

# **The Development of Europol's External Relations: Towards Supranationalism?**

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## **Abstract**

This article examines the extent to which, if any, the development of Europol's external relations over time has contributed to the integration of EU policing and criminal justice. More precisely, with reference to the academic debates on 'intergovernmentalism' and 'supranationalism', it examines the extent to and the ways in which the growth in Europol's external relations has indicated a move away from intergovernmentalism towards more supranationalism in the EU's policing and criminal justice cooperation. It does so by systematically examining the development of Europol's external relations over time using a continuum ranging from 'intergovernmentalism' to 'supranationalism' as ideal-types, whilst arguing for not reducing supranationalism to the 'Community method'. The article shows that the balance between intergovernmental and supranational features in the governance of Europol's external relations has changed over time as the latter have been gradually reinforced. Starting from a position close to the intergovernmental pole of the continuum, Europol has moved significantly towards the supranational pole, especially after the Europol Regulation began to apply in 2017.

## **1. Introduction**

Since it began its work in 1999, Europol, which is now a European Union agency that supports law enforcement cooperation, has developed a range of partnerships with third bodies and third countries, as varied as the International Criminal Police Organisation (Interpol), Brazil, China

and the United States.<sup>1</sup> This growth in its international role has taken place against the backdrop of an expansion of its activities in general, as well as changes to its legal framework.<sup>2</sup> It is important to emphasise that Europol is not an executive police force; it does not undertake searches or arrest suspects.<sup>3</sup> From its inception, the core of its mandate has been to support the exchange of information amongst EU Member States.<sup>4</sup> This has mainly taken place through the work of the liaison officers that represent each of the Member States at Europol's headquarters in The Hague, as well as that of the Europol National Units in the Member States, which constitute the interface between Europol and the national authorities. These activities have been supported by the development of increasingly sophisticated and secure databases and information exchange systems.<sup>5</sup> Given Europol's focus on information exchange, it is perhaps unsurprising that developing relations with third countries and third bodies, which would notably enable information transfers, has been seen as a priority since its establishment.<sup>6</sup>

This article contributes to this special issue by analysing the extent to which, if any, the development of Europol's external relations over time has contributed to the integration of EU policing and criminal justice. More precisely, with reference to the academic debates on

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<sup>1</sup> A list of Europol's partners and agreements can be found on its website: [www.europol.europa.eu/partners-agreements](http://www.europol.europa.eu/partners-agreements) (last accessed on 15 January 2021).

<sup>2</sup> J.D. Occhipinti, *The Politics of EU Police Cooperation: Towards a European FBI?* (Lynne Rienner, 2003); F. Coman-Kund *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge, 2018); S. Gless, 'Europol', in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law* (Edward Elgar, 2016), p. 457-479.

<sup>3</sup> J.D. Occhipinti, *The Politics of EU Police Cooperation: Towards a European FBI?* (Lynne Rienner, 2003); M. Deflem, 'Europol and the Policing of International Terrorism: Counter-terrorism in a Global Perspective', 23(3) *Justice Quarterly* (2006), 336-359.

<sup>4</sup> Article K.1(9) of the Treaty on European Union.

<sup>5</sup> Mounier, G., 'Europol: A New Player in the EU External Policy Field?', 10(4) *Perspectives on European Politics and Society* (2009), p. 584-585; F. Coman-Kund, *European Union Agencies as Global Actors*, p. 218; C. Kaunert, 'Europol and EU Counterterrorism: International Security Actorness in the External Dimension', 33(7) *Studies in Conflict & Terrorism* (2010), p. 655.

<sup>6</sup> At the time of the signing of the Europol Convention, the Council made a declaration concerning Article 42, which highlighted that 'Europol should as a matter of priority establish relations with the competent bodies of those states with which the European Communities and their Member States [had] established a structural dialogue' (Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies (1999/C26/04), Citations).

