

# New Journal of **European Criminal Law**

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# THE EUROPOL COUNCIL DECISION: A NEW LEGAL BASIS FOR EUROPOL\*

ALEXANDRA DE MOOR\*\* and GERT VERMEULEN\*\*\*

## ABSTRACT

*This article offers a thorough analysis of the legal basis of Europol over the years of its existence. Three eras are distinguished: the pre-Convention era, the Convention era and the post-Convention era. The succession of legal instruments represents choices embodying the development of Europol. The choices made are analysed and evaluated using four criteria: necessity, consistency, balance and transparency. By studying Europol's legal basis simultaneous insight is gained into the lawmaking process under the third pillar of the EU. Here a distinction is made between the periods before and after the entry into force of the Treaty of Amsterdam, as well as between the periods before and after the entry into force of the Treaty of Lisbon.*

**Keywords:** European Police Office; EU third pillar; EU criminal law; Europol Convention; Europol Council Decision

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\* This article serves as a building block in the writing of a doctoral thesis in law (working title: Europol, *quo vadis?* Critical analysis and evaluation of the development of the European Police Office). Europol is thematically dissected into six clusters: legal basis; objective; competence; tasks; governance and control. On each of the six clusters, the choices made are analysed and evaluated using two sets of criteria, corresponding to two types of evaluation: product-evaluation (necessity, consistency and balance) and process-evaluation (transparency, professionalism). This paper is devoted to the first cluster 'legal basis'. On the second cluster see, A. De Moor & G. Vermeulen, "Europol and the blurring of boundaries between law enforcement and public order", in P. Deelman *et al* (eds.), *Cahier Politiestudies: Policing in Europe*, Antwerp, Maklu, 2010 (submitted for review). On the third cluster see, A. De Moor & G. Vermeulen, "Shaping the competence of Europol. An FBI perspective", in M. Cools *et al* (eds.), *Governance of Security Research Paper Series*, Antwerp-Apeldoorn-Portland, Maklu, 2010, 63–99.

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## 1. INTRODUCTION

The European Police Office (Europol) is the European Union (EU) law enforcement organisation that handles criminal intelligence. Its aim is to improve the effectiveness of cooperation between the authorities in the Member States (mainly police forces, immigration and customs authorities) competent for preventing and combating serious forms of international crime. Europol was created in 1995, on the basis of an established instrument of public international law, a convention between Member States (Europol Convention).<sup>1</sup> It was the first organisation set up under the provisions of the Treaty on European Union (TEU), introduced by the Treaty of Maastricht.<sup>2</sup> In 1995 Europol stood alone as an institutional player in the third pillar and in terms of law enforcement cooperation had the most experience. The drawback was that the legal basis of Europol no longer reflected state of the art legislation. In the meantime other EU bodies and agencies dealing with security related issues had been set up by Council decisions, a legal instrument introduced by the Treaty of Amsterdam.<sup>3</sup> In December 2006 the European Commission submitted a Proposal to replace the Europol Convention by just such a Council Decision.<sup>4</sup> The Commission Proposal was for long the subject of intense discussion, until after 15 months of negotiations the Member States reached a political agreement under the Slovenian Presidency (JHA Council of 18 April 2008). Formal adoption was ultimately postponed from end of 2008 to early 2009, due to a reservation of the Czech Republic, which held the Presidency in the first half of 2009. At its meeting of 6 April 2009 the Council of Justice and Home Affairs Ministers (JHA Council)<sup>5</sup> ultimately adopted the Council Decision establishing the European Police Office (Europol), transforming Europol from an intergovernmental organisation into an EU agency (as from 1 January 2010).<sup>6</sup>

The new Europol Council Decision triggers a thorough analysis of the legal basis of Europol over the years of its existence. The succession of legal instruments represents choices embodying the development of Europol: from the Ministerial Agreement in 1993 via the Joint Action and the Convention in 1995 to the Council Decision in 2009

<sup>1</sup> OJ C 316, 27.11.1995, p. 1.

<sup>2</sup> OJ C 191, 29.7.1992, p. 1.

<sup>3</sup> OJ C 325, 24.12.2002, p. 5.

<sup>4</sup> COM (2006) 817 final of 20 December 2006.

<sup>5</sup> The Council of the EU is the Union's main decision-making body. The Council is made up of the ministers of the Member States. It meets in ten different configurations depending on the subject under discussion. The Justice and Home Affairs configuration (JHA Council) brings together the ministers for justice, ministers for the interior and ministers for immigration. Throughout this article the words 'Council' and 'JHA Council' are used interchangeably.

<sup>6</sup> OJ L 121, 15.5.2009, p. 37. See R. Genson & E. Buysens, "La transformation d'Europol en Agence de l'Union: regards sur un nouveau cadre juridique", *Revue du Marché Commun* 2009, 525, 83–87. See also A. De Moor & G. Vermeulen, "Europol, quid novis? Kritische exploratie van het Europol-Besluit", *Panopticon* 2010, 1, 20–45.

and a possible Regulation in the near future. The model chosen for analysis and evaluation consists of *eras* and *criteria*. In three parts, Three eras are covered in three parts and for each the legal basis of Europol is examined more closely: the pre-Convention era (§2), the Convention era (§3) and the post-Convention era (§4). The choices made are analysed and evaluated using four criteria: necessity, consistency, balance and transparency. In this article, as well as in the PhD research on which it is based, the criteria are operationalised as follows. *Necessity* means at least offering an added-value or corresponding to an identifiable need. *Consistency* implies correspondence among related aspects, within the third pillar and even cross-pillar. *Balance* relates to the comparison of the by no means necessarily irreconcilable interests of efficient law enforcement and adequate legal protection. The degree of *transparency* with which negotiations were carried out is another important measure. The main findings on these criteria are compiled in the conclusion (§5). By studying Europol's legal basis, the primary goal, insight is simultaneously gained into the lawmaking process under the third pillar of the EU, the secondary goal.<sup>7</sup> This explains the two-fold structure of the three core parts: with Europol's legal basis, first, and EU lawmaking, second. Here a clear distinction is apparent between the periods before and after the entry into force of the Treaty of Amsterdam, as well as between the periods before and after the entry into force of the Treaty of Lisbon.<sup>8</sup> Although this is largely a retrospective exercise, it also facilitates discussion of future tracks, the new Europol Council Decision being by no means the end of the development of Europol.

## 2. THE PRE-CONVENTION ERA

### 2.1. THE EUROPOL LEGAL BASIS

The acknowledged forerunner of Europol was the intergovernmental cooperation under the auspices of TREVI (Terrorism, Radicalism, Extremism and International Violence), which took place at the margins of the European Community (EC) from the mid seventies until the early nineties.<sup>9</sup> Unlike Europol, TREVI was not an institution. It operated instead around a system of confidential meetings where good practice, experiences and initiatives were debated and disseminated. In 1975 the

<sup>7</sup> See e.g. E. Guild, "The Constitutional consequences of lawmaking in the third pillar of the European Union", in P. Craig & C. Harlow (eds.), *Lawmaking in the European Union*, London, Kluwer law international, 1998, 65–88.

<sup>8</sup> OJ C 306, 17.12.2007, p. 1.

