooperation aspects of the agency.

to assess the way in which it addresses crucial aspects of the agency's international cooperation compared to the 'moribund' Europol legal framework. In this respect, the article addresses the more general question of the room left under the Founding Treaties for EU agencies like Europol to carry out international cooperation. The legal-analytical blueprint employed for this purpose uses the principle of institutional balance, the *Meroni* doctrine and the concept of (binding) 'international agreement' as parameters for determining the legal nature and implications of Europol's international cooperation instruments, as well as the compatibility with the EU constitutional framework of the agency's international dimension under the former Europol Council Decision and the new Europol Regulation.

In order to address these legal questions in a dynamic and comparative fashion, the analysis focuses on essential formal legal design aspects of Europol's old and new international dimensions. The paper investigates specifically the way in which the international cooperation mandate of Europol is defined, the agency's international cooperation tasks and powers, substantive and procedural aspects regarding the agency's formal international cooperation instruments, as well as limitations, supervision and controls over the agency's international cooperation activities. Special attention is given to Europol's cooperation agreements as they represent arguably one of the most problematic aspects as to the compatibility of the agency's international dimension with the EU constitutional framework concerning external relations.<sup>20</sup> Europol's international cooperation practice, which is relevant for gaining a deeper understanding into how the agency's international dimension actually works and for determining the legal nature of Europol's concrete international cooperation instruments, is examined only with regard to the former legal framework as at the moment of writing there was no practice under the new Regulation yet.

The possibility to apply *mutatis mutandis* findings concerning a special agency like Europol to the wider population of EU agencies should be regarded with caution. Yet the study of Europol on the basis of the above legal-analytical framework mentioned previously may offer valuable insights with regard to broader issues, such as the nature, scope and limits of the external powers that may be conferred on EU agencies, the conditions for the exercise of such powers, the application

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20 The Common Approach on EU agencies (para 25) foresees the conclusion by EU agencies of arrangements with third countries and international organizations excluding the possibility to commit the EU to international obligations.

of the principle of institutional balance, and the assessment of EU agencies' international cooperation practices and instruments. Also the transformation of Europol's international dimension through the new Europol Regulation might indicate a broader trend towards streamlining EU agencies' international cooperation, entailing that some of the elements introduced by the agency's new legal framework might be transplanted to other EU agencies in the future.

The article begins with a brief overview of the evolution and design of the agency's general mandate (section 2). Thereafter, Europol's international dimension according to the Europol Council Decision is scrutinized, by addressing both the formal legal framework for the agency's international cooperation and its international practice. Besides examining the international cooperation mandate and tasks of the agency, the terminology and types, content and structure, effects and practical aspects concerning the procedure for the negotiation and conclusion of Europol's cooperation agreements are addressed (section 3). This is followed by a mapping out of the design, the legal implications and potential problems of Europol's international dimension according to the new Europol Regulation (section 4). Next, the article advances a legal-analytical blueprint providing the benchmarks for assessing Europol's international dimension both under the old and the new legal frameworks (section 5). Section 6 offers an assessment of Europol's international dimension with regard to the legal nature and effects of its international cooperation instruments, and as to the compatibility of its international cooperation with the European Union's legal-institutional framework.

## **2. Europol's legal design and incremental evolution: from a Member States' agency to an EU agency**

Europol was established on the basis of Article K.1 TEU by the 1995 Europol Convention<sup>21</sup> and became operational on 1 July 1999. This prompted the conclusion that Europol was not really an EU agency but a 'fully fledged international organization' equipped with 'full legal personality, including the capacity to enter into binding agreements under international law'<sup>22</sup> or at least a 'European organization *sui*

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21 The Europol Convention can be best described as an intergovernmental agreement concluded by the Member States within the framework of the EU; see Rijken (n 10) 582-3.

22 Heimans (n 10) 369.

*generis* of the EU.<sup>23</sup> The centre of gravity of Europol's mandate was on information processing and exchange tasks.<sup>24</sup>

After ten years of operation as an intergovernmental body, Europol's legal framework has been replaced by Council Decision 2009/371/JHA (Europol Council Decision). This was an important milestone in the evolution of Europol with implications for its legal status and operation. Most notably, although it kept its legal personality, Europol was transformed into an EU agency, meaning that it was financed from the EU budget and subject to staff regulations and all relevant EU rules.<sup>25</sup> However, with regard to the agency's main tasks, its governance and control, the Europol Council Decision implemented overall cosmetic changes.<sup>26</sup> The same holds for the international dimension of Europol. The Europol Council Decision, together with the relevant implementing measures,<sup>27</sup> basically maintained the status quo of the Europol Convention, including the agency's capacity to conclude agreements with third countries and international organizations.<sup>28</sup>

With the entry into force of the Lisbon Treaty, the fields from the former 'third pillar' were brought together with the other elements of the Area of Freedom, Security and Justice (AFSJ) within Title V of the Treaty on the Functioning of the European Union (TFEU). Accordingly, police cooperation became a shared competence,<sup>29</sup> triggering the application of the standard EU instruments and decision-making procedures. In this vein, Article 88 TFEU (Europol's treaty legal basis) ensures that the legal framework of the agency would be established by regulations adopted according to the ordinary legislative procedure. Whereas Protocol No. 36 on Transitional Provisions still allowed Europol to operate under the Europol Council Decision,<sup>30</sup> the Lisbon Treaty has further consolidated

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23 Rijken (n 10) 583.

24 Heimans (n 10) 369–70.

25 Steve Peers, *EU Justice and Home Affairs Law* (OUP 2011) 932.

26 Alexandra de Moor and Gert Vermeulen, 'The Europol Council Decision: Transforming Europol into an Agency of the European Union' (2010) 47 CML Rev 1089, 1097–1104 and 1120–1.

27 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 [2009] OJ L325/6, and Council Decision 2009/935/JHA of 30 November 2009 determining the list of third states and organizations with which Europol shall conclude agreements, [2009] OJ L325/12.

28 Moor and Vermeulen (n 26) 1121.

29 Article 4(2)(j) TFEU.

30 According to Article 9 of Protocol No. 36, the legal effects of acts adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon are preserved 'until those acts are repealed, annulled or amended in implementation of the Treaties'.



the international legal status of the EU, by providing explicitly for the European Union's legal personality,<sup>31</sup> by codifying its competence to conclude international agreements<sup>32</sup> and, arguably, by establishing a 'single treaty-making procedure' under Article 218 TFEU.<sup>33</sup>

Both the Europol Council Decision<sup>34</sup> and Article 88(1) TFEU emphasize the role of Europol as a supportive structure for the enforcement authorities of the Member States, and not as a 'European FBI' with fully fledged investigative and enforcement powers. Above all, Europol's information-related tasks defined the 'core business' of the agency.<sup>35</sup>

The new Europol Regulation maintains the core principles upon which the role and functioning of Europol were premised, but also brings some noteworthy novelties. First, it expands Europol's *ratione materiae* competence by supplementing the list of serious crimes,<sup>36</sup> and by adding 'forms of crime which affect a common interest covered by a Union policy'.<sup>37</sup> Second, it further consolidates Europol's core information-related tasks by establishing an obligation for the Member States to provide information to the agency.<sup>38</sup> Third, it aims to strengthen through the involvement of the European Data Protection Supervisor (EDPS) the supervision over Europol's processing of personal data,<sup>39</sup> and to increase parliamentary supervision over Europol's activities in line with Article 88(2) TFEU.<sup>40</sup> Fourth, the Commission is given a more influential role with regard to the agency.<sup>41</sup> Overall, the new Regulation can be seen as an important step towards transforming Europol from a 'special' agency into an 'ordinary' EU agency in line with the Common Approach on EU agencies.

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31 Article 47 TEU.

32 Articles 3(2) and 216–17 TFEU.

33 See Jean-Claude Piris, *The Lisbon Treaty: a Legal and Political Analysis* (CUP 2010) 259–60.

34 Article 3.

35 Moor and Vermeulen (n 26) 1099.

36 For example, as compared to the Europol Council Decision, Annex I of Regulation 2016/794 adds the category 'genocide, crimes against humanity and war crimes' to Europol's mandate.

37 Article 3(1) of Regulation 2016/794; an example is the category of 'crimes against the financial interests of the Union' listed in Annex I of the Regulation.