‘intergovernmentalism’ and ‘supranationalism’, it examines the extent to and the ways in which the growth in Europol’s external relations has been indicative of a move away from intergovernmentalism towards more supranationalism in the EU’s policing and criminal justice cooperation. In so doing, this article also contributes to the scholarship on Europol in general and to the stream of scholarship that has examined the international role of Europol in particular. Although the issue of Europol’s external relations has received growing attention in the last few years, the specific question at the heart of this article – namely, whether the developing activities of Europol on the international stage are also indicative of an intensification of European integration - has not been addressed yet. Existing scholarship on Europol’s international role has focused on other questions, such as the issue of the legal status of Europol as an international actor or the challenges inherent to the development of its external activities.<sup>7</sup>

In this article, it is argued that the evolution of the international role of Europol can be best understood by placing it on a continuum ranging from ‘intergovernmentalism’ to ‘supranationalism’ as ideal-types. This emphasises that there is no dichotomy between intergovernmentalism and supranationalism as ideal-types. Rather, decision-making and policy-making in a specific policy area at a given time can exhibit both intergovernmental and supranational features. Concomitantly, the balance between supranational elements and intergovernmental elements can change over time and this can be highlighted by a systematic, chronological analysis.

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<sup>7</sup> F. Coman-Kund, *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge, 2018), 210-254; C. Brière, ‘Cooperation of Europol and Eurojust with External Partners in the Fight against Crime: A Legal Appraisal’, in H.C.H. Hoffmann, E. Vos and M. Chamon (eds.), *The External Dimension of EU Agencies and Bodies: Law and Policy* (Edward Elgar, 2019); J.D. Occhipinti, *The Politics of EU Police Cooperation: Towards a European FBI?* (Lynne Rienner, 2003); M. Deflem, ‘Europol and the Policing of International Terrorism: Counter-terrorism in a Global Perspective’, 23(3) *Justice Quarterly*, 336-359.

As a consequence, this article is structured as follows. It starts with the identification of a suitable analytical framework for analysing the evolution of Europol's external relations. This section argues that using a continuum ranging from intergovernmentalism to supranationalism as ideal-types is the most adequate framework for exploring how the international role of Europol has evolved over time and whether there has been a move towards more supranationalism in that dimension of EU policing and criminal justice cooperation. The remainder of this article applies this analytical framework to empirical developments as it examines the evolution of the international role of Europol. More precisely, it considers how Europol's external relations have been governed on the basis of its three successive legal bases, namely the Europol Convention, the Europol Council Decision and the Europol Regulation, with a particular emphasis on the balance between intergovernmental and supranational features.

## **2. Understanding the evolution of Europol's external relations: analytical framework**

Various analytical frameworks have been developed over the years to analyse and evaluate European integration. Many of those have compared and contrasted the different modes of policy-shaping and policy-making that have characterised different areas of EU cooperation.<sup>8</sup> Given that this special issue aims to explore the nature and depth of integration in the EU's policing and criminal justice cooperation and more precisely whether there has been a move towards a more supranational and integrated framework, we argue that the most adequate framework for examining these questions in the case of Europol's external relations is based on an understanding of European integration as involving a continuum ranging from

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<sup>8</sup> A. Wiener, T. Börzel and T. Risse, *European Integration Theory* (Oxford University Press, 2019); B. Rosamond, *Theories of European Integration* (Palgrave Macmillan, 2000); M. Eilstrup-Sangiovanni, *Debates on European Integration: A Reader* (Palgrave Macmillan, 2006); M. Cini and N. Pérez-Solórzano Borragán (eds), *European Union Politics* (6<sup>th</sup> edition, Oxford University Press, 2019).