<sup>9</sup> See M. Anderson *et al*, *Policing the European Union*, Oxford, Clarendon press, 1995; T. Bunyan, *TREVI, Europol and the European State*, Statewatch, 1993. Retrieved at: [www.statewatch.org/news/handbook-trevi.pdf](http://www.statewatch.org/news/handbook-trevi.pdf) (15.3.2010); C. Fijnaut, "Policing Western Europe: Interpol, TREVI and Europol", *Police Studies* 1995, 3, 101–106.

European Council<sup>10</sup> decided that the Ministers of Justice and Home Affairs of the 12 EC Member States should meet at regular intervals to discuss internal security and the maintenance of public order. Several working groups were established over the years. TREVI 1 specialized in the fight against terrorism. TREVI 2 had several roles, most notably overseeing the exchange of information in relation to the maintenance of public order and the harmonisation of police equipment and training. TREVI 3 encouraged and supported the international fight against organized crime. Drug trafficking was one of its major concerns. TREVI 4 dealt with safety and security at nuclear installations and transport. After the signing of the Single European Act<sup>11</sup> a particular group, known as TREVI '92, was formed to look into the means of compensating for the expected lack of security as a consequence of the completion by 31 December 1992 of the internal market. What was the rationale behind this? In 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', the free movement of persons would notably entail the free movement of criminals. The Ad Hoc Working Group on Europol was set up in August 1991 and took over part of TREVI 3 and TREVI '92. It paved the way for the establishment of Europol.

To the attentive observer it came as no surprise when at the Luxembourg European Council of 28–29 June 1991 Germany proposed the creation of a European Criminal Investigation Office.<sup>12</sup> This had always been the dream of former German Chancellor Helmut Kohl<sup>13</sup>, who was in fact promoting the idea of a European Federal Police, modelled on the American FBI.<sup>14</sup> Half a year later, at the European Council of 9–10 December 1991 in Maastricht, a modified proposal was formally adopted to the effect that a European Police Office (Europol) should be recognized under the new Justice and Home Affairs (JHA) Title of the equally new Treaty on European Union (TEU). The TEU was signed in Maastricht on 7 February 1992. It entered into force on 1 November 1993 and marked a new step in European integration. The Treaty of Maastricht, which established the European Union (EU), divided EU policies into three main areas referred to as 'pillars'. The supranational first pillar (European Communities) was complemented by the intergovernmental second (Common Foreign and Security Policy) and third (Cooperation in the Fields of Justice and Home Affairs) pillars. Why have three pillars in the first place? The reason was that Member

<sup>10</sup> As distinct from the Council of the EU (*supra* note 5), the European Council brings together Heads of State or Government of the Member States to give general political guidance.

<sup>11</sup> OJ. L 169, 26.9.1987, p. 1.

<sup>12</sup> C. Fijnaut, "Om de toekomst van Europol", *Delikt en delinkwent*, 1994, 5, 443.

<sup>13</sup> "Wir brauchen eine schlagkräftige europäischen Polizeitruppe, die quer durch unseren Kontinent Verbrecher verfolgen darf" ("We need a decisive European police force, competent to prosecute criminals throughout our continent"), *Focus* 1994, 34, 19.

<sup>14</sup> See J. Ellerman, *Europol und FBI. Probleme und Perspektiven*, Baden-Baden, Nomos, 2005. See also A. De Moor & G. Vermeulen, "Shaping the competence of Europol. An FBI perspective", in M. Cools *et al* (eds), *GofS Research Paper Series*, Antwerp-Apeldoorn-Portland, Maklu, 2010, 63–94.



States took the view that JHA cooperation and foreign policy cooperation were issues so central to their sovereignty that the supranational approach of and to Community law had to be abandoned.<sup>15</sup>

Art. K. TEU brought JHA cooperation out of the shadows of European integration, formally establishing it as a part of the EU. Art. K.1 TEU, the core provision of Title VI (Provisions on Cooperation in the Fields of Justice and Home Affairs) provided that Member States would consider as a matter of common interest *inter alia*: ‘9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)’.<sup>16</sup> A critical note: it was not until the Council adopted the Joint Action of 10 March 1995<sup>17</sup> that Europol – or rather its predecessor the Europol Drugs Unit (EDU) – was formally housed in the third pillar.

The initial legal basis of the EDU was the Ministerial Agreement on the establishment of the Europol Drugs Unit, signed in Copenhagen on 2 July 1993.<sup>18</sup> The text had been drafted by the Ad Hoc Working Group on Europol (*supra*) and intended to give Europol some substance, in anticipation of a proper legal basis. The TREVI Ministers had in fact agreed on a step-by-step creation of Europol, beginning with a drugs intelligence unit, which would then be further developed. The EDU, which formed the nucleus of Europol, started off in 1993 with competence for illicit drug trafficking where the criminal organisations involved and associated moneylaundering activities affected two or more Member States. In anticipation of a Europol Convention, about which agreement could not be reached at that time, the Essen European Council of 9–10 December 1994 decided to extend the EDU’s initial competence to the fight against illegal trade in radioactive and nuclear materials, crimes involving clandestine immigration networks, illegal vehicle trafficking and associated money-laundering operations. Although the extension was formalized in the 1995 Joint Action, the fact that in the absence of agreement on a Europol Convention, the EDU had been set to

<sup>15</sup> S. Peers, *EU Justice and Home Affairs Law*, Harlow, Longman, 2000, 13.

<sup>16</sup> Other matters of common interest in Art. K.1 TEU: “1. asylum policy; 2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; 3. immigration policy and policy regarding nationals of third countries: (a) conditions of entry and movement by nationals of third countries on the territory of Member States; (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; (c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States; 4. combating drug addiction in so far as this is not covered by 7 to 9; 5. combating fraud on an international scale in so far as this is not covered by 7 to 9; 6. judicial co-operation in civil matters; 7. judicial co-operation in criminal matters; 8. customs co-operation.”

<sup>17</sup> OJ L 62 of 20.3.1995, p. 1.

<sup>18</sup> T. Bunyan, *Key texts on Justice and Home Affairs in the European Union: 1976–1993*, London, Statewatch, 1997.

work with an extended mandate on the mere basis of non-binding agreements among Ministers, with no legal force whatsoever, was described as unsatisfactory.<sup>19</sup>

The 1995 Joint Action was equally controversial. At a stroke the remit of the EDU had been extended from one area of crime to four, without any reference to the European or national Parliaments and without any justification whatsoever. It was a move described by EDU/Europol Director Storbeck as ‘a legally and politically relative simple extension of the ministerial agreement’.<sup>20</sup> Under the 1995 Joint Action the EDU acted as ‘a non-operational<sup>21</sup> team for the exchange and analysis of information and intelligence’ (Art. 2 (2) Joint Action). The objective of the EDU was to help the police and other competent agencies to combat the criminal activities within its scope more effectively within and between Member States. The Member States’ liaison officers and the EDU analysts joined forces in The Hague (NL). The essential feature of the EDU was that no personal information could be centrally stored, whether automatically or otherwise (Art. 4 (2) Joint Action).<sup>22</sup> For the establishment of actual databases at Europol a convention was a legal prerequisite, for obvious reasons of data protection and privacy.