38 Recital (13) and Article 7(6) of Regulation 2016/794.

39 Recitals (50)–(54) and Article 43 of Regulation 2016/794.

40 Recital (58) and Articles 51–52 of Regulation 2016/794.

41 See, for instance, Articles 12 and 68 of Regulation 2016/794.

### 3. Europol's international cooperation legal framework and practice under Council Decision 2009/371/JHA<sup>42</sup>

#### 3.1 Legal framework

##### 3.1.1 *Mandate, tasks and instruments*

The legal framework for Europol's international cooperation activities was provided primarily by Article 23 of the Europol Council Decision complemented by Council Decision 2009/934/JHA. Article 23(1) of the Europol Council Decision stipulated clearly that Europol's international cooperation activities were instrumental to the core mandate and tasks of the agency. This provision also made clear that the quasi exclusive way for the agency to formalize its relationship with partners outside the EU was by concluding cooperation agreements. What is more, it exhibited that exchange of information related to crimes within Europol's mandate was the main concern of such instruments.<sup>43</sup> Council Decision 2009/934/JHA also touched on the issue of information exchange between Europol and its external partners,<sup>44</sup> and introduced a distinction between operational and strategic agreements concluded by Europol with its partners, depending on the information which could be exchanged under each type of instrument.<sup>45</sup> Yet importantly, the Europol Council Decision provided two important limitations on Europol's international cooperation. According to Article 23(2) in combination with Article 26(1) of Council Decision 2009/371/JHA the agency was bound to conclude agreements only with third countries and international organizations put on a 'list' drawn up by the Council, on the proposal of Europol's Management Board.<sup>46</sup> Furthermore, Article 23(2) subjected each Europol's agreement to prior approval by the Council.

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42 See concisely on these issues also Coman-Kund (n 11) 108, 110–12 and 114–15.

43 Article 23(3)–(9) of the Europol Council Decision.

44 See Title III, Articles 8–20 of Council Decision 2009/934/JHA.

45 Article 1(g) and (h) of Council Decision 2009/934/JHA.

46 The 'list' took the form of Council Decision 2009/935/JHA and initially included twenty-five third countries and three organizations. The Council's 'list' was amended in May 2014, when four third countries were added (Brazil, Georgia, Mexico, United Arab Emirates) – see Article 1 of Council Implementing Decision of 6 May 2014 amending Decision 2009/935/JHA as regards the list of third States and organizations with which Europol shall conclude agreements, [2014] OJ L138/104.

### 3.1.2 *The procedure for Europol's cooperation agreements*

According to Articles 5–6 of Council Decision 2009/934/JHA, the detailed procedure for negotiating and concluding Europol's international agreements included the following milestones:

- the negotiations with a third country or international organization included on the Council's 'list' were carried out by the Executive Director, supported by the relevant internal units of Europol;<sup>47</sup>
- after the conclusion of negotiations, the Executive Director had to submit the draft agreement to the Management Board for endorsement;<sup>48</sup>
- the draft agreement endorsed by the Management Board was then submitted to the Council for approval (which made a decision after having consulted the Management Board);<sup>49</sup>
- the agreement was concluded (signed by the Executive Director) after the Council's approval.<sup>50</sup>

Whereas for strategic agreements the steps mentioned previously were sufficient, for operational agreements there were additional procedural requirements.<sup>51</sup> First, before initiating negotiations, Europol had to carry out 'an assessment of the existence of an adequate level of data protection ensured by the third party'.<sup>52</sup> This assessment was forwarded to the Management Board, which sent it to the Joint Supervisory Body (JSB) for an opinion.<sup>53</sup> After receiving the opinion of the JSB, the Management Board decided whether to authorize the Executive Director to start negotiations on an operational agreement.<sup>54</sup> Second, after the negotiations, the draft agreement was submitted to the Management Board, which asked again for the opinion of the JSB, this time on the draft agreement.<sup>55</sup>

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47 Article 6(1) and (2) of Council Decision 2009/934/JHA.

48 Article 6(3) of Council Decision 2009/934/JHA.

49 Article 6(4) of Council Decision 2009/934/JHA.

50 Article 6(4) of Council Decision 2009/934/JHA. Post Lisbon, the approval took the shape of a Council implementing decision.

51 Emma Disley et al, 'Evaluation of the Implementation of the Europol Council Decision and of Europol's Activities' (technical report), RAND Europe (2012) 113.

52 Article 5(4) of Council Decision 2009/934/JHA.

53 Established as an independent body outside the structure of the agency, the JSB was Europol's data protection control authority; see Article 34 of the Europol Council Decision and Heimans (n 10) 371.

54 Article 6(1) of Council Decision 2009/934/JHA.

55 Article 6(3) of Council Decision 2009/934/JHA.

## 3.2 Europol's international dimension in practice

### 3.2.1 *Setting the international cooperation priorities and actions*

Europol's overall priorities, including in the area of international cooperation, are framed in multiannual documents adopted by the Management Board<sup>56</sup> in the shape of four-year general strategies<sup>57</sup> and specific strategies focusing on external relations issues.<sup>58</sup> The overall planning of Europol's priorities concerning international cooperation could be depicted as mainly being operationally driven, but also subject to policy-political influences.<sup>59</sup> First, although driven mostly by operational needs, setting the agency's priorities was tightly restricted and controlled by the Council and the Member States via the Management Board. Second, the consistency between Europol's international cooperation priorities and the European Union's operational and political needs and priorities, including taking into account of the sudden changes in the EU external action,<sup>60</sup> is guaranteed mainly by the Commission<sup>61</sup> and through relevant Council committees and working parties.<sup>62</sup> This suggests a rather limited discretion for Europol in conducting international cooperation because of the restrictions set by the agency's legal framework and the constraints imposed by its operational and political environment.<sup>63</sup>

### 3.2.2 *Europol's cooperation agreements*

According to Council Decision 2009/934/JHA, the scope of Europol's strategic agreements was more limited in that they allow for the exchange of information, except for personal data, while operational agreements included the issues covered by strategic agreements plus

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56 Article 37(9)(a) of the Europol Council Decision.

57 For example, Europol Strategy 2016–2020, (2015) EDOC# 796794v19B, available at <<https://www.europol.europa.eu/content/europol-strategy-2016-2020>>.

58 For example, Europol External Strategy 2010–2014, (2010) EDOC # 434663; Europol External Strategy 2017–2020 (2016) EDOC#865852v3.

59 According to a Europol official, 'the setting of Europol's international strategy is a mix of (politically) predetermined elements and of operationally driven considerations', Interview 5, The Hague, 29 January 2013.

60 Interview 13 with a Europol official, The Hague, 1 July 2013.

61 This is in line with the Common Approach on EU agencies (para 25) providing for Commission's role to oversee EU agencies' international cooperation.

62 E.g. the Group on External JHA issues (JAEX), Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS), Law Enforcement Working Party (LEWP).

63 See Madalina Busuici, Deirdre Curtin and Martijn Groenleer, 'Agency Growth between Autonomy and Accountability: the European Police Office as a "Living Institution"' (2011) J Eur Publ Pol 862.

personal data exchanges. Put simply, the two types of agreements provided the 'toolbox' allowing Europol to use one instrument or another depending on the level of trust in its partners: strategic agreements to establish formal cooperation with partners whose data protection system or human rights record might be problematic<sup>64</sup> and operational agreements with close partners.

Europol currently has twenty-six agreements: eighteen operational agreements (seventeen with third countries<sup>65</sup> and one with Interpol) and eight strategic agreements (six with third countries<sup>66</sup> and the remaining two with United Nations Office on Drugs and Crime (UNODC) and World Customs Organization (WCO)).<sup>67</sup> The wording of both strategic and operational agreements features prescriptive 'shall/will' clauses. Regarding the structure, both strategic and operational agreements include a preamble, a main body and usually one or more annexes. The provisions of all the cooperation agreements are structured in articles.

The core part of all Europol's agreements deals mostly with the exchange of operational, strategic and technical information relating to the areas of crime within Europol's mandate. Rules on the detailed procedure for information exchange (including classified information), specific limitations and requirements, as well as confidentiality duties are included. Other aspects normally included in the core part of the agreements deal with issues such as the exchange of expertise and training. Importantly, the agreements provide for the possibility to assign liaison officers. The final provisions of the strategic agreements usually cover dispute settlement, amendment procedures, entry into force, termination of the agreement and the relationship with other international cooperation instruments. The entry into force of the agreements is usually linked to the date on which the third country notifies Europol about the completion of its own internal procedures. The agreements stipulate that Europol may consent to amendments only after approval by the Council, thereby re-confirming that the agency does not act fully independently in its relationship with its partners. According to the standard procedure, the termination of the agreements requires a written notification and a three-month notification period.

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64 Heimans (n 10) 382.

65 Albania, Australia, Bosnia and Herzegovina, Canada, Colombia, Former Yugoslav Republic of Macedonia (FYROM), Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Ukraine, USA (2002).