‘intergovernmentalism’ to ‘supranationalism’ as ideal-types, as originally suggested by Stone Sweet and Sandholtz.<sup>9</sup>

This relates to one of the most important debates in the study of European integration, which has contrasted intergovernmentalism with supranationalism. According to intergovernmentalism, the key players in driving cooperation amongst states are the national executives. Thus, in the case of European integration, those are the national executives of the Member States. More precisely, ‘the distribution of preferences and the conduct of bargaining among the governments of the [Member States] broadly explain the nature, pace, and scope of integration, and neither supranational [organisations] nor transnational actors generate political processes or outcomes of seminal importance’.<sup>10</sup> One of the most influential variants of intergovernmentalism has been the so-called ‘liberal intergovernmentalism’ originally developed by Moravcsik.<sup>11</sup> It conceives of the development of European cooperation as a two-level game. Policy preferences emerge domestically, before becoming the negotiating positions of the Member States, which bargain at the EU level. The relative powers of the Member States is a critical factor for the outcome of the negotiations, whereas the EU (and its predecessors) only provide a structure for this inter-state bargaining.<sup>12</sup>

In contrast, supranationalism refers to a form of governance ‘in which [centralised] governmental structures (those [organisations] constituted at the supranational level) possess jurisdiction over specific policy domains within the territory comprised by the [Member

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<sup>9</sup> A. Stone Sweet and W. Sandholtz, ‘European Integration and Supranational Governance’, 4 *Journal of European Public Policy* (1997), p. 302-303.

<sup>10</sup> A. Stone Sweet and W. Sandholtz, 4 *Journal of European Public Policy* (1997), p. 298

<sup>11</sup> A. Moravcsik, ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’, 31(4) *Journal of Common Market Studies* (1993).

<sup>12</sup> Ibid.

States]'.<sup>13</sup> As a result, these supranational structures are able to exercise a certain degree of constraint – which may be variable – over the behaviour of the political actors concerned, including the Member States. According to Dehousse and Weiler, the most distinctive features of supranationalism are 'the existence of organs autonomous from the Member States in their composition and their functioning' and 'the resort in, intergovernmental bodies, to decision-making processes which go beyond traditional diplomacy, such as the possibility of a vote and the giving up of "one state, one vote" principle'.<sup>14</sup> Rather unhelpfully, in the academic literature, supranationalism has often been equated and interchangeably used with the so-called 'Community method'. Also known as 'the 'classic Community method', it refers to the legal and institutional arrangements that traditionally characterised the so-called 'Community pillar', namely the adoption of 'more or less uniform rules through binding legislative and executive acts at the EU level based on the Commission's exclusive right of legislative initiative, the legislative powers of the Council and the European Parliament, and the central role of the Court in guaranteeing the respect of the rule of law'.<sup>15</sup> This article argues that the confusion between supranationalism and the 'Community method' is problematic for at least two reasons. The first is that it is conflating a concept with an empirical application. In other words, the 'Community method' is an application of the idea of 'supranationalism'. The second source of confusion is that the 'Community method' is only one possible empirical manifestation of the concept of 'supranationalism'. In other words, whilst the 'Community method' is one of the ways in which supranationalism can be applied in practice, it is actually not the only one. One could observe the application of the idea of supranationalism outside the 'Community method'.

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<sup>13</sup> A. Stone Sweet and W. Sandholtz, 'European Integration and Supranational Governance', 4 *Journal of European Public Policy* (1997), p.303.

<sup>14</sup> R. Dehousse and J.H.H. Weiler, 'The Legal Dimension', in W. Wallace (ed.), *The Dynamics of European Integration* (Pinter, 1990), p. 250.

<sup>15</sup> S. Smismans, 'From Harmonization to Co-ordination? EU Law in the Lisbon Governance Architecture', 18(4) *Journal of European Public Policy* (2011), p. 505. See also R. Dehousse (ed.) *The 'Community Method': Obsolete or Obsolete?* (Palgrave Macmillan, 2011); H. Wallace and C. Reh, 'An Institutional Anatomy and Five Policy Modes', in H. Wallace, M.A. Pollack and A.R. Young (eds.) *Policy-making in the European Union* (Seventh Edition, Oxford University Press), p. 99-102.