## 2.2. EU LAWMAKING: MAASTRICHT

How does Europol’s legal basis fit in with the lawmaking in the third pillar of the EU? Both the EDU Joint Action and the Europol Convention featured on the list of third pillar legal instruments introduced by Art. K.3 TEU.<sup>23</sup> The third pillar as formalized at Maastricht was given a special set of legal instruments distinct from Community law: the first pillar legal instruments – directives, regulations and decisions – did not apply. The distinct names of the instruments served to emphasize the difference in nature of the third pillar competences vis-à-vis the Community competences.<sup>24</sup> Art.

<sup>19</sup> A. Klip, ‘United Kingdom: report on the Draft Europol Convention by the House of Lords’, *International Enforcement Law Reporter* 1995, 6, 235–236; House of Lords, Select Committee on the European Communities, *Report on the Draft Europol Convention*, 1995. Retrieved at [www.fecl.org/circular/3401.htm](http://www.fecl.org/circular/3401.htm) (15.3.2010).

<sup>20</sup> T. Bunyan, *The Europol Convention*, London, Statewatch, 1995, 4. Retrieved at [www.statewatch.org/docbin/europol-pamphlet-1995.pdf](http://www.statewatch.org/docbin/europol-pamphlet-1995.pdf) (15.3.2010).

<sup>21</sup> Only when Europol was enabled to participate – albeit in a support capacity – in the activities of joint investigation teams (*infra*), the organisation was released from its operational isolation, i.e. its isolation from operations ‘on the ground’.

<sup>22</sup> F.R. Monaco, ‘Europol: the culmination of the European Union’s international police efforts’, *Fordham International Law Journal*, 1995, 1, 281; W. Bruggeman, ‘Europol – Wanted or tolerated?’, in J.A. Winter *et al* (eds.), *Reforming the Treaty on European Union – The Legal Debate*, The Hague, Kluwer Law International, 1996, 439.

<sup>23</sup> See D. O’Keefe, ‘Recasting the Third Pillar’, *Common Market Law Rev* 1995, 4, 893–920; P. Müller-Graft, ‘The Legal Bases of the Third Pillar and its position in the framework of the Union Treaty’, *Common Market Law Review* 1994, 3, 493–510.

<sup>24</sup> K. Lenaerts & M. Desomer, ‘Towards a hierarchy of legal acts in the European Union? Simplification of legal instruments and procedures’, *European Law Journal* 2005, 6, 747.

K.3 (2) (a) allowed the Council to adopt ‘joint positions’ and promote cooperation contributing to the Union’s objectives. Art. K.3 (2) (b) allowed for the adoption of a ‘joint action’ where the Union’s objectives could be better achieved by joint action than by Member States acting alone. Art. K.3 (2) (c) referred to ‘conventions’, which the Council was to draw up and then recommend to the Member States for adoption in accordance with their respective constitutional requirements.

A major problem with regard to these legal instruments was that their legally binding character had not been explicitly determined, with the exception perhaps of the convention.<sup>25</sup> The convention was an established instrument of public international law<sup>26</sup>, so there was no doubt that conventions, and the measures implementing them, were binding on the Member States at international level. However, it was up to each Member State to determine the legal effect of a convention in national law.<sup>27</sup> There was no indication whether joint positions and joint actions were to be binding or not. Thirteen Member States backed the view of the Legal Service of the Council that all joint actions were ‘obligatory in law and that the extent of the obligation on the Member States depends on the content and the terms of each Joint Action’, but the United Kingdom (UK) and Portugal argued that they ‘were not automatically... legally binding... the whole question of whether [a joint action] was legally binding depended on its actual text’.<sup>28</sup> Also in the attendant literature there was a controversy over their legal effect.<sup>29</sup>

At that stage of the European integration process, the choice for inter-state conventions – rather than the more incisive legal instruments of the first pillar – was clearly inspired by the wish to preserve Member State control over the adoption of these instruments.<sup>30</sup> It is instructive to look at the legal output under the Maastricht era third pillar. In the years following the entry into force of the Treaty of Maastricht, a large number of such conventions were concluded<sup>31</sup>, but only one of these actually

<sup>25</sup> See M. Den Boer, *Taming the Third Pillar: Improving the Management of Justice and Home Affairs Cooperation in the EU*, Maastricht, European Institute of Public Administration, 1998, 29; R. Fernhout, “Justice and Home Affairs: immigration and asylum policy. From JHA co-operation to communitarisation”, in J.A. Winter *et al* (eds.), *Reforming the Treaty on European Union – The Legal Debate*, The Hague, Kluwer Law International, 1996, 385.

<sup>26</sup> Vienna Convention on the Law of Treaties of 23 May 1969, United Nations Treaty Series, Vol. 1155, p. 331. See A. Aust, *Modern treaty law and practice*, Cambridge, Cambridge University Press, 2007.

<sup>27</sup> S. Peers, *EU Justice and Home Affairs Law*, 18.

<sup>28</sup> Council document 6684/95 of 4 May 1995 (Outcome of proceedings of K.4 Committee of 7 April 1995).

<sup>29</sup> See the different views of D. O’Keefe (“Recasting the Third Pillar”) and P. Müller-Graft (“The Legal Bases of the Third Pillar and its position in the framework of the Union Treaty”).

<sup>30</sup> B. de Witte, “International Law as a Tool for the European Union”, *European Constitutional Law Review* 2009, 5, 273.

<sup>31</sup> Ten Conventions were agreed by the end of 1998 (OJ C 78, 30.3.1995, p. 1; OJ C 316, 27.11.1995, p. 1; OJ C 316, 27.11.1995, p. 33; OJ C 316, 27.11.1995, p. 48; OJ C 313, 23.10.1996, p. 11; OJ C 261, 27.8.1997, p. 1; OJ C 195, 25.6.1997, p. 1; OJ C 24, 23.1.1998, p.1; OJ C 221, 16.7.1998, p. 1; OJ C 216, 10.7.1998, p. 1). Five Protocols conferring jurisdiction on the Court of Justice of the European Communities

entered into force during that period, namely the Europol Convention. Each Convention or Protocol was in the standard form of an agreement between Member States annexed to the Council Act drawing it up and recommending its acceptance. The first joint action was not agreed until December 1994 and only a handful of joint actions were agreed before Autumn 1996. After that, the pace picked up and in total about thirty-nine were agreed under the Maastricht era third pillar.<sup>32</sup>

Art. K.3 (2) provided for the Council as an EU institution, rather than the Member States, to adopt the third pillar legal instruments, with the exception of conventions. Unlike in the first pillar, there was no Commission monopoly on proposals. The Commission was given non-exclusive power to make proposals, along with the Member States in the first six areas of common interest (*supra*). For the remaining three areas (judicial cooperation in criminal matters, customs cooperation and police cooperation, including Europol), the Member States had an exclusive right of initiative. This would change fundamentally after the entry into force of the Treaty of Amsterdam (*infra*).