66 Brazil, China, Russian Federation, Turkey, United Arab Emirates, USA (2001).

67 A list of cooperation agreements is available at <<https://www.europol.europa.eu/partners-agreements>>.

Additionally, the *operational agreements* include detailed provisions on the procedures and obligations of the parties concerning the exchange, processing and handling of *personal data*, including conditions and restrictions for the onward transmission of the data exchanged with third parties. They also lay down a right for the individuals and private entities to have access to personal data concerning them that is processed under the agreement, and usually comprise elaborated provisions on the liability of the contracting parties for damages caused to individuals as a result of errors in the exchange and processing of personal data. It should be also noted that few of Europol's operational agreements depart from the standard model described above.<sup>68</sup> The 2002 Supplemental Agreement with the United States deserves special attention for its emphasis on the fact that it does not give rise to a right on behalf of any private party to obtain, suppress, exclude any evidence or to impede the execution of a request.<sup>69</sup> Next, quite surprisingly, the agreement does not mention anything about the adequate level protection of personal data and says little about data protection safeguards. What is more, this agreement does not contain clear provisions on liability, and it does not include elaborated provisions on dispute settlement.<sup>70</sup> These issues raised legal concerns as it was suspected that this agreement did not meet essential legal and data protection safeguards provided by the Europol legal framework, thereby potentially infringing fundamental rights.<sup>71</sup>

Regarding the *procedure for the negotiation and conclusion of the cooperation agreements*, in practice, the initiation of contacts with potential partners started after receiving a request, which was normally channelled through the Management Board.<sup>72</sup> An important practical aspect is that both JSB's (formally non-binding) opinions on the data protection report and on the draft agreement to be signed between the parties seemed to be quite influential.<sup>73</sup> Also, throughout the whole process (initiation, negotiations, conclusion) there were informal and formal interactions between the agency and the Council,

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68 Operational agreements with Canada and USA.

69 Article 3(3).

70 Articles 11 and 13.

71 Elspeth Guild et al, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office', Study for the European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE) (PE 453.196/2011) 74; see also Heimans (n 10) 385–7.

72 Interview 5 (n 59).

73 Interview 13 (n 60).

the Commission as well as the Member States.<sup>74</sup> This suggests dynamics going beyond the formal legal procedures, entailing more involvement of the main EU external action actors in Europol's most important international cooperation agreements than on paper.

A recent development regarding the procedure for the conclusion of Europol's agreements flowed from Court of Justice of the European Union (CJEU)'s judgment in Case C-363/14<sup>75</sup> concerning the action for annulment of Council Implementing Decision 2014/269/EU extending the Council's 'list'. The Court confirmed that Article 26(1)(a) of the Europol Council Decision represented a valid secondary legal basis<sup>76</sup> for adopting Council implementing acts such as the one under consideration,<sup>77</sup> and established a duty for the Council to consult the European Parliament (EP) based on former Article 39(1) TEU when adopting such measures.<sup>78</sup> The Council gave an extensive interpretation to this consultation duty by extending it to all implementing measures adopted under the old 'third pillar' framework.<sup>79</sup> Accordingly, after September 2015, the Council implementing decisions approving Europol's agreements with third countries were also subject to prior EP consultation. In short, this resulted in strengthening EP's oversight by adding an extra condition to the procedure for the negotiation and conclusion of the agency's cooperation agreements.

#### 4. The new Europol Regulation: redesigning Europol's international dimension

The new Europol Regulation substantively redesigns Europol's international dimension.<sup>80</sup> Among the factors that arguably triggered the overhaul of the agency's international cooperation were the demand for aligning Europol's international relations with the post-Lisbon

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74 Interviews 5 (n 59) and 13 (n 60).

75 Case C-363/14 *Parliament v Council* EU:C:2015:579. In that case, the EP argued essentially that the contested Council implementing decision had been adopted based on an invalid secondary law legal basis (ie, Article 26 of the Europol Council Decision), and that, moreover, EP's prerogative to be consulted before the adoption of that decision had been breached.

76 See for previous cases on this matter, Joined Cases C-317/13 and C-679/13 *Parliament v Council* EU:C:2015:223, and Case C-540/13 *Parliament v Council* EU:C:2015:224.

77 Case C-363/14 *Parliament v. Council*, paras 70–72.

78 *ibid*, paras 82–85.

79 Council doc. 12035/15, Judgment of the Court of 10 September 2015 in Case C-363/14, '*European Parliament v Council for the European Union – legality of a Council implementing Decision based on the 2009 Europol Decision concerning the list of third states with which Europol can conclude cooperation agreements*', 7 October 2015, 6.

80 For a brief analysis, see also Coman-Kund (n 11).

EU external action constitutional framework, the concerns regarding the insufficient parliamentary/democratic scrutiny over the agency's international activities, and the need to streamline its international dimension in line with the Common Approach on EU agencies.<sup>81</sup> The Commission in particular had been sensitive over time as regards Europol's power to conclude its own international cooperation agreements as this could affect the coherence of the Union's external relations and collide with the institutional balance established by the Founding Treaties regarding EU external representation and treaty-making.<sup>82</sup> Post Lisbon, Articles 216 and 218 TFEU offered arguably more support for an exclusive EU treaty-making procedure which rendered allegedly the possibility for Europol to conclude binding international agreements highly questionable.<sup>83</sup> Also the EP's frustration regarding its longstanding non-involvement in Europol's design and activities (including highly controversial aspects of the agency's international cooperation, such as the 2002 Supplemental Agreement with USA)<sup>84</sup> had been arguably one of the drivers behind the reform of Europol's international dimension. As such, the EP had been eager to seize the opportunity offered by Article 88 TFEU in order to gain the possibility to decide on an equal footing with the Council upon Europol's legal design, operation and scrutiny (including international exchanges of data).<sup>85</sup> As stated in the Commission's proposal for the Europol Regulation,<sup>86</sup> the Common Approach on EU agencies, which foresees an enhanced relationship between the Commission and EU agencies for consistency reasons and for ensuring that these bodies do not commit the Union to international obligations, also played a role in the reshaping of Europol's international dimension.<sup>87</sup>

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81 'Impact Assessment on Adapting the European Police Office's Legal Framework with the Lisbon Treaty' SWD (2013) 98 final, 3–4.

82 Commission, 'Proposal for a Council Decision establishing the European Police Office (Europol)' COM (2006) 817 final, 11; Commission, 'Impact Assessment on Adapting the European Police Office's Legal Framework with the Lisbon Treaty' SWD (2013) 98 final, 3. See also Heimans (n 10) 389; Moor and Vermeulen (n 26) 1107–8.

83 See House of Commons, European Scrutiny Committee, *Reforming Europol 3rd Report of Session 2013–2014* (TSO 2013), HC 83-iii (Session 2013/14), 13.

84 Busuioac, Curtin and Groenleer (n 63) 857–8. On the legal concerns raised by this agreement, see Guild et al (n 71) 74.

85 EP legislative resolution of 17 January 2008 on the proposal for a Council decision establishing the European Police Office (EUROPOL), P6\_TA (2008)0015; Committee on Civil Liberties, Justice and Home Affairs, Meeting 4-5 November 2009, Joint debate on Europol related files, LIBE(2009)1104\_1; see also Moor and Vermeulen (n 26) 1096–1097.

86 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA' COM (2013) 173 final, 4.

87 See in particular para 25 of the Common Approach (n 1).



First, Europol is brought in line with other EU agencies, in that the agency will formally establish cooperative relations with the competent authorities of third countries (instead of third countries as provided by the former Europol legal framework).<sup>88</sup>

Second, in response to the concerns regarding institutional balance in EU external relations and the unity of the Union's external representation, there will no longer be Europol cooperation agreements. Whilst Europol's agreements concluded by 1 May 2017 are preserved<sup>89</sup> and will remain for the time being the basis for cooperation with third countries and international organizations,<sup>90</sup> future international agreements allowing the agency to transfer personal data will be concluded according to Article 218 TFEU.<sup>91</sup>

However, the Europol Regulation does not clarify whether and how the agency will be involved in the negotiation of the relevant agreements foreseen under Article 218 TFEU. Article 11(2) of the Europol Regulation only provides for the possibility of the Management Board to make a suggestion to the Council to draw the attention of the Commission to the need for concluding an 'Article 218 TFEU' international agreement. From this provision it can be inferred that the initialling of an international agreement allowing Europol to exchange personal data will not so much depend on the agency anymore, but on the Council and the Commission. Furthermore, the application of the procedure for 'Article 218 TFEU' agreements will entail Council decisions concerning the opening of negotiations, adopting negotiating directives, authorizing the signing of and concluding the agreement, negotiations by the negotiator designated by the Council, and EP's consent.<sup>92</sup> Within this procedure, Europol representatives might eventually be involved either in the negotiating team or in the special consultation committee which may be designated by the Council in order to support the negotiator.<sup>93</sup> In any case, this represents an important shift in Europol's role in international cooperation, as compared to the Europol Council Decision, where the agency was in the lead as regards the initiation, negotiation and conclusion of the cooperation agreements. This change largely reflects Commission's

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88 Article 23(1) of Regulation 2016/794.