This is particularly evident when one considers that, although supranationalism has often been associated with the EU, it is a concept that could potentially be used in other parts of the world beyond Europe. After all, one of the early uses of ‘supranational’ can be found in an article written by Albert Einstein calling for ‘supranational control’ over the use of atomic bombs in 1947.<sup>16</sup> As a consequence, and with a view to applying an ‘intergovernmentalism-supranationalism’ continuum in the empirical analysis, this article calls for carefully distinguishing between ‘supranationalism’ and the ‘Community method’. Going back to the etymology of ‘supranationalism’ (i.e. above or beyond the borders of one nation), it is based on an understanding of supranationalism as referring to intensified cooperation amongst states above the national level, which may take the form of the ‘Community method’, but may take many other forms as well.

Before proceeding further, it is important to acknowledge that some scholars may disagree with the choice of the analytical framework used in this article. One can identify some criticisms that some might level at the analytical framework adopted here. First of all, some scholars such as Wallace and Wallace have described the ‘intergovernmental-supranational continuum’ as an ‘overly simplistic dichotomy’.<sup>17</sup> As a result, other analytical frameworks have been developed for analysing EU integration.<sup>18</sup> One of those has been ‘intensive transgovernmentalism’, which has been coined in order to address the observation that ‘[throughout] the history of the EU there have been examples of policy cooperation which have depended mainly on interaction between the relevant national policy-makers, and with

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<sup>16</sup> A. Einstein, ‘Atomic War or Peace’, 180(5) *The Atlantic* (1947), p. 29-32.

<sup>17</sup> H. Wallace and W. Wallace, ‘Overview: The European Union, Politics and Policy-making’, in K.E. Jørgensen, M.A. Pollack and B. Rosamond (eds.), *Handbook of European Union Politics* (Sage, 2006), p. 341.

<sup>18</sup> A. Wiener, T. Börzel and T. Risse, *European Integration Theory* (Oxford University Press, 2019); B. Rosamond, *Theories of European Integration* (Palgrave Macmillan, 2000); M. Eilstrup-Sangiovanni, *Debates on European Integration: A Reader* (Palgrave Macmillan, 2006); M. Cini and N. Pérez-Solórzano Borragán (eds.), *European Union Politics* (6<sup>th</sup> edition, Oxford University Press, 2019); H. Wallace and C. Reh, ‘An Institutional Anatomy and Five Policy Modes’, in H. Wallace, M.A. Pollack and A.R. Young (eds.) *Policy-making in the European Union* (Seventh Edition, Oxford University Press), p. 72-112.

relatively little of the classical treaty-based involvement of the EU institutions'.<sup>19</sup> This policy mode has also often been perceived as being characteristic of sensitive policy areas touching upon state sovereignty, such as the Area of Freedom, Security and Justice (AFSJ).<sup>20</sup> Thus, proponents of 'intensive transgovernmentalism' might argue that this theoretical lens would be more adequate for analysing the evolution of Europol's external relations, given that Europol's activities fall under the category of sensitive policy matters related to state sovereignty. It appears that this approach may have been particularly well-suited to examining the beginnings of European internal security cooperation, which were characterised by a dominant role for the Member States and a more marginal role for the EU institutions. However, given that one of its core ideas is the lack of involvement of the EU institutions in the development of a policy area, it is arguably not the most adequate framework for capturing the legal and institutional changes that could potentially reinforce the supranational character of a policy area.

Another theoretical lens that might be presented as being particularly well-suited to studying the evolution of Europol is a specific variant of intergovernmentalism, which has been developed under the label of 'new intergovernmentalism' in recent years. Its proponents have argued that, since the signing of the Treaty of Maastricht in 1992, there has been a 'tendency towards European integration without supranationalism', which has been 'predicated on an increasingly deliberative and consensual approach to EU decision-making'.<sup>21</sup> At first sight, this approach appears to offer a promising theoretical lens through which one can examine the

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<sup>19</sup> H. Wallace and W. Wallace, 'Overview: The European Union, Politics and Policy-making', p. 351.