### 3. THE CONVENTION ERA

#### 3.1. THE EUROPOL LEGAL BASIS

The Europol Convention was drawn up in secret by members of the Working Group on Europol comprising interior ministry officials and police officers. At no stage was the European Parliament even consulted during the two years of negotiations on the Convention's content, although Article K.6 TEU explicitly stated that the Council should 'consult' the European Parliament 'on the principal aspects of activities' to ensure its 'views' are 'duly taken into consideration'.<sup>33</sup> This, many Members of Parliament believed, was reminiscent of the pre-TEU days when negotiations were carried out by a small group of bureaucratic elites behind closed doors.<sup>34</sup> The European Parliament nonetheless initiated *post facto* examinations on the Europol Convention, despite the failure to consult it.<sup>35</sup>

Initial delays in the drafting of the Europol Convention were related to unresolved dilemmas about Europol's objective and remit, the jurisdiction of the Court of Justice

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were also agreed (OJ C 299, 9.10.1996, p. 1; OJ C 151, 20.5.1997, p. 1; OJ C 151, 20.5.1997, p. 15; OJ C 261, 27.8.1997, p. 18; OJ C 221, 16.7.1998, p. 19) as well as four other Protocols (OJ C 313, 23.10.1996, p. 1; OJ C 221, 19.7.1997, p. 1; OJ C 221, 19.7.1997, p. 11; OJ C 91, 31.3.1999, p. 1).

<sup>32</sup> See S. Peers, *EU Justice and Home Affairs Law*, 28.

<sup>33</sup> T. Bunyan, *The Europol Convention*, 1.

<sup>34</sup> V. Flynn, "Europol, a watershed in EU law enforcement cooperation?", in G. Barrett (ed.), *Justice cooperation in the EU: the creation of a European legal space*, Dublin, Institute of European Affairs, 1998, 91.

<sup>35</sup> See Resolution of 19 May 1995 on the Europol Convention, OJ C 151, 19.6.1995, p. 376; Resolution of 13 March 1996 on Europol, OJ C 96, 1.4.1996, p. 288.

of the European Communities, the level of access to sensitive data in Europol's databases and the conditions under which executive powers could be attached to Europol in the future.<sup>36</sup> The Europol Convention was eventually signed on 26 July 1995, without resolving the dispute over the Court of Justice. The vast majority of Member States supported a role for the Court, yet the UK steadfastly opposed it.<sup>37</sup> It was not until the Florence European Council of 21–22 June 1996 that the outstanding problem was solved, enabling the Court of Justice to give a preliminary ruling on the interpretation of the Europol Convention, by virtue of an optional Protocol to the Europol Convention.<sup>38</sup> The Court of Justice, like the Commission and the European Parliament, had a truncated role in the third pillar.<sup>39</sup> It is often asserted that the Court had *no* jurisdiction, but it is more correct to say that the Court had no *mandatory* jurisdiction (cfr. The *optional* Protocol).<sup>40</sup> Under Art. K.3 (2) (c) *in fine* TEU it could be given jurisdiction to interpret and settle disputes on the application of Conventions 'in accordance with such arrangements' as each Convention might (or might not)<sup>41</sup> lay down.

The Europol Convention entered into force on 1 October 1998, after its adoption by the Member States in accordance with their constitutional requirements. However, it was not until 1 July 1999, following a number of legal acts related to the Europol Convention, that Europol commenced its activities as the EU law enforcement organization in full.

### 3.2. EU LAWMAKING: AMSTERDAM

It may help to contextualise these developments again. The Treaty of Amsterdam of 2 October 1997<sup>42</sup> brought a new dimension to cooperation in the fields of justice and home affairs. With the gradual transfer of policy on asylum, migration and judicial cooperation in civil matters from the third to the first pillar, Title VI of the TEU was renamed 'Provisions on police and judicial cooperation in criminal matters'. The aspirations were wider, as it was now the Union's objective 'to provide citizens with a high level of safety within an area of freedom, security and justice' (Art. 29, §1 TEU).

<sup>36</sup> M. Den Boer, "Police cooperation in the TEU: tiger in a Trojan horse?", *Common Market Law Review* 1995, 2, 569.

<sup>37</sup> See V. Flynn, "Europol, a watershed in EU law enforcement cooperation?", 93–94.

<sup>38</sup> OJ C 299, 9.10.1996, p. 1. The Court of Justice was, however, left out of the Protocol to the Europol Convention on the privileges and immunities of Europol staff, OJ C 221, 19.7.1997, p. 1.

<sup>39</sup> The role of the Court of Justice was subject of a contentious debate. See S. Lavenex & W. Wallace, "Justice and Home Affairs. Towards a 'European Public Order'?", in H. Wallace *et al* (eds.), *Policy-making in the European Union*, Oxford, Oxford University Press, 2005, 466.

<sup>40</sup> S. Peers, *EU Justice and Home Affairs Law*, 18.

<sup>41</sup> The Europol Convention did not prescribe the forum for resolving disputes between Member States on the interpretation or application of the Convention (see Art. 40); the Protocol to the Europol Convention conferring – facultative – jurisdiction to the Court of Justice did (see *supra* note 35).

<sup>42</sup> OJ C 325, 25.12.2002, p. 1.

This objective was to be achieved through ‘closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol) in accordance with the provisions of Articles 30 and 32’ (Art. 29, §2, first indent TEU). Art. 30 (1) TEU emphasized the importance of operational cooperation between the competent law enforcement authorities in the Member States. Europol was also confirmed in its role of ‘information broker’, i.e. facilitating the exchange of information, developing criminal intelligence and maintaining databases. In addition, Art. 30 (2) TEU foresaw new tasks for Europol.

Within a period of five years after the entry into force of the Treaty of Amsterdam (1 May 1999 – 1 May 2004), Europol had to be enabled to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity. Moreover, Europol had to be empowered to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases. In November 2002 a Protocol amending the Europol Convention in this sense was adopted, adding ‘participation in a support capacity in joint investigation teams’<sup>43</sup> and ‘making requests to initiate criminal investigations’ to the principal – information-related – tasks of Europol.<sup>44</sup> However, by the time this Protocol – and two other amending Protocols (2000<sup>45</sup>, 2003<sup>46</sup>) – finally entered into force (Spring 2007), a Commission Proposal to replace the Europol Convention with a Europol Council Decision was already on the negotiating table of the Council of Ministers.<sup>47</sup> How did the convention become the ‘ugly duckling’ among third pillar legal instruments?

To answer this question, it helps to take stock of the new set of third pillar legal instruments introduced by the Treaty of Amsterdam. Art. 34 (2) TEU became the key provision. Joint positions were retained, but re-baptized ‘common positions’. The joint action was abolished and replaced by two new instruments: ‘framework decisions’ and ‘decisions’. The difference with the past was that their purpose, binding character and implementation strength were made more explicit.<sup>48</sup> Framework decisions are

<sup>43</sup> See A. De Moor, “The Role of Europol in Joint Investigation Teams. A Foretaste of an Executive European Police Office?”, in M. Cools *et al* (eds.), *Governance of Security Research Paper Series – Readings On Criminal Justice, Criminal Law & Policing*, Antwerp, Maklu, 2009, 329–358; T. Schalken & M. Pronk, “On Joint Investigation Teams, Europol and Supervision of Their Joint Actions”, *European Journal of Crime, Criminal Law and Criminal Justice* 2002, 1, 70–82.