89 According to Article 25(4) of Regulation 2016/794, the Commission will review all Europol's cooperation agreements by 14 June 2021, in particular with regard to data protection.

90 Europol External Strategy 2017–2020 (2016) EDOC#865852v3, 4.

91 Article 25(1) and (4) of Regulation 2016/794.

92 Article 218 (6)(a) TFEU *juncto* Article 88(2) TFEU.

93 Article 218(4) TFEU.

view regarding the revision of Europol's international cooperation with a view to fully align it with the Lisbon Treaty and to increase coherence in the Union's external relations.<sup>94</sup> With regard to the latter aspect, the negotiation and conclusion of international agreements concerning Europol by the main EU external action actors are expected to ensure better that broader strategic aspects of the Union's external relations are observed in the agency's international cooperation activities.

Furthermore, it remains to be seen how effective the procedure laid down in Article 218 TFEU will be. Thus, political and non-specialized actors might not be sufficiently familiar with the specific and highly technical issues covered by the current Europol agreements. What is more, there might be a risk for wider political preferences in the Union's external action area being privileged to the detriment of Europol's operational priorities. Also the negotiation and conclusion of agreements under Article 218 TFEU might take longer than in the case of Europol's cooperation agreements.

Besides, it is not very clear what kind of agreements will be concluded under Article 218 TFEU. One option would be to conclude special agreements concerning Europol's cooperation with a third country or international organization, in particular with regard to exchanges of personal data. Such instruments would be very much like the current Europol's cooperation agreements. Another option could be the conclusion of broader framework agreements between the EU and the respective international partner covering various cooperation aspects, and including Europol. Under the latter scenario, the negotiation process might meet with specific difficulties depending on the breadth and complexity of the issues covered by such an agreement.

Third, Europol is still allowed to conclude specific international cooperation instruments. In this respect, the Europol Regulation distinguishes between working arrangements and administrative arrangements in a way that evokes the demarcation between strategic and operational agreements under the old legal framework. The working arrangements are designed to cover cooperative relations, except for exchanges of personal data, and are explicitly characterized as not being binding for the EU and the Member States.<sup>95</sup> Europol's administrative arrangements are intended to enable personal data exchanges by implementing 'Article 218 TFEU' agreements, cooperation agreements concluded by Europol before 1 May 2017, or the Commission's

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94 See Moor and Vermeulen (n 26) 1107–8.

95 Article 23(4) of Regulation 2016/794.

'adequacy decisions' regarding the transfer of personal data, but, unlike the working arrangements, nothing is mentioned about their legal nature.<sup>96</sup> While on the face of it, the provisions of the new Regulation suggest that such instruments would likely qualify as soft law measures<sup>97</sup> (as shown in section 5), determining their legal nature requires a case-by-case analysis of each particular instrument in light of international law criteria.

It should be also noted that, unlike the Europol Council Decision, the new Regulation does not provide details regarding the procedure for the negotiation and conclusion of Europol's working and administrative arrangements, except that they need to be approved by the Management Board.<sup>98</sup> As compared to Europol's cooperation agreements, the new international cooperation framework does not foresee Council's approval or EP's compulsory consultation for the agency's new international cooperation tools.

Fourth, the new Regulation enhances the Commission's role with regard to Europol's international dimension. Most obviously, this is exhibited by formalizing the Commission's 'adequacy decisions'<sup>99</sup> as one of the legal bases, allowing the agency to exchange personal data. As already mentioned, the implementation of such decisions may require the conclusion of specific administrative arrangements between the agency and competent authorities of third countries and international organizations<sup>100</sup> moreover, Europol's Executive Director has a duty to report to the Management Board on the implementation of the Commission's 'adequacy decisions'.<sup>101</sup> Additionally, Article 25(4) of the new Regulation further bolsters the Commission's position by granting it the power to review Europol's 'surviving' cooperation agreements with a view to maintain or replace them with 'Article 218' agreements. In line with the Common Approach on EU Agencies,<sup>102</sup>

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96 Article 25(1) of Regulation 2016/794.

97 For a recent analysis of the concept of 'soft law' and of soft law instruments at EU level, see Fabien Terpan, 'Soft Law in the European Union: the Changing Nature of EU Law' (2015) 21 *Eur LJ* (2015) 68.

98 Article 11(1)(r) of Regulation 2016/794.

99 Based on Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, [2016] OJ L 119/89.

100 Article 25(1) of Regulation 2016/794.

101 Article 25(2) of Regulation 2016/794.

102 See in particular paras 29 and 60 of the Common Approach on EU agencies (n 1).

the new Regulation also introduced more general tools, which enable presumably the Commission to influence the agency's international cooperation. This entails giving the Commission a say with regard to Europol's multiannual planning and annual work programmes,<sup>103</sup> as well as presumably the role assigned to the Commission as regards the periodic evaluation of the agency.<sup>104</sup>

Fifth, the new Regulation formally enhances parliamentary scrutiny of Europol's international cooperation as compared to the former Europol Council Decision. A Joint Parliamentary Scrutiny Group (JPSG), which brings together members of the EP and of national parliaments, is established with a view to monitor Europol's activities.<sup>105</sup> For this purpose, the Europol Regulation imposes a duty on the chair of the Management Board, the Executive Director and other Europol officials to report before the JPSG on the agency's activities.<sup>106</sup> Moreover, an obligation is placed on Europol to transmit to JPSG various documents, including the administrative arrangements concluded with authorities of third countries and international organizations, for the purpose of enabling exchanges of personal data.<sup>107</sup> The outcome of the monitoring carried out by the JPSG materializes in 'conclusions', which are submitted to the EP and the national parliaments.<sup>108</sup> Additionally, the EP can access non-classified and, under certain conditions, also classified information processed by or through Europol.<sup>109</sup> Nevertheless, two caveats should be mentioned both as regards JPSG monitoring and EP's access to Europol information. To begin with, access to information will be subject to the agency's own rules regarding protection of non-classified and classified information, which could at least in theory enable Europol to restrict to a certain extent parliamentary scrutiny of its activities.<sup>110</sup> Next, the Europol Regulation does not provide anything concrete regarding the legal consequences of the scrutiny of Europol's activities.

Sixth, the supervision of Europol's processing of personal data is reinforced by replacing the JSB with the European Data Protection Supervisor (EDPS) with far-reaching tasks and powers.<sup>111</sup> In this respect, the EDPS is tasked to hear complaints, conduct inquiries,

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103 Article 12(1) of Regulation 2016/794.

104 Article 68 of Regulation 2016/794.

105 Article 51(1) of Regulation 2016/794.

106 Article 51(2) of Regulation 2016/794.

107 Article 51(3)–(4) of Regulation 2016/794.

108 Article 51(5) of Regulation 2016/794.

109 Article 52 of Regulation 2016/794.

110 See Articles 51(4) and 52(1)–(2) *juncto* Article 67 of Regulation 2016/794.

111 See Article 43 of Regulation 2016/794.

monitor and ensure the application of the relevant EU legal framework in order to protect natural persons with regard to processing of personal data by Europol, including in the context of international exchanges of data.<sup>112</sup> The EDPS may, *inter alia*, warn or admonish Europol, compel the agency to rectify, restrict, erase or destroy incorrectly processed personal data, ban Europol's processing operations, or refer a matter to the EP, the Council, the Commission or the CJEU.<sup>113</sup>

**Table 1.** Comparative overview of Europol's international dimension under the Europol Council Decision and the new Europol Regulation

<b>Europol's International Dimension</b>	<b>Europol Council Decision</b>	<b>New Europol Regulation</b>
Mandate definition	Instrumental – ancillary to core tasks	Instrumental – ancillary to core tasks
Tasks	Information exchange (strategic and personal data)	Information exchange (strategic and personal data)
Formal cooperation instruments	Cooperation agreements (strategic and operational)	Working arrangements (non-personal data) and (implementing) administrative arrangements (personal data)
Procedures	Elaborate: Council's 'list', Management Board authorization to start negotiations, JSB opinions (for operational agreements), Management Board endorsement of draft agreement, Council approval	Concise: Management Board to decide upon the conclusion of working and administrative arrangements
Supervision and controls	Council, Management Board, JSB, Commission (informally), EP (ex post information duties)	Management Board, EDPS, Commission (formal role), EP/JPSG (more intense ex post formal reporting and information duties)

112 Article 43(2) of Regulation 2016/794.

113 Article 43(3) of Regulation 2016/794.

## 5. A legal-analytical framework for assessing Europol's international dimension<sup>114</sup>

From an EU law perspective, the principle of institutional balance and the so-called *Meroni* doctrine, as essential parameters for determining the 'constitutionality' of the overall design and powers of EU agencies like Europol, bear particular importance also for assessing Europol's international cooperation mandate, powers and actions. As for the international law perspective, the concept of 'international agreement' enables the clarification of the legal nature of Europol's international cooperation instruments.