<sup>20</sup> Ibid. See also S. Lavenex, 'Transgovernmentalism in the Area of Freedom, Security, and Justice', in I. Tömmel and A. Verdun (eds.) *Innovative Governance in the European Union: The Politics of Multilevel Policymaking* (Lynne Rienner, 2009), p. 255-271; S. Lavenex, 'Justice and Home Affairs: Communitarization With Hesitation', in H. Wallace, M.A. Pollack and A.R. Young (eds.), *Policy-making in the European Union* (Oxford University Press, 2010), p. 457-480.

<sup>21</sup> C.J. Bickerton, D. Hodson and U. Puetter (eds.), *The New Intergovernmentalism: State and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), p. 1.



development of Europol's external activities.<sup>22</sup> This is because, still according to Bickerton, Hodson and Puetter, this further integration without supranationalism has notably taken place through the establishment and further development of so-called 'de novo bodies'.<sup>23</sup> Those are defined as 'newly created institutions that often enjoy considerable autonomy by way of executive or legislative power and have a degree of control over their own resources'.<sup>24</sup> In addition, they are said to 'fulfil functions that could have been delegated to the Commission and tend to contain mechanisms for Member State representation as a part of their governance structure'.<sup>25</sup> This category is broad as it includes bodies as different as the European Central Bank, the European External Action Service (EEAS), as well as 'numerous regulatory and executive agencies'.<sup>26</sup> Thus, according to that perspective, Europol would be one of these 'de novo bodies' and the increase in its activities, including the development of its international role, would confirm the new intergovernmentalist thesis that further European integration is taking place without supranationalism. There are some problems with new intergovernmentalism. It is beyond the scope of this article to examine all of them.<sup>27</sup> It suffices here to point out two problems in particular, which make new intergovernmentalism inappropriate for examining the evolution of Europol's external relations. The first is the problematic character of the definition of 'de novo bodies'. One of the central features of 'de novo bodies' for Bickerton and his colleagues is that they are given 'functions that could have been delegated to the Commission', which, still in their view, would constitute evidence that European integration is now taking place without supranationalism. However, that assumption

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<sup>22</sup> S. Wolff, 'Integrating in Justice and Home Affairs: A Case of New Intergovernmentalism Par Excellence?', in C.J. Bickerton, D. Hodson and U. Puetter (eds.), *The New Intergovernmentalism: State and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), p. 129.

<sup>23</sup> C.J. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', 53(4) *Journal of Common Market Studies*, p. 705.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> See F. Schimmelfennig, 'What's the News in "New Intergovernmentalism"? A Critique of Bickerton, Hodson and Puetter', 53(4) *Journal of Common Market Studies* (2015), p. 723-730.

is simply not true in the case of an agency like Europol, as one cannot conceive how the European Commission could have fulfilled the specialised tasks that this agency has been delegated. The second problem is that, in practice, ‘*de novo* bodies’ actually ‘display a wide variation of intergovernmental and supranational features’<sup>28</sup>, which means that the creation of ‘*de novo* bodies’ cannot necessarily be equated with a rise in intergovernmentalism and a retreat of supranationalism, as suggested by Bickerton, Hodson and Puetter. Therefore, although intensive transgovernmentalism or new intergovernmentalism might be able to shed some light on developments in the AFSJ, including the evolution of Europol, they are not well-equipped to capture possible shifts between intergovernmental and supranational features in a policy area.

As a consequence, having considered possible alternative frameworks, this article argues that the most adequate framework for examining the evolution of Europol’s external relations and whether it points towards a strengthening of European integration is a continuum ranging from intergovernmental to supranational as ideal-types. In order to address the aforementioned objections, it is important to point out that a conceptualisation in terms of a *continuum* precisely aims to avoid the limitations of a clear-cut dichotomy between intergovernmentalism and supranationalism. Being able to locate a policy development at one point on a spectrum precisely enables an analyst to highlight that it combines both supranational and intergovernmental elements and to assess the balance between those.<sup>29</sup> In addition, the use of an analytical framework based on a continuum allows for an assessment of the evolution of this balance between supranational features and intergovernmental features over time. Finally, it is important to emphasise that using a continuum does not pre-suppose that cooperation in a

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<sup>28</sup> Ibid., p. 724.