<sup>44</sup> OJ C 312, 16.12.2002, p. 1.

<sup>45</sup> OJ C 358, 13.12.2000, p. 1.

<sup>46</sup> OJ C 2, 6.1.2004, p. 1.

<sup>47</sup> See *supra* note 4.

<sup>48</sup> M. Den Boer, *Taming the Third Pillar: Improving the Management of Justice and Home Affairs Cooperation in the EU*, 31; S. Grillier *et al*, *The Treaty of Amsterdam. Facts. Analysis. Prospects*, Wien, Springer, 2000, 486. See extensively, A. Hinarejos, “On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing, Supreme?”, *European Law Journal* 2008, 5, 620–634.

clearly related to first pillar directives.<sup>49</sup> They have the purpose of ‘approximation of the laws and regulations of the Member States’ in the area of police and judicial cooperation in criminal matters. They are playing an important role as an instrument for the harmonization of criminal law.<sup>50</sup> Framework decisions are ‘binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods’. It is explicitly stated, however, that they do not have direct effect. This exclusion of direct effect does not alter the fact that framework decisions, like directives, impose a duty on Member States to take all measures that are necessary for the correct and complete implementation at the national level. Although the Commission cannot bring an infringement action before the Court of Justice for failure to implement (correctly) a framework decision, it has developed a system of monitoring and assessing Member State compliance in this area.<sup>51</sup> Furthermore, the Court of Justice held in the *Pupino* Case that the national courts have a duty to interpret implementing legislation in conformity with the framework decisions in order to give them their useful effect.<sup>52,53</sup> In addition to common positions and framework decisions, the third pillar uses decisions, which have a residual character: they may concern any other purpose that is consistent with the objectives of the third pillar, excluding the approximation of the laws and regulations of the Member States. Decisions are binding, but also lack direct effect. In sum, as regards third pillar legal instruments only conventions may entail direct effect following adoption, ratification and entry into force<sup>54</sup> and where its provisions have the required characteristics.<sup>55</sup>

<sup>49</sup> For an exploration of the consequences of the similarities and differences between framework decisions and directives, see the Opinion of Advocate General Kokott of 11 November 2004 in Case C-105/03, *Criminal Proceedings against Maria Pupino*.

<sup>50</sup> See A. Klip & H. Vander Wilt (eds.), *Harmonisation and Harmonising Measures in Criminal Law*, Amsterdam, Royal Netherlands Academy of Science, 2002; E.J. Husabø & A. Strandbakken, *Harmonization of criminal law in Europe*, Antwerp, Intersentia, 2005.

<sup>51</sup> M. Borgers, ‘Implementing Framework Decisions’, 44 *CML Rev* 5 (2007), 1361–1386.

<sup>52</sup> Case C-105/03, *Criminal Proceedings against Maria Pupino*, Judgment of 16 May 2005. For a general overview of the Case, see M. Fletcher, ‘Extending “indirect effect” to the third pillar: the significance of *Pupino*’, *European Law Review* 2005, 6, 862–877; C. Lebeck, ‘Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after *Pupino*’, *German Law Journal* 2007, 5, 501–532.

<sup>53</sup> The Court’s role was expanded significantly by the Treaty of Amsterdam (See Art. 35 TEU). The Court is not merely competent to rule on the interpretation of conventions (*supra*), but also to give preliminary rulings on the validity and interpretation of framework decisions and decisions. Still, it remains a facultative jurisdiction, which is by no means comparable to first pillar jurisdiction.

<sup>54</sup> Since the entry into force of the Treaty of Amsterdam, conventions enter into force, unless otherwise provided, once they have been adopted by at least half of the Member States (Art. 34 (2) (d) §2 TEU).

<sup>55</sup> In order for a treaty to be self-executing and entail direct effect in the domestic legal order, its provisions must be clear, unconditional and not subject to discretionary implementing measures.

What then of the legal output under the Amsterdam era third pillar? The convention was shunned<sup>56</sup>, whereas an impressive list of (framework) decisions was produced by the swift decision-making machinery of the third pillar. The Council only had recourse to a convention on six occasions, including the three Protocols to the Europol Convention.<sup>57</sup> The Commission – now eagerly sharing the right of initiative with the Member States<sup>58</sup> – never even bothered to propose the adoption of a convention. Even when human rights issues, such as data protection and privacy, were dealt with, the convention was disregarded.<sup>59</sup> Europol was given a convention, Eurojust, Europol’s judicial counterpart, (only) a decision<sup>60</sup>, while they both collect and process extremely sensitive data. Another example is CEPOL, the European Police College.<sup>61</sup> Art. 34 TEU does not say much about when a given instrument should be used. There is room for much discretion, leading to a lack of consistency in the choices made.<sup>62</sup> With the Europol Council Decision, Europol’s legal basis has been brought into line with the legal framework of other bodies working in the third pillar area, in particular Eurojust and CEPOL. Viewed in the light of third pillar consistency, we believe this is a change for the better.

## 4. THE POST-CONVENTION ERA

### 4.1. THE EUROPOL LEGAL BASIS

The discussions on Europol’s legal basis were not new. As far back as 2001 the possibility of supplanting the Europol Convention by a Council Decision was discussed by the Council, which led to a first draft of a Council Decision replacing the Europol Convention.<sup>63</sup> At that time it was decided to address the issue in the European

<sup>56</sup> M. Wasmeier, “Artikel 34 Handlungsformen”, in H. von der Groeben & J. Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, Baden-Baden, Nomos, 2003, 385.

<sup>57</sup> See *supra* notes 41, 42, 43. See also OJ C 197, 12.7.2000, p. 1; OJ C 326, 21.11.2001, p. 1; OJ C 139, 13.6.2003, p. 1.

<sup>58</sup> Although the third pillar is said to be managed in an intergovernmental way, the increasing role of the Commission should alter this idea. See R. Lewis & D. Spence, ‘The Commission’s role in freedom, security and justice and the threat of terrorism’ in D. Spence (ed.), *The European Commission*, London, John Harper Publishing, 2006.

<sup>59</sup> See P. De Hert, “Division of competences between national and European levels with regards to Justice and Home Affairs”, in J. Apap (ed.), *Justice and home affairs in the EU: liberty and security issues after enlargement*, (Elgar, 2004), 92.

<sup>60</sup> OJ L 63, 6.3.2002, p. 1.

<sup>61</sup> OJ L 256, 1.10.2005, p. 63.

<sup>62</sup> J. Schutte, ‘De Rechtsinstrumenten van de Europese Unie voor de Ontwikkeling van Gezamenlijk Optreden van de Lidstaten op het Gebied van Politie en Justitiële Samenwerking in Strafzaken’, *Delikt en Delinkwent* 2002, 7, 681–682 and 684.

<sup>63</sup> Council document 8452/02 of 30 April 2002 (First draft of a Council Decision replacing the Europol Convention).