### 5.1 The principle of institutional balance and the doctrine of delegation of powers

Developed gradually in CJEU's case law<sup>115</sup> and enshrined in Article 13(2) TEU, the principle of institutional balance has been portrayed by scholars as a tool performing a similar function at EU level to the principle of separation of powers in state constitutional systems.<sup>116</sup> Thus, institutional balance is aimed at a system of checks and balances in which the prerogatives of the EU institutions are guaranteed.<sup>117</sup> Based on this understanding, institutional balance requires 'that each institution: (1) has the necessary independence in exercising its powers; (2) must respect the powers of the other institutions; and (3) may not unconditionally assign its powers to other institutions and bodies'.<sup>118</sup> In

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114 Based on the legal-analytical framework for assessing the international dimension of EU agencies developed in *Coman-Kund* (n 1), and further refined in *Coman-Kund* (n 11) 100–106.

115 Some of the landmark cases affirming the principle of institutional balance are *Case 9/56 Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* EU:C:1958:7 and *Case 10/56 Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community* EU:C:1958:8 (the *Meroni* cases); *Case 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co* EU:C:1970:115; *Case C-70/88 Parliament v Council: Radioactive contamination of foodstuffs (Chernobyl)* EU:C:1991:373.

116 Sacha Prechal, 'Institutional Balance: a Fragile Principle with Uncertain Contents' in Ton Heukel, Niels Blokker and Marcel Brus (eds) *The European Union after Amsterdam: a Legal Analysis* (Kluwer Law International 1998) 280; Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 CML Rev 383, 384.

117 Prechal (n 116) 280.

118 The list of 'institutional balance' requirements has been advanced initially by Lenaerts and Van Nuffel listing, however, requirements (2) and (3) in a reversed order; see Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell 1999) 414. This list has been taken over and adapted by Majone, and adopted in this study as in the author's view the current sequence of requirements reflects more logically the

particular the second and the third observations illustrate the relevance of the principle of institutional balance concerning the delegation of powers to EU agencies like Europol.<sup>119</sup> More specifically, when setting up and entrusting powers to an EU agency like Europol, it must be ensured that its legal design neither affects the powers of the EU institutions established by the Treaties nor entails an unconditional surrender of powers by the institutions creating it.

The main tool ensuring that EU agencies like Europol do not affect the institutional balance is the delegation of powers doctrine or the so-called *Meroni* doctrine.<sup>120</sup> The delegation of powers doctrine determines the kind of powers that may be entrusted to EU agencies, as well as the conditions and requirements attached to such powers. The delegation of powers doctrine is dynamic, depending on the evolution of the EU constitutional framework and on the interpretation given by the CJEU. In the *Meroni* cases, the Court established that EU institutions may delegate to external bodies ‘executive’ powers that they themselves possess according to the Treaties, but only if such powers are ‘clearly defined’ and subject to their supervision.<sup>121</sup> In the *ESMA* judgment, the Court confirmed the application of the *Meroni* doctrine to EU agencies,<sup>122</sup> but at the same time opened the path for entrusting wide-ranging powers to these bodies.<sup>123</sup> According to the *Meroni* logic as reinterpreted by the CJEU in *ESMA*,<sup>124</sup> and in light of the principle of institutional balance,<sup>125</sup> EU agencies’ powers seem to be acceptable as long as:

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essentials of the principle of institutional balance; see Giandomenico Majone, ‘Delegation of Regulatory Powers in a Mixed Polity’ (2002) 8 ELJ 319, 327.

119 *Coman-Kund* (n 1) 350.

120 Koen Lenaerts, ‘Regulating the Regulatory Process: “Delegation of Powers” in the European Community’ (1993) 18 EL Rev 23, 27 and 40–49.

121 Case 9/56, *Meroni*, 152 and Case 10/56, *Meroni*, 173.

122 Case C-270/2012 *United Kingdom v Parliament and Council (ESMA)* EU:C:2014:1, para 41.

123 *ESMA*, paras 44–45. See for a detailed analysis of the *ESMA* judgment, Merijn Chamon, ‘The Empowerment of Agencies under the *Meroni* Doctrine and Article 114 TFEU: Comment on *United Kingdom v Parliament and Council (Short-selling)* and the Proposed Single Resolution Mechanism’ (2014) 39 EL Rev 381.

124 There is no general consensus on the detailed list of requirements that make up the *Meroni* doctrine, the only common aspect so far being that ‘discretionary powers cannot be delegated’, see Chamon (n 123) 382; for an overview of the various *Meroni* conditions devised in literature, see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 191.

125 Regarding the relevance of institutional balance as a standard for assessing the lawfulness of EU agencies’ powers, see Stefan Griller and Andreas Orator, ‘Everything Under Control? The “Way Forward” for European Agencies in the Footsteps of the *Meroni* Doctrine’ (2010) 35 EL Rev 3, 31. Whereas, conceptually, the principle of institutional balance, being concerned with preserving the prerogatives of the EU institutions, is different

- (1) they are of an executive nature;<sup>126</sup>
- (2) they are clearly defined, which, however, has been construed broadly by the Court as meaning that they stay within the boundaries of the agency's broad regulatory framework;<sup>127</sup>
- (3) they there are criteria and conditions limiting the discretion of the agency, which calls for mechanisms ensuring sufficient oversight by the main EU institutions;<sup>128</sup>
- (4) they do not encroach upon the powers conferred by the Treaties on the EU institutions.<sup>129</sup>

In the aftermath of *ESMA*, EU agencies like Europol may arguably be entrusted with wide-ranging powers provided that the revamped *Meroni* conditions are met. Moreover, alternative routes for the delegation of executive powers by the legislator to agencies, outside the Commission's powers under the Treaties, do not necessarily breach the principle of institutional balance. What seems to matter in terms of institutional balance in light of the revived *Meroni* doctrine is the system of controlling mechanisms set up under the Treaty framework with regard to the exercise of EU agencies' powers in order to preserve the system of checks and balances.

The principle of institutional balance and the *Meroni* requirements are relevant legal standards for assessing the overall design and delegated powers of EU agencies like Europol. It is therefore maintained that they are also applicable to their international cooperation tasks and activities.<sup>130</sup> The specific features of the international dimension of EU agencies like Europol entail in particular that these bodies must not encroach upon the powers conferred by the Treaties on the EU institutions in the Union's external action area.

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from the *Meroni* doctrine, it is maintained that in practice these two parameters are tightly connected. Accordingly, for the purpose of the present analytical framework, conditions regarding delegation of powers to EU agencies *stricto sensu* (1)–(3) have been integrated with requirements dictated by the principle of institutional balance (4). To be sure, there is no consensus in the literature as regards the precise relationship between institutional balance and *Meroni*; see for a summary of the different views, Chamón (n 123) 188–9 and 200–1.

126 *ESMA*, para 67. Here the Court states that the condition that 'only clearly defined executive powers may be delegated' is still a valid standard for assessing *ESMA*'s powers.

127 *ibid.*, para 44.

128 *ibid.*, paras 45–54.

129 *ibid.*, paras 84–86.

130 *Coman-Kund* (n 1) 88–9.