<sup>29</sup> See also R. Dehousse and J.H.H. Weiler, ‘The Legal Dimension’, p. 251.

given policy sector necessarily moves from the ‘intergovernmental’ to the ‘supranational’ pole of the continuum. It can highlight how cooperation in a given policy area may remain the same in terms of the balance between intergovernmental and supranational features over time or could even move in one direction at one point and then in the opposite direction later.

### **3. The evolution of Europol’s external relations: towards more supranationalism?**

Before proceeding to analyse the evolution of Europol’s external relations, it is necessary to briefly present the wider context in which those have developed. For that purpose, the next section outlines the strategic framework that the EU has strived to develop over time for the external dimension of the AFSJ, which notably comprises the external relations of Europol.

#### ***3.1 The external dimension of the AFSJ***

Although the main objective of the AFSJ is internal, it has been acknowledged from the beginning that its successful completion entailed the development of external action. The Presidency Conclusions of the Tampere European Council in October 1999 already called for the definition of ‘clear priorities, policy objectives and measures for the Union’s external action in Justice and Home Affairs’ (as the AFSJ was known then).<sup>30</sup> Since then, a significant number of strategy and programming documents have been adopted, which are important for the ways in which they have framed the external relations of an agency active in the AFSJ like Europol. According to Monar, one can identify four categories of such documents.<sup>31</sup> The first are documents laying down a strategy for the development of the AFSJ in its entirety, such as the so-called ‘Tampere Programme’ and ‘The Hague Programme’, which contain sections concerning external relations, including in the field of policing and criminal justice

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<sup>30</sup> Tampere European Council, Presidency Conclusions, 15-16 October 1999.

<sup>31</sup> J. Monar, ‘The EU’s Growing External Role in the AFSJ Domain: Factors, Framework and Forms of Action’, 27(1) *Cambridge Review of International Affairs* (2014), p. 159-160.

cooperation.<sup>32</sup> The second category contains strategic documents for the development of the external dimension of the AFSJ, such as the influential ‘Strategy for the external dimension of the Area of Freedom, Security and Justice’, which was adopted in December 2005.<sup>33</sup> The third category gathers documents aiming to lay down a strategy for the development of specific sub-fields of the AFSJ, which usually also address their external dimension. An example is the EU’s Counter-terrorism Strategy, which was adopted in 2005.<sup>34</sup> The fourth category of programming and strategic documents identified by Monar are documents focusing on specific third countries or regions, such as the ‘Strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa’ Council document adopted in 2010<sup>35</sup> and the various Action Plans adopted in the framework of the European Neighbourhood Policy (ENP).<sup>36</sup> Thus, it is remarkable to see how much energy has been devoted to trying to lay down a strategy and a programme for the development of the external dimension of the AFSJ and its various components. However, it is important to highlight two limitations to the EU’s endeavours. First of all, as suggested by the paragraphs above, the external dimension of the AFSJ has been characterised by a high degree of complexity in terms of its strategic development. This has been mirrored at the institutional level with the involvement of a large number of policy actors.<sup>37</sup> Moreover, it is noteworthy that Member States have remained ‘free to conclude individual agreements on external aspects of

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<sup>32</sup> Tampere European Council, Presidency Conclusions, 15-16 October 1999; ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’, 2005/C 53.

<sup>33</sup> Council of the European Union, ‘A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice’, 15446/05, 6 December 2005.

<sup>34</sup> Council of the European Union, ‘The European Union Counter-terrorism Strategy’, 14469/4/05, 30 November 2005.

<sup>35</sup> Council of the European Union, ‘Implementing the strategy for the external dimension of Justice and Home Affairs Action-oriented paper: Strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa’, 5069/3/10, 25 March 2010.

<sup>36</sup> See C. Kaunert and S. Leonard, ‘EU Counterterrorism and the European Neighbourhood Policy: An Appraisal of the Southern Dimension’, 23(2) *Terrorism and Political Violence* (2011), p. 286-309.