Convention and the subsequent Intergovernmental Conference (IGC), which prepared the Treaty establishing a Constitution for Europe.<sup>64</sup> Working Group X “Freedom, Security and Justice” of the European Convention recognized an urgent need for reform of the legal instruments available in the third pillar (Art. 34 TEU) (*supra*) and recommended conventions already adopted to be converted into regulations or directives. For Europol, this operation would solve the pressing legal problems, which were making the development of its legal framework so cumbersome.<sup>65</sup> The Constitutional Treaty simplified the legal acts of the Union (Art. I-33) and in this sense provided for a ‘European law’ on Europol (Art. III-276). The fact that the Constitutional Treaty would require a change to Europol’s legal framework was also recognized in the 2004 Hague Programme.<sup>66</sup> The Council was to adopt the European law on Europol as soon as possible after the entry into force of the Constitutional Treaty and no later than 1 January 2008. As the Constitutional Treaty was stalled following two negative referenda in France and the Netherlands in 2005, other ways were to be found to address the issue of Europol’s legal framework.

In the first half of 2006 the Austrian Presidency put Europol’s future firmly back on the political agenda.<sup>67</sup> Starting with a discussion at the informal JHA Council in January 2006, followed by a High Level Conference on Europol’s future in February 2006, the work continued through a number of meetings of a Friends of the Presidency Group, resulting in a May 2006 Options Paper on ways to improve Europol’s functioning.<sup>68</sup> A significant number of these required amendments to Europol’s legal framework. In its Conclusions on the future of Europol, the June 2006 JHA Council decided that ‘competent Council bodies should commence work in order to consider whether and how to replace by 1 January 2008, or as soon as possible thereafter, the Europol Convention by a Council Decision as foreseen in Article 34 (2) (c) where possible on the basis of a concrete initiative or proposal’ (Conclusion 4).<sup>69</sup> The December 2006 JHA Council took note of the intention of the Commission to submit a proposal to this end (Conclusion 4). In December 2006 the Commission, true to its word, submitted its Proposal for a Europol Council Decision.

What are the advantages and disadvantages of each legal instrument? We made a critical comparison. The main advantage of a decision over a convention is that it is relatively easy to adapt to changing circumstances, because it does not require ratification. Contrary to conventions, that only become binding upon ratification by

<sup>64</sup> OJ C 310, 16.12.2004, p. 1.

<sup>65</sup> Convention document 426/02 of 2 December 2002 (Final report of Working Group X “Freedom, Security and Justice”).

<sup>66</sup> OJ C 53, 3.3.2005, p. 1.

<sup>67</sup> Council document 5051/06 of 1 April 2006 (Presidency Programme on Police and Judicial Co-operation).

<sup>68</sup> Council document 9184/1/06 of 16 May 2006 (Friends of the Presidency’s report to the Future of Europol).

<sup>69</sup> Council document 9670/2/06 of 6 June 2006 (Council Conclusions on the future of Europol).

the national governments after having been approved of by the national Parliaments or the citizens via referendum, decisions do not need to be approved or ratified at the national level, even if they may well need implementation into or require amendment of national law. Whereas any amendment to a convention normally requires ratification by all signatory parties, changes to a decision can be decided directly by the Council (by unanimity) after mandatory consultation of the European Parliament.<sup>70</sup> The disadvantage is that the national Parliaments are side-lined in this scenario. Replacing the Europol Convention with the Europol Council Decision would then reduce the power of national Parliaments to control the development of Europol and would furthermore accelerate the pace of this development.<sup>71</sup>

The legal question may be formulated as follows:

- i) was the Council able validly to re-establish Europol by way of a decision rather than by means of a convention; and
- ii) ii) was a protocol abrogating the Europol Convention a legal prerequisite.?

For the Commission the choice of a decision was never under serious discussion; it was obvious. Two further options were considered. The first option was to replace the Europol Convention by a Council decision and to propose at the same time a protocol to abrogate the Europol Convention, since there was a body of opinion holding that the entry into force of such a protocol would be necessary before a Europol Council Decision could take effect.

The main disadvantage of this option was that such a protocol would itself have been an instrument requiring a long process of ratification by all the Member States. 'After careful legal analysis', the Commission outlined its main reasons why such a protocol was not necessary.<sup>72</sup> Firstly, there is no hierarchy between the different instruments put at the disposal of the Council through Art. 34 (2) TEU. Secondly, the freedom of the EU legislator, as determined by primary Treaty law, cannot be limited by provisions of secondary legislation, such as the Europol Convention, even though the latter does not provide for the possibility of being amended or *a fortiori* repealed by a decision of the Council (Art. 43 *juncto* Art. 45 Europol Convention). This conclusion is also borne out by public international law. A treaty can be made to expire at any time by the consent of all the parties. Public international law does not require

<sup>70</sup> The Treaty of Amsterdam amplified the role of the European Parliament with an obligation for the Council to consult the European Parliament before adopting legally binding measures (See Art. 39 TEU). However, this remains largely cosmetic, as the Council can simply ignore the European Parliament.

<sup>71</sup> S. Peers, *Europol: the final step in the creation of an 'Investigative and Operational' European Police Force*, Statewatch, 2007. Retrieved at: [www.statewatch.org/news/2007/jan/europol-analysis.pdf](http://www.statewatch.org/news/2007/jan/europol-analysis.pdf) (15.3.2010).

<sup>72</sup> SEC (2006) 851 of 21 June 2006 (Converting the Europol Convention into a Council Decision – Legal analysis).

the consent of the parties to respect a given form.<sup>73</sup> And finally, the involvement of national Parliaments is ensured through the national implementation procedures, which Member States will need to employ to give effect to the Europol Council Decision.

After further discussions within the Council structures, the Commission's position was supported by a very large majority of Member States, as well as by the Legal Service of the Council. On a critical note: for the latter this was a remarkable reversal, considering that in 2001 and 2002 the same legal service issued opinions stating the exact opposite<sup>74</sup>, namely that a Council decision replacing the Europol Convention could only have entered into force after the abrogation of the Europol Convention by a protocol, which would have required ratification by all Member States.

The Court of Justice would later confirm the Commission's legal analysis with a similar line of reasoning in the Case *Advocaten voor de wereld*.<sup>75</sup> This preliminary ruling confirmed the validity of the Framework Decision on the European Arrest Warrant<sup>76</sup>, providing for a simplified system for the surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or conducting criminal proceedings.<sup>77</sup> Thus the Court ruled that Art. 34 TEU did not establish any order of priority between the different instruments (framework decisions, decisions, conventions) listed in that provision, with the result that it could not be ruled out that the Council may have a choice between several instruments to regulate the same subject-matter.<sup>78</sup> Applied to Europol, it was then within the Council's discretion to choose a decision as the preferred legal instrument, while it is true that Europol could equally have been the subject of another convention.

The Court did not rule on the *actus contrarius* argument raised by *Advocaten voor de wereld*, a non-profit-making association. According to classical *actus contrarius* doctrine an existing legal act may only be repealed by a new legal act of the same legal nature and quality. The applicants argued that only a measure of the same kind, *i.e.* a

<sup>73</sup> The Vienna Convention on the Law of Treaties (see *supra* note 23), which governs the rules applicable to international agreements concluded between States in written form provides that 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all parties after consultation with the other contracting States' (Art. 54).