### 5.1.1 Institutional balance and delegation of powers in the EU external action area

Whereas various actors are involved in different ways in the Union's external action, from Articles 17(1) and 21(3) TEU, as well as Article 220 TFEU it can be inferred that the Commission is mainly in charge of the Union's external representation and of the daily management of its external relations.<sup>131</sup> Recently in Case C-660/13,<sup>132</sup> the Court has further clarified the scope and limits of the Commission's external powers in light of the principle of institutional balance. In its judgment, the Court explained that the EU external action is based on an institutional system whereby the European Council defines the strategic interests and objectives of the Union, the Council is in charge of policy-making, and more specifically it further elaborates the Union's external action and ensures its consistency, whereas the Commission exercises executive and management functions and ensures the Union's external representation.<sup>133</sup>

Next, the institutional balance regarding EU treaty-making is relevant for the limits of EU agencies' international cooperation as it triggers the inquiry into whether such actors are allowed to conclude international binding agreements. This directly questions the constitutionality of Europol's cooperation agreements, and also the agency's international cooperation instruments according to the new Europol Regulation, provided that these qualify as binding agreements in light of the relevant international law criteria. Thus, Article 218 TFEU features a procedure according to which the Council formally decides on the opening of negotiations, the signing and conclusion of the international agreements, while the Commission, in principle, can only propose and negotiate the Union's binding international agreements. On this division of tasks, the Court took a strict stance, relying on the principle of institutional balance. The issue arose most famously in Case C-327/91 *France v Commission*<sup>134</sup> around the legal question of whether the Commission could conclude certain international agreements autonomously. The Court disagreed, essentially arguing that there was a particular institutional balance set by the Treaty with regard to the Union's international

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131 Ott (n 2) 521. See also Commission, *Vademecum on the External Action of the European Union*, SEC (2011) 881/3, 18–19.

132 Case C-660/13 *Council v Commission* EU:C:2016:616. *In casu*, the Council asked for the annulment of a Commission decision on the signature of an addendum to the 2006 Memorandum of Understanding on a Swiss contribution to the new Member States concluded between the EU and Switzerland.

133 *ibid*, paras 33–34.

134 Case C-327/91 *France v Commission* EU:C:1994:305.

agreements entailing the conclusion of such agreements by the Council, not the Commission.<sup>135</sup> Furthermore, the Court indicated that there was no automatic parallelism between the internal and external powers of the Commission as far as the Union's treaty-making was concerned.<sup>136</sup>

The strict stance taken by the Court seems to be backed up by Article 218(1) TFEU, suggesting a single procedure for the negotiation and conclusion of the Union's agreements with third countries and international organizations.<sup>137</sup> However, the delegation of specific treaty-making powers to the Commission and other actors like EU agencies should not be ruled out, provided that the prerogatives of the institutions involved in 'Article 218 TFEU' procedure are not affected.<sup>138</sup>

A more flexible view of the institutional balance in external relations has also been embraced by the EU legislator, by delegating certain external relations tasks to the Commission. The most obvious examples are the financing agreements concluded by the Commission with third countries and international organizations on the basis of the EU Financial Regulation.<sup>139</sup> Similarly, the EU legislator has entrusted limited external relations tasks to EU agencies, though the Founding Treaties do not formally assign them with a role in the Union's external action. The founding acts of some EU agencies provide explicitly for the possibility to conclude agreements<sup>140</sup> or arrangements with third countries and international organizations.<sup>141</sup> A common thread in all these cases is that the enabled international cooperation is ancillary and instrumental to the implementation of the relevant secondary legislative instruments. If such secondary law provisions are interpreted as allowing legally binding agreements to be concluded by the Commission and the EU agencies, one may argue that the EU legislator distorted the institutional balance under Article 218 TFEU.

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135 *ibid.*, para 36.

136 *ibid.*, para 41. See also James Kingston, 'External Relations of the European Community: External Capacity versus Internal Competence' (1995) 44 ICLQ 659, 668.

137 Piris (n 33) 87.

138 See on the delegation of treaty-making powers to the Commission and other EU institutions and bodies, Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (CUP 2014) 392–9.

139 Articles 58 and 184–9 of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002 [2012] OJ L 298/1; see also Schütze (n 138) 395–9.

140 Besides the former Europol Council Decision, the label 'agreement' is explicitly mentioned in the case of Eurojust (Article 26a of 2002/187/JHA Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, [2002] OJ L 63/1).

141 See, for details and examples, Coman-Kund (n 1) 62–80.

Yet, in our view, a delineation<sup>142</sup> could be made between agreements concluded according to the ordinary procedure laid down in Article 218 TFEU and international agreements concluded by the Commission and other EU bodies. The first category embodies the most important legal–political commitments taken by the Union on the international plane corresponding to a sort of ‘external legislation-making’, and requiring the participation of the EU institutions that are also involved in the legislative process.<sup>143</sup> The second category features agreements of a technical–administrative nature regarding the implementation of Article 218 TFEU agreements and EU legislation, and the daily management of EU external policies or the external dimension of Union’s internal policies.<sup>144</sup> These instruments must comply with the international agreements concluded in accordance with Article 218 TFEU and with the Union’s internal legislation, and they must not affect the powers bestowed on other actors in EU external relations.

### 5.1.2 *EU agencies and institutional balance in external relations*

Whereas the Commission and the EU agencies resemble each other in that they both pursue, as part of the EU administration, international cooperation on a technical–administrative level, the Founding Treaties are silent as regards the role of agencies in the EU external action area. However, in *ESMA*, the Court admitted generally that ‘while the treaties do not contain any provision to the effect that powers may be conferred on’ EU agencies, such a possibility exists nevertheless.<sup>145</sup> Since there is no distinction between the delegation of powers exercised by EU agencies internally, (within the Union), and powers concerning external relations, one may assume that the possibility to delegate holds in principle for both categories.<sup>146</sup> Moreover, the Court clarifies that post Lisbon, the Commission’s prerogatives under the Treaties should not be undermined per se if executive powers delegated to EU agencies are part of the regulatory framework in a policy area that requires specific technical expertise, and they are necessary to attain the objectives of that policy area.<sup>147</sup> Similarly, limited international cooperation tasks and actions performed by the EU agencies within

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142 For a similar view, see Schütze (n 138) 392–6.

143 For a parallel between the Union’s international law-making and the making of its ‘internal’ legislation, see Piet Eeckhout, *EU External Relations Law* (OUP 2011) 193–4.

144 For a more detailed analysis of the concept of ‘international administrative agreement’ at EU level, see Coman-Kund (n 1) 155–65.

145 *ESMA*, para 79.

146 Coman-Kund (n 1) 132.

147 *ESMA*, para 85.

their mandate, and with a view to attain the objectives established by the EU legislator, should not be in principle irreconcilable with the powers of the Commission in EU external relations.

The possibility for EU agencies to pursue international cooperation has been acknowledged in the Common Approach on EU agencies<sup>148</sup> through an all-embracing formula covering instances where the mandate or work programme of these bodies ‘foresees cooperation with third countries and/or international organizations’. Moreover, the CJEU has for the first time examined the international dimension of an agency with regard specifically to Europol in Case C-363/14, *Parliament v Council*<sup>149</sup> without questioning the ‘constitutionality’ of the agency’s international dimension as long as it was ancillary and necessary for the performance of its core tasks, and provided that it took place within the framework defined by the EU legislature.<sup>150</sup>

Unlike the Commission, which has a general vocation in EU external relations, EU agencies may only become involved in international cooperation as sectoral actors, with a role that is restricted to what is necessary to fulfil their core mandate entrusted by the legislator in a certain policy area. Accordingly, entrusting certain international cooperation tasks to EU agencies is acceptable, but the *Meroni* requirements listed previously and the institutional balance in the EU external action area must be observed.

It is also maintained that EU agencies can be delegated limited powers to conclude binding international agreements inherent to the fulfilment of their mandate by an act of secondary legislation.<sup>151</sup> Similarly to the Commission’s administrative agreements, such agreements concluded by the EU agencies are *a special form of EU external administrative action* which does not automatically disturb the institutional balance laid down in Article 218 TFEU.<sup>152</sup> In order for such instruments to be validated in light of the *Meroni* requirements and the principle of institutional balance, it is essential that they: (1) remain within the core mandate of the agency, and are consistent with

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148 Common Approach on EU agencies (n 1), para 25.

149 The Court examined the overall setting of Europol’s international relations, including the agency’s cooperation agreements, with a view to determine whether the Council decision amending the ‘list’ of Europol’s partners pertained to an essential element of the matter regulated by the Europol Council Decision, which would have required using the legislative procedure established by primary law instead of the more flexible procedure provided for in Article 26(1)(a) of the Europol Council Decision.

150 Case C-363/14 *Parliament v Council*, paras 49–50.

151 See Schütze (n 138) 397–9.

152 See Ott, Vos and Coman-Kund (n 8) 91–93 and 115–16.

'Article 218 TFEU' agreements and EU legislation; and (2) the agency is subject to sufficient supervision and control, ensuring that the powers of the main actors in the EU external action area are not affected. In particular, the Council and the Commission should be involved in view of their roles under Articles 17(1), 16(6) and 21(3) TEU, as well as Articles 218 and 220 TFEU.