<sup>37</sup> F. Coman-Kund, *European Union Agencies as Global Actors*, p. 216.

internal security – a freedom they [have made] ample use of<sup>38</sup>, although they have been required to abide by the principles of ‘loyalty and mutual solidarity cooperation’.<sup>39</sup>

### ***3.2 Europol’s external relations under the Europol Convention***

Europol was established by a Council Act in 1995 – known as the Europol Convention<sup>40</sup> - and became operational on 1 July 1999.<sup>41</sup> The Treaty of Maastricht, which had entered into force in 1993, had established two new ‘pillars’, alongside the European Community, namely the ‘Common Foreign and Security Policy’ and ‘Justice and Home Affairs’ (later known as the ‘Area of Freedom, Security and Justice’ (AFSJ)).<sup>42</sup> With regard to the latter, the Treaty on European Union laid down that, ‘[for] the purposes of achieving the objectives of the Union, in particular the free movement of persons, [...] Member States [should] regard the following areas as matters of common interest: [...] police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international 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>43</sup> From an institutional point of view, the Treaty on European Union largely maintained the predominantly intergovernmental character of the cooperation on policing and criminal justice matters, which had informally - and largely secretly - developed in *ad hoc* bodies, such as the Trevi group, in the previous two decades.<sup>44</sup> The institutional arrangements

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<sup>38</sup> J. Monar, ‘The EU’s Externalisation of Internal Security Objectives: Perspectives after Lisbon and Stockholm’, 45(2) *The International Spectator* (2010), p. 33.

<sup>39</sup> Article 23(3) TEU. See J. Monar, ‘The Integration of Police and Judicial Cooperation in Criminal Matters into EU External Relations: Achievements and Problems’, in C. Fijnaut and J. Ouwerkerk (eds.) *The Future of Police and Judicial Cooperation in the European Union* (Brill, 2009), p. 71-72.

<sup>40</sup> Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) [1995] OJ C 316/1.

<sup>41</sup> Council of the European Union, ‘Europol Annual Report 1999’, Doc. 7728/2/00 , 11 May 2000.

<sup>42</sup> Title V and Title VI of the Treaty on European Union.

<sup>43</sup> Article K.1 of the Treaty on European Union.

<sup>44</sup> C. Kaunert and S. Leonard, ‘The Collective Securitisation of Terrorism in the European Union’, 42(2) *West European Politics* (2019), p. 264-265; A. De Moor and G. Vermeulen, ‘The Europol Council Decision: A New Legal Basis for Europol’, 1(2) *New Journal of European Criminal Law* (2010), p. 180-181.

that it formalised kept the Member States as the dominant actors – now taking decisions within the Council of Ministers - , whilst giving very limited competences to the European Commission, the European Parliament and the Court of Justice. The Treaty on European Union also enabled the Council to ‘draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements’.<sup>45</sup> As a result, the Europol Convention was adopted by the Council on 26 July 1995. It can therefore be described as an intergovernmental agreement that the Member States concluded within the framework of the EU and that each of them had to ratify according to its own constitutional requirements. Consequently, at the time, Europol was a fully-fledged international organisation. It possessed full legal personality, which meant that it was allowed to enter into binding agreements under international law.<sup>46</sup>

Article 42 of the Europol Convention stipulated that Europol was allowed to ‘establish and maintain relations with third states and third bodies’ as necessary for the performance of its tasks.<sup>47</sup> This provision referred to Article 10, which envisaged that, if the performance of its tasks justified it, Europol was allowed to accept and to request information from various third parties, including third states, international organisations and the International Criminal Police Organisation (Interpol).<sup>48</sup> The Convention did not stipulate the rules governing Europol’s external relations. Rather, it tasked the Council with drawing up the rules for governing Europol’s external relations. Those were to be adopted by the Council acting unanimously according to the procedure laid down in Title VI of the Treaty on European Union, after having

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<sup>45</sup> Article K.3(2) of the Treaty on European Union.