<sup>74</sup> Council document 13875/01 of 13 November 2001 (Procedure for amendment of the Europol Convention); Council document 11283/02 of 17 July 2002 (Readoption of the Europol Convention by way of a Council decision as referred to in Article 34(2)(c) TEU).

<sup>75</sup> Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Judgment of 3 May 2007.

<sup>76</sup> OJ L 190, 18.7.2002, p. 1.

<sup>77</sup> See F. Geyer, "European Arrest Warrant. Court of Justice of the European Communities. Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*", *European Constitutional Law Review* 2008, 4, 149–161.

<sup>78</sup> See G. Vermeulen, "Vijftien jaar uniestrafrecht: verwezenlijkingen en perspectieven", in J. Meeusen & G. Straetemans (eds.), *Politionele en justitiële strafrechtelijke samenwerking in de Europese Unie. Welk evenwicht tussen vrijheid, veiligheid en rechtvaardigheid*, Antwerpen, Intersentia, 2007, 87.

convention within the meaning of Art. 34 (2) (d) TEU could validly derogate from a convention in force. The Court simply found that such an interpretation ‘would risk depriving of its essential effectiveness the Council’s recognized power to adopt framework decisions in the field previously governed by international conventions’.<sup>79</sup>

In light of the extended controversy that existed between the Commission’s and the Council’s Legal Service as to the conversion of the Europol Convention, one rather hoped for additional analysis by the Court – beyond relying on pure effectiveness, especially since the Advocate-General had examined the issue in his Opinion.<sup>80</sup> According to the Advocate-General, the rule – which states that once a field has been governed by a particular type of provision it must always be governed by other provisions of the same rank, without any possibility of resorting to lower ranking provisions – cannot not be absolute, because it reflects an individual right in the context of relations between a sovereign power – the legislature – and another, essentially subordinate power – the executive – and their respective acts, namely laws and regulations. Therefore, it makes no sense to discuss that point because (framework) decisions and international conventions have the same legal basis and must pass through the same procedure, in that both must be approved unanimously by the Council, following a proposal from a Member State or the Commission and after consultation of the European Parliament.

The *actus contrarius* doctrine was deemed inapplicable by the Advocate General on purely formal grounds; looking at the essence of lawmaking in the third pillar could, however, lead to another conclusion. According to DE HERT, it would be more respectful to Western political tradition to refer to the Council systematically as the Council of Ministers: ‘Members of the executive power jump scales and become the legislative power’.<sup>81</sup>

Even though the Council was able validly to re-establish Europol by way of the Europol Council Decision, the Council’s choice may have serious consequences for the domestic effect of the instrument. Decisions are binding, but lack any direct effect (*supra*). However, this does not exclude direct effect by virtue of domestic law. According to doctrine, national law in the EU Member States may lay down its own criteria for granting direct effect.<sup>82</sup> Take for instance, the information obligation of the Member States towards Europol, with exceptions (refusal grounds) only in particular cases. Art. 8 (4) and (5) Europol Council Decision are an exact copy of Art. 4 (4) and (5) Europol Convention. The content of the information obligation is taken

<sup>79</sup> See note 75, §42.

<sup>80</sup> Opinion of Advocate General Colomer of 12 September 2006 in Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, §57–60.

<sup>81</sup> See P. De Hert, “Division of competences between national and European levels with regards to Justice and Home Affairs”, 89.

<sup>82</sup> A. van den Brink, *Regelgeving in Nederland ter implementatie van EU-recht* (Setting legal norms in the Netherlands for the implementation of European Union law), Erasmus Universiteit Rotterdam, 2004, 134.

over entirely, yet its legal force remains unclear. According to the Europol Council Decision the Member States are required merely to ensure that their national law conforms to this Decision by the date of its application (Art. 61 Europol Council Decision). A perverse consequence of Europol's new legal basis might very well be that the clear and unconditional information obligation ceases to be self-executing, thus differing from the position under the Europol Convention. Everything will therefore depend on the national implementing legislation of the Europol Council Decision.

#### 4.2. EU LAWMAKING: LISBON

With the Treaty of Lisbon it is hoped that discussions on the question of whether the appropriate legal instrument was used will now belong to the past. The reduction of the number of acts of the Union and the indication of the particular act with which the Union should legislate in each policy area, make the choice of act much clearer.<sup>83</sup> The Treaty of Lisbon of 13 December 2007 amends the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC) and generates two separate, yet equal bodies of law: an amended version of the TEU and the Treaty on the Functioning of the European Union (TFEU).<sup>84</sup> The latter houses both the first and the third pillar, including Europol.

The legal instruments of the third pillar (common positions, framework decisions, decisions, conventions) will not be continued under the new regime. Art. 288 TFEU (formerly Art. 249 TEC) states that 'to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions'. A regulation has 'general application. It shall be binding in its entirety and directly applicable in all Member States'. A directive is 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Art. 291 TFEU states in a general manner that Member States are to adopt all the measures of national law necessary to implement legally binding acts. The importance of a regulation for criminal law will increase when the Union uses the competences received in the TFEU, which distinguishes between the changes that Union law may bring to national criminal law and criminal procedure on the one hand, and the establishment of European offices (Europol, European Public Prosecutor's Office) and accompanying law on the other. The approximation of both substantive and procedural law will take place by means of directives. The establishment of Europol will find its basis as stated in Art. 88 TFEU, which is an exact copy of Art. III-276 Constitutional Treaty.

The abolition of a legal instrument, raises the question of the transition from the old to the new system. What will happen to the legal acts adopted under the third

<sup>83</sup> A. Klip, *European Criminal Law. An Integrative Approach*, Antwerp-Oxford-Portland, Intersentia, 2009, 56.

<sup>84</sup> OJ C 306, 17.12.2007, p. 1. The Treaty of Lisbon entered into force on 1 December 2009.

pillar before the entry into force of the Treaty of Lisbon? Since the Treaty of Lisbon, unlike the Constitutional Treaty, does not repeal and replace the existing Treaties, the general ‘succession and legal continuity’ Article has also disappeared.<sup>85</sup> Instead, there is a miscellaneous Protocol on Transitional Provisions, whose very complicated Title VII deals with the legal effects of the existing acts in the field of criminal justice and police co-operation.<sup>86</sup> Basically, the intergovernmental characteristics of these acts will remain in place for another five years, unless such acts are amended within that period.<sup>87</sup> This means that the Commission cannot bring a case against a Member State to the Court of Justice because of non-compliance. Similarly, the powers of the Court remain the same as before the Treaty of Lisbon entered into force (Art. 10 (1) Protocol on transitional provisions). Should an act of the pre-Lisbon period be amended after the entry into force of the Treaty of Lisbon, it will automatically fall within the new regime in which both the Commission and the Court are fully competent (Art. 10 (2) Protocol on transitional provisions). The same will happen to all the remaining acts of the pre-Lisbon period, five years after the Treaty of Lisbon has entered into force (Art. 10 (3) Protocol on Transitional Provisions).<sup>88</sup>

What then is the fate of the new Europol Council Decision, now that Art. 88 TFEU provides for the further development of Europol by means of regulations? In any case, there is no *obligation* to replace the Europol Council Decision by a Europol Regulation. There is merely an *invitation* addressed to the European Parliament, the Council and the Commission to seek to adopt, in appropriate cases and as far as possible within the five-year transitional period, legal acts amending or replacing third pillar acts of the pre-Lisbon period.<sup>89</sup>

The European Parliament, is a strong supporter of a Europol Regulation.<sup>90</sup> At present, the European Parliament is still not sufficiently involved in the decision-making processes covering third pillar policies.<sup>91</sup> In the case of Europol, the Council merely consulted the European Parliament on the Europol Council Decision. The Lisbon Treaty will – in principle – provide a single legislative procedure that guarantees

<sup>85</sup> Art. I-437 Constitutional Treaty: ‘The acts of the institutions, bodies, offices and agencies adopted on the basis of the treaties and acts repealed by Article I-437 shall remain in force. Their legal effects shall be preserved until those acts are repealed, annulled and amended in implementation of this Treaty’.