## 5.2 The concept of a (binding) 'international agreement'

Moving away from the controversies surrounding the concept of 'treaty' or binding 'international agreement',<sup>153</sup> the most authoritative definition is to be found in the two Vienna Conventions on the Law of Treaties.<sup>154</sup> These instruments define a treaty as 'an international agreement' concluded in a written form and governed by international law, regardless of whether it is embodied in one, two or more instruments and whatever its particular designation.<sup>155</sup> This definition is widely accepted by the international law scholarship<sup>156</sup> and it is also supported by the International Court of Justice (ICJ)<sup>157</sup> as reflecting customary international law.

Based on this definition, it follows that under international law an essential criterion for assessing the legally binding character of international instruments is the genuine intention of the parties to create binding effects governed by international law, regardless of the name or the form of the instrument.<sup>158</sup> Accordingly, one may identify two essential requirements for an instrument (agreement) to become binding under international law:

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153 See, for a comprehensive overview, Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer 1996).

154 1969 Vienna Convention on the Law of Treaties between States (the 1969 Vienna Convention) and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (the 1986 Vienna Convention).

155 Article 2(1)(a) of the 1969 Vienna Convention and Article 2(1)(a) of the 1986 Vienna Convention.

156 Duncan B. Hollis, 'Defining Treaties' in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2012) 12 and Philippe Gautier, 'Article 1' and 'Article 2' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions of the Law of Treaties: a Commentary*, v I (OUP 2011) 45 and 60.

157 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, Judgment, 2002 ICJ 303, para 263.

158 Hollis (n 156) 26. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and admissibility, Judgment, 1994 ICJ 112, paras 23–25.

- (1) there must be an intention to create legally binding effects;
- (2) such effects must be governed by international law.<sup>159</sup>

However, it is more difficult to assess whether particular instruments (agreements) fulfil these requirements.<sup>160</sup> Accordingly, one has to use various evidentiary factors in order to assess the legal nature of each particular international instrument. The factors most commonly accepted include the wording and substance, as well as the particular circumstances (context) surrounding the negotiation and conclusion of the instrument.<sup>161</sup>

Thus, an instrument with an elaborated structure comprising articles and covering issues such as the purpose of the instrument, rights and obligations of the parties, entry into force, amendment, suspension and termination, liability and dispute settlement is likely to constitute a treaty. Moreover, binding international agreements normally use a certain language featuring 'shall' and 'will' clauses and a certain terminology such as 'parties', 'agree', 'agreement', 'enter into force'.<sup>162</sup> Additionally, the wider legal framework within which the instrument has been enacted, the procedure used, as well as decisions taken after the conclusion of the instrument regarding the application of its provisions are relevant circumstances for determining its legal nature.<sup>163</sup>

The factors mentioned above are mere indicators of intent, as 'there are no magic words to create a treaty or deny an agreement that status'.<sup>164</sup> Therefore, the determination of the legal nature of international cooperation instruments requires a careful analysis combining the above-mentioned factors, by giving consideration to the form, terminology and content of the instrument, as well as to the surrounding circumstances.<sup>165</sup>

Things are no different within the European Union. The CJEU indicated that the binding character of an agreement should be

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159 See, for more elaborated discussions, Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity* (5th revised edn, Martinus Nijhoff Publishers 2011) 1121–3, and Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013) 17–18.

160 Hollis (n 156) 26–8.

161 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, paras 23–25. See also Kirsten Schmalenbach, 'Article 2. Use of Terms', in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012), 40–1.

162 Anthony Aust, 'Alternatives to Treaty-making: MOUs as Political Commitments', in Hollis (ed), *The Oxford Guide to Treaties* (n 156) 48–9.

163 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, para 27.

164 Hollis (n 156) 27.

165 *ibid.*

established, in principle, based on the intention of the parties as results from the wording of the instrument and the history of negotiations.<sup>166</sup> Moreover, the Commission's *Vademecum on the External Action of the European Union* stresses the decisive character of the content of an instrument for the purpose of determining its legal nature, and warns about careful drafting in order to avoid an instrument being considered as legally binding.<sup>167</sup>

Therefore, in order to determine the legal nature of Europol's international cooperation instruments, a complex analysis is required. This entails an assessment of Europol's legal framework pertaining to international cooperation, including the procedure for negotiating and concluding international cooperation instruments, together with a more detailed analysis of the international cooperation instruments.

## 6. Europol's international dimension: an assessment

### 6.1 The legal framework and international cooperation practice under Council Decision 2009/371/JHA

#### 6.1.1 *The legal nature of Europol's cooperation agreements*

The analysis of the relevant legal framework, the procedure for the negotiation and conclusion, as well as the content and effects support the conclusion that Europol's cooperation agreements can be qualified as binding international agreements.<sup>168</sup> This is most obvious with the operational agreements, which include clear obligations for the contracting parties in terms of data protection, information exchange and processing, rights for third parties affected, and liability provisions. The strategic agreements are lighter in terms of the content of the cooperation, but still the procedure used, and the wording and content of their provisions, suggest their binding nature. The qualification of Europol's cooperation agreements as binding international agreements triggers the application of the principle *pacta sunt servanda*, and international responsibility in case of breach of the duties under the agreement.<sup>169</sup>

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166 Case C-327/1991 *France v Commission*, para 15.

167 *Vademecum on the External Action of the European Union* (n 131) 52.

168 See also Vara (n 10) 127 and 135.

169 See generally on this issue, Hollis (n 156) 14.

Europol's cooperation agreements are to be included in the category of international technical-administrative agreements. They have a very limited scope, in line with the mandate of the agency, and lay down a specific framework for technical and operational cooperation. As such, these agreements enable concrete cooperation between administrations without touching presumably the political sphere of external relations.

### *6.1.2 The principle of institutional balance and the Meroni doctrine*

In the field of police cooperation, Europol is a technical body playing a much more modest role than suggested by its name. Europol's discretion to set its international cooperation priorities seems limited because of the constraints imposed on the agency in practice by its operational and political environment. The restricted role of Europol as a global actor was reflected in the agency's legal framework for international cooperation,<sup>170</sup> and in its cooperation agreements. Europol's agreements primarily cover information exchange and processing, the competence of the agency is delineated,<sup>171</sup> and essential requirements in line with Europol's legal framework regarding data protection, confidentiality and liaison officers are included.<sup>172</sup> Overall, Europol's legal provisions on international cooperation, as well as its agreements and related activities were instrumental to attaining the main objectives set by the relevant legal framework, including Article 88(2) TFEU, and their scope remained within the core mandate of the agency.

Particularly after Lisbon, the conclusion of binding international agreements by Europol arguably posed problems for the institutional balance in the EU external action area.<sup>173</sup> Thus, it could be maintained that 'Article 218 TFEU' agreements should have been used instead or, in the alternative, that the legal framework concerning Europol's cooperation agreements did not account sufficiently for the Commission's role to ensure the Union's external representation under Articles 17(1) TEU and 220 TFEU, and for EP's prerogatives under Article 218 TFEU.

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170 See Article 23 of the Europol Council Decision.

171 Still one may argue that Europol's mandate is broadly defined because of the lack of an EU-wide definition of the crimes for which the agency is competent.

172 Note, however, the controversial 2002 Supplemental Agreement between Europol and the USA.

173 Ott, Vos and Coman-Kund (n 8) 108.



Based on the analysis of Europol's agreements, we take the view that these instruments, as technical-administrative agreements remaining outside the scope of Article 218 TFEU, do not per se affect institutional balance in external relations. In our opinion, the CJEU judgment in Case C-363/2014 provides further support for this view by validating Europol's international dimension provided that it was ancillary to the core activities of the agency, and that it took place within the framework defined by the EU legislator. What is more, the Court highlighted the possibility for Europol to conclude cooperation agreements as an essential element of this framework, and then indicated that the procedure for the negotiation and conclusion of these instruments provided sufficient safeguards preventing the transfer of personal data to third countries from interfering with fundamental rights.<sup>174</sup> From this it can be inferred that Europol's cooperation agreements, as forms of the agency's ancillary international action, and taking place within the legal framework defined by the legislator, were not precluded by Article 218 TFEU.

The legal provisions dealing with international cooperation established important formal conditions and controls concerning Europol's cooperation agreements. These included the Council's 'list', the role of the Management Board to authorize the negotiation of cooperation agreements and to endorse them, the approval of each cooperation agreement by the Council, as well as the authoritative opinions of the JSB on operational agreements. Insights from practice into the procedure for the negotiation and conclusion of Europol's agreements revealed additional informal supervisory mechanisms carried out by the Commission. Such formal and informal conditions and mechanisms appeared to be capable of ensuring consistency with the Union's priorities in external relations, and to preserve the Commission's role under Articles 17 TEU and 220 TFEU. Furthermore, the obligation undertaken recently by the Council to consult the EP prior to approving Europol's cooperation agreements, together with the duty placed on the chair of the Management Board and of the Director to inform the EP on request,<sup>175</sup> were presumably sufficient to pass the *Meroni* conditions and the institutional balance test.