<sup>46</sup> D. Heimans, ‘The External Relations of Europol: Practical, Legal and Operational Considerations’, in B. Martenczuk and S. van Thiel (eds.) *Justice, Liberty and Security: New Challenges for EU External Relations* (VUB Press, 2008), p. 369; C. Kaunert, ‘Europol and EU Counterterrorism’, p. 659.

<sup>47</sup> Article 42(2) of the Europol Convention.

<sup>48</sup> Article 10(4) of the Europol Convention.

obtained the opinion of the Management Board.<sup>49</sup> In practice, this meant that the role of the supranational institutions was severely limited. At the time, the European Commission had not been granted any right of initiative in the fields of criminal justice cooperation and police cooperation.<sup>50</sup> As for the European Parliament, it only had the rights to be informed and to be consulted about JHA developments<sup>51</sup>.

At the time of the signing of the Europol Convention, the Council made a declaration concerning Article 42, which highlighted that ‘Europol should as a matter of priority establish relations with the competent bodies of those states with which the European Communities and their Member States [had] established a structural dialogue’.<sup>52</sup> As a result, in November 1998, the Council adopted rules governing the external relations of Europol with third states and third bodies.<sup>53</sup> Those identified several steps in the negotiation of an agreement between Europol and a third state or third body. First, the Council was expected to draw up a list of third states and third bodies with which Europol was to negotiate an agreement. Second, the Director of Europol was required to consult the Management Board and to receive the authorisation by the Council to start the negotiations, such an authorisation being potentially conditional. Third, the Council was required to give its unanimous approval for an agreement to be concluded.<sup>54</sup> Europol was able to conclude two types of agreements, namely ‘strategic cooperation agreements’ and ‘technical cooperation agreements’.<sup>55</sup> Whereas the former were limited to the

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<sup>49</sup> Article 42(2) of the Europol Convention. Article 28 of the Europol Convention stipulated that the Management Board comprised one representative of each Member State, as well as a representative of the European Commission, albeit with non-voting status.

<sup>50</sup> Article K.3(2) of the Treaty on European Union.

<sup>51</sup> Article K.6 of the Treaty on European Union.

<sup>52</sup> Council Act of 3 November 1998 laying down rules governing Europol’s external relations with third States and non-European Union related bodies (1999/C26/04), Citations.

<sup>53</sup> Council Act of 3 November 1998 laying down rules governing Europol’s external relations with third States and non-European Union related bodies (1999/C26/04).

<sup>54</sup> Council Act of 3 November 1998 laying down rules governing Europol’s external relations with third States and non-European Union related bodies (1999/C26/04), Article 2(3).

<sup>55</sup> Europol, *1998-2016: Looking Back, Moving Forward – One Hundred Meetings of the Europol Management Board* (Publications Office of the European Union, 2016), p. 93.

exchange of strategic and technical information only, the latter also allowed for the exchange of personal data.<sup>56</sup> As highlighted by Mounier, from the viewpoint of practitioners (i.e. police officers), ‘only operational agreements [had] a real added value for investigations because strategic agreement merely [allowed] the exchange of threat assessments and analytical reports’.<sup>57</sup> The key issue that determined the type of agreement negotiated was whether it was considered that the security and data protection standards applied by the potential partner were adequate. This decision was taken by the Council.<sup>58</sup>

In March 2000, the Council authorised the Director of Europol to begin negotiations on agreements with a series of third states and third (i.e. non-EU related) bodies. In the context of the debates on and the preparations for the EU’s enlargement, there was a significant emphasis on developing Europol’s cooperation with states holding the membership candidate status, as evidenced by the inclusion of Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey on the list. Other third states were also included, namely Bolivia, Canada, Colombia, Morocco, Norway, Peru, the Russian Federation, Switzerland and the United States, as well as third bodies, such as ICPO-Interpol, the United Nations Drugs Control Programme and the World Customs Organisation.<sup>59</sup> By the end of 2004, ten strategic and seven operational agