



HIGHLIGHT

TREADING ON WHOSE TOES? EUROPOL, THE EUROPEAN PARLIAMENT AND THE LIMITS OF PARLIAMENTARY CONTROL AND ACCOUNTABILITY

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The recent decision of the Court of Justice *Parliament v. Council* (case C-363/14)¹ concerned a challenge by the European Parliament (EP), who sought the annulment of Council Implementing Decision 2014/269,² regarding the list of third States and organisations with which Europol shall conclude agreements.

The decision concerns the eternally awkward intersection between EU international relations law and constitutional and administrative procedures, not least in the post-Lisbon framework. It is a striking decision on one level, where the EP once again post-Lisbon increasingly litigates to defend its prerogatives within inter-institutional balance as the new post-Lisbon framework of EU law, this time in response to the evolution of Europol. On the other hand, it may also be seen in another light as a dry, dull and even technical attempt by the EP to reverse a manoeuvre extending Europol's mandate in the external context. However, the post-Lisbon institutional balance era contains many examples of external action but also institutional balance being 'enlarged' through weakly reasoned CJEU decisions (e.g. *Commission v. Council*, case C-425/13,³ or *European Parliament v. Council*, case C-658/11).⁴ And they raise the question then, what is a victory in this context?

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¹ Court of Justice, judgement of 10 September 2015, case C-363/14, *European Parliament v. Council*.

² Implementing Decision 2014/269/EU of the Council of 6 May 2014, amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements.

³ Court of Justice, judgement of 16 July 2015, case C-425/13, *Commission v. Council*.

⁴ Court of Justice, judgement of 24 June 2014, case C-658/11, *European Parliament v. Council*.

Europol is steadily evolving, as a Justice and Home Affairs entity, into a full fledged agency of EU law post-Lisbon. Various crises, be they security or migration, have progressively seen Europol take more responsibility, be given various new powers or achieve new public prominence. It has a long-standing involvement with third countries for various aspects of its portfolio, most notably with the US, where it has for several years had a role in the controversial transfer of data to the US (the so-called SWIFT agreement).

This power to engage in agreements with third countries is typically a characteristic of actorness or power, autonomy and independence of an entity. Europol has long stood-out for acquiring such powers in the area of international relations unlike other JHA agencies and has been the study of much international relations scholarship in particular to date as a result.

Case C-363/14⁵ involved the EP alleging that various administrative law principles had not been complied with to its detriment in the compilation of the list of third States with which Europol would conclude agreements.

The decision impugned concerned Brazil, Georgia, Mexico and the United Arab Emirates, which include countries that are in negotiations with the EU concerning Passenger Name Records Agreements, i.e. the red-hot subject of the transfer of data.

The EP complained that the decision breached essential procedural requirements as a result of the lack of an initiative of a Member State or the Commission and the incorrect procedure of the optional consultation of the EP, that a repealed or invalid legal base had been chosen incorrectly (Art. 26, para. 1, lett. a), of the Europol Decision or Arts 5 and 6 of Decision 2009/934)⁶ and that a legal basis (Art. 26 of the Europol Decision) relating to implementing measures was chosen for the adoption of a legislative decision, by not laying down the conditions to be satisfied for a State to be put on the list, resulting in serious fundamental rights consequences.

The Court held that the absence of power in the provisions cited in the Decision to amending the list did not deprive it of legality. The Court tersely concluded that the repeal of Article 34 TEU did not affect the decision either.

Reciting its familiar case law, the Court held that the choice of legal basis of an EU act had to rest upon objective factors amenable to judicial review. Provisions laying down essential elements of basic legislation requiring political choices falling within the responsibilities of the EU legislature could not be delegated or appear in implementing acts. The Court held that the establishment of relations between Europol and third States was an ancillary action to the activities of Europol and was not a decision requir-

⁵ *European Parliament v. Council*, case C-363/14, cit.

⁶ Decision 2009/371/JHA of the Council establishing the European Police Office (Europol); Decision 2009/934/JHA of the Council adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

ing political choices to be made falling within the responsibilities of the EU legislature. It found that this decision and listing did not allow any transmission of personal data to that State, arguably underscoring the non-sensitivity of the claim. The Court then turned to the question of implementing measures, perhaps out of sequence in the arguments and held that the disagreement as to the initiative of a Member State or Commission in police and judicial cooperation matters did not relate to implementing measures. In so far as Art. 290 TFEU was not applicable, Art. 26, para. 1, lett. a), of the Europol decision was not incompatible with that provision.

The decision demonstrates the increased willingness of the EP to litigate its prerogatives post-Lisbon in international relations and also to defend the legitimacy and legality of the procedural framework now provided for in the treaties. The fact remains that the EP appears somewhat distantly removed from decision-making and rule-making processes after this decision in such a context, shorn of its technicalities. It is no doubt of political salience to EU institutions the countries that Europol may interact with and transmit data to etc. The strictness of the decision in the CJEU rejection of EP claims to procedural impropriety may indeed carry constitutional muster. However, the outcome is worth reflecting upon just how far may the Council push the ambit of action of the external dimension of EU law *without* parliament.