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174 Case C-363/14 *Parliament v Council*, paras 53–55. This general finding based on the formal legal design of Europol's procedure for the negotiation and conclusion of cooperation agreements could be relativized to some extent when looking at the agency's international cooperation practice, a prime example being the 2002 Supplemental Agreement with the USA.

175 Article 48 of the Europol Council Decision.

Accordingly, Europol's cooperation agreements are in line overall with *Meroni* and do not seem to disturb the institutional balance in EU external relations. Being concluded by an EU body acting on the global level, Europol's agreements are considered as being carried out ultimately on behalf of the European Union, which is in contrast with the Common Approach on EU agencies, stipulating that EU agencies cannot commit the Union to international obligations.<sup>176</sup> Whilst Europol's international agreements are binding, the agency did not have international legal personality because of the strict controls set on its international cooperation precluding it from enjoying a sufficient degree of autonomy on the international plane.<sup>177</sup> Accordingly, since Europol is an element of the Union's institutional structure and the Union has international legal personality, it follows that the obligations arising from Europol's cooperation agreements are incumbent in the end upon the EU.

## 6.2 The new Europol Regulation

The legal framework established by the new Regulation arguably marks a weakening of Europol's role in international cooperation, in parallel with a partial enhancement of controlling mechanisms over the agency's international dimension. While emphasizing almost identically with the old Europol Council Decision the instrumental-ancillary nature of Europol's international cooperation,<sup>178</sup> the new Regulation also subdues the agency's core international activities – i.e. exchange of personal data – to 'Article 218 TFEU' agreements and the Commission's 'adequacy decisions'. The agency is merely left with the possibility to conclude administrative arrangements with a view to implementing the instruments providing the legal basis for international cooperation, or to conclude, on the matters covered previously by strategic agreements, working arrangements which are, however, qualified as non-binding for the EU and the Member States. At the same time, the new Regulation features increased scrutiny from the

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176 Para 25. This statement seems to envisage two possible scenarios: (1) that EU agencies cannot adopt legally binding international cooperation instruments or (2) that EU agencies could adopt legally binding international cooperation instruments but without engaging the Union internationally; the latter scenario would entail that EU agencies have their own international legal personality allowing them to take up in their own right obligations on the international plane.

177 On the international legal personality of EU agencies and, in particular, of Europol, see also Coman-Kund (n 11) 105–6 and 117.

178 Article 23(1) of Regulation 2016/794.

Commission and the EP over Europol's international cooperation. As discussed, for the Commission this entails the possibility to assess Europol's 'surviving' cooperation agreements, getting involved in the agency's annual and multiannual planning, and undertaking the periodic evaluation of the agency. EP's increased role vis-à-vis the agency materializes most importantly in the monitoring of Europol's activities through the JPSG and the possibility to obtain access to Europol information. The previous points suggest that Europol's redesigned international dimension is likely to respect institutional balance in external relations and the *Meroni* doctrine.

However, the new legal framework also raises some legal and practical problems. First, the application of the criteria for binding international agreements discussed under section 5.2 to Europol's working and administrative arrangements which will be concluded under the new Regulation might conduce to the conclusion that some of them are legally binding instruments.<sup>179</sup> In spite of being labelled 'arrangements' and acting essentially as implementing tools, if the wording and content of these instruments as well as the particular circumstances surrounding their negotiation and conclusion reveal the intention of the parties to create legally binding effects under international law they will qualify as binding international agreements. Just like under Europol's former legal framework, this would entail that such specific technical-administrative agreements would ultimately bind the EU. Hence, replacing Europol's previous strategic and operational agreements with working and administrative arrangements does not necessarily result in a complete abolition of the agency's 'problematic' power to enact binding international cooperation instruments. What is more, Europol's new international cooperation instruments can be seen as problematic because there is more uncertainty as to their legal nature, which might impede legal review and individual protection.

Second, the fact that the new Regulation is elliptical as regards the involvement of the Council, the Commission and the EP in the procedure for the negotiation and conclusion of Europol's working and administrative arrangements raises questions about the sufficiency of controlling mechanisms by the main EU institutions in light of the *Meroni* doctrine.<sup>180</sup> From this perspective, the new Regulation

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179 Presumably, this could be the case most obviously for the administrative arrangements concluded by Europol for enabling exchanges of personal data.

180 Coman-Kund (n 11) 116–17.

marks a step back as compared to the strict system of controls regarding Europol's cooperation agreements under the previous legal framework, featuring Council's approval, the influential opinions of the JSB, and, lately, also the duty to consult the EP. While Europol's international cooperation instruments will be concluded within the framework of existing international agreements or the Commission's 'adequacy decisions', the lack of express provisions on controlling mechanisms ensuring that the agency's arrangements remain within its mandate and do not affect the powers of the institutions in the EU external action area is a matter of concern. Arguably this concern is not sufficiently addressed by the Commission's involvement in the agency's annual and multiannual planning nor by the duties to provide access to information to the EP or to transmit *ex post* to the JPSG the administrative agreements concluded with third countries and international organizations.<sup>181</sup> According to Articles 17(1) TEU and 220 TFEU, and in line with the Common Approach on EU agencies, at least involvement and oversight by the Commission should be ensured in line with the role of the latter to ensure the Union's external representation and consistency of EU policy. Moreover, similarly to the JSB under the Europol Council Decision, the EDPS could be granted an advisory role in the procedure for the negotiation and conclusion of Europol's administrative arrangements with third country authorities and international organizations.

## 7. Conclusion

The analysis of Europol's international cooperation framework and practice reveals an agency with an international dimension ancillary to its core tasks, and which was subject to various formal and informal conditions and controls, in particular by the Council, the Commission and the Member States. As such, Europol's international dimension represents a specific form of EU administrative external action which respects in principle the institutional balance in external relations and with the present-day *Meroni* requirements. This holds also for Europol's cooperation agreements having a limited scope which revolves around

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181 In our view more effective oversight would have been ensured by including in the Europol regulation a duty to inform the JPSG before an administrative agreement is concluded (*ex ante*) as this could prevent potential breaches of the relevant legal framework from taking place in the first place.

the agency's information-related tasks, and laying down a very specific framework for technical and operational cooperation. As a specific category of international agreements of a technical-administrative nature, these instruments appear to remain outside the scope of Article 218 TFEU, and they comply overall with the relevant EU legal framework. Contrary to the Common Approach on EU agencies, Europol's cooperation agreements ultimately bind the Union under international law.

Regulation 2016/794 substantially redesigns Europol's international dimension while ensuring that the agency's cooperation agreements remain valid bases for international cooperation under the new legal framework. The new Europol Regulation brings Europol's international dimension in line with that of other EU agencies, and attempts to improve the agency's accountability for its international activities through strengthening the Commission's position towards the agency, increasing parliamentary oversight, and establishing supervision by the EDPS. Quite significantly, the new Regulation removes the agency's power to conclude cooperation agreements by replacing them with 'Article 218 TFEU' agreements. While in our view such a change was not imperative in order to ensure the compatibility of Europol's international dimension with the current Treaty framework, it arguably downplays the role of Europol on the international plane. This suggests a more modest role for Europol in international cooperation, which will likely respect institutional balance in external relations and the *Meroni* conditions. The application of the new Regulation also raises interesting legal and practical problems, such as: finding the most appropriate type of international agreement under Article 218 TFEU in order to address Europol's operational needs; determining the legal nature and implications of Europol's working and administrative arrangements; or the issue of supervision and controls over Europol's international cooperation powers and instruments. Future practice in the application of the new Europol Regulation will offer more insights into the actual shaping of the agency's international dimension and the way in which these issues are addressed.

In brief, this article has shown that Europol's international dimension under the former legal framework was compatible overall with the EU constitutional framework and, therefore, a reform of this aspect of the agency's operations was not indispensable from a legal point of view. It also argues that the new Europol Regulation does not seem to address ideally some of the important aspects of the agency's international cooperation. From a broader perspective, however, the

reform of Europol's international dimension may signal a more general phenomenon of enhancing the Union's international actorness<sup>182</sup> by streamlining the rather fragmented EU external action institutional landscape, and by instating coordination and control over various EU bodies pursuing international cooperation.

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182 See, on the concept and application of Union's international actorness, Martijn Groenleer and Louise van Schaik, 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45 *JCMS* 969.