<sup>86</sup> OJ C 306, 17.12.2007, p. 163.

<sup>87</sup> B. de Witte, “Legal Instruments and Law-Making in the Lisbon Treaty”, in S. Griller & J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Wien, Springer, 2008, 90.

<sup>88</sup> For a schematic reproduction, see A. Klip, *European Criminal Law. An Integrative Approach*, 124.

<sup>89</sup> Declaration concerning Article 10 of the Protocol on transitional provisions (OJ C 115, 9.5.2008, p. 354).

<sup>90</sup> See W. De Bondt & A. De Moor, “De Europese Metamorfose? De implicaties van het Verdrag van Lissabon voor het Europees strafrecht”, *Panopticon* 2009, 1, 49.

<sup>91</sup> See *supra* note 70.

democratic accountability.<sup>92</sup> Art. 88 TFEU states that the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. The ordinary legislative procedure (Art. 294 TFEU) is nothing but the co-decision procedure, consisting in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. However, for judicial cooperation in criminal matters and police cooperation (including Europol) the Commission still shares the right of initiative with a quarter of the Member States (Art. 76 combined with Art.289 TFEU). The European Parliament sees its powers increase. This explains why the European Parliament was eager to propose an amendment to revise the Europol Council Decision within a period of six months following the entry into force of the Treaty of Lisbon. The Council, however, did not adopt the revision clause from the January 2008 legislative resolution on the Proposal for a Europol Council Decision.<sup>93</sup> The European Parliament would not give in. In November 2009, the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) rejected the text of four proposed Council decisions, implementing the Europol Council Decision.<sup>94</sup> In four legislative resolutions the European Parliament considered that 'without prejudice to the overall support for the European Police Office (Europol) and taking into account the imminent entry into force of the Treaty of Lisbon and its effects on police cooperation, there should be no amendments to the measures implementing the Europol Decision until such measures can be adopted under the new legal framework provided for in the Treaty of Lisbon'. The Commission or the Council were also called upon to make a declaration on a proposal for a Europol Regulation which is to be submitted six months following the date of entry into force of the Treaty of Lisbon. Europol is not ill-disposed toward a new Regulation, which would provide a remedy for some of the shortcomings of the Europol Council Decision. We also believe this would be a change for the better, Viewed in the light of cross-pillar consistency, it is submitted that this would be a change for the better. In 2004 the European Border

<sup>92</sup> S. Carrera & F. Geyer, *The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice*, CEPS Policy brief, No. 141, August 2007. Retrieved at: [www.ceps.be/book/reform-treaty-justice-and-home-affairs-implications-common-area-freedom-security-and-justice](http://www.ceps.be/book/reform-treaty-justice-and-home-affairs-implications-common-area-freedom-security-and-justice) (15.3.2010).

<sup>93</sup> European Parliament legislative resolution of 17 January 2008 on the proposal for a Council Decision establishing the European Police Office (P6\_TA(2008)0015).

<sup>94</sup> Committee on Civil Liberties, Justice and Home Affairs, Meeting 4–5 November 2009, Joint debate on Europol related files (LIBE(2009)1104\_1). The draft Council decisions concerned: 1) Implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information; 2) Rules of confidentiality of Europol information; 3) List of third States and organisations with which Europol shall conclude agreements; 4) Implementing rules for Europol analysis work files.

Agency, Frontex, was established on the basis of a Council regulation<sup>95</sup>, the first pillar equivalent of a Council decision, only with direct effect.<sup>96</sup>

## 5. CONCLUSION

The new Europol Council Decision triggered a thorough analysis of the legal basis of Europol over the years of its existence: from the Ministerial Agreement in 1993 via the Joint Action and the Convention in 1995 to the Council Decision in 2009 and a possible Regulation in the near future. The analysis has shown a recurrent *necessity* to adapt Europol's legal basis. The essential feature of the EDU, which formed the nucleus of Europol, was that no personal data could be centrally stored on the basis of the 1995 Joint Action. For the establishment of actual databases at Europol a Europol Convention was a legal prerequisite, for obvious reasons of *balance* (data protection and privacy). Pressing legal *needs*, gave way to more practical *needs* in the post-Convention era. The disadvantage of replacing the Europol Convention with a Europol Council Decision is that the national Parliaments are side-lined, although according to the Commission the involvement of national Parliaments would still be ensured through the national implementation procedures of the Europol Council Decision. The main advantage of the Europol Council Decision over a Europol Convention is that is relatively easy to adapt to changing circumstances, precisely because it does not require ratification. In the Convention-era the development of Europol could be described as painfully slow, while (European) Councils were urging the Member States to finalise the ratification of no less than three Protocols. Delays of up to seven years may not be tolerable, but this does not mean that the ratification procedures in the Member States and the consequent delays were not justified given the democratic processes in place.

*Consistency* proved to be a very pertinent criteria for analysis and evaluation. Art. 34 TEU, the catalogue of third pillar legal instruments for the Amsterdam era, did not say much about when a given instrument should be used, which led to a lack of consistency in the choices made. Europol was given a convention, Eurojust and CEPOL only a decision. With the Europol Council Decision, Europol's legal basis is brought into line again with the legal framework of other bodies working in the third pillar area. This increases consistency in the third pillar. A possible Europol Regulation in the near future would further increase cross-pillar consistency, as Europol and Frontex would then be placed on an equal legal footing, a regulation.

The making of the Europol Convention was not exactly a paragon of *transparency*. It was drawn up in secret. The European Parliament was not even consulted. This was reminiscent of the TREVI-days when negotiations were carried out by a small group

<sup>95</sup> OJ L 349, 25.11.2004, p. 1.

<sup>96</sup> K. Lenaerts & M. Desomer, "Towards a hierarchy of legal acts in the European Union? Simplification of legal instruments and procedures", 748.



of bureaucratic elites behind closed doors. Also the fact that in the absence of an agreement on a Europol Convention, the EDU had been set to work with an extended mandate, without any reference to the European or national Parliaments and without any justification whatsoever was described as unsatisfactory. The European Parliament became increasingly involved in the further development of Europol, as its role was amplified by the Treaty of Amsterdam and even further by the Treaty of Lisbon. The national Parliaments, on the other hand, were seen more as an impediment to the further development of Europol during the Convention era. With the adoption of the Europol Council Decision their role has been marginalized.

## New Journal of European Criminal Law

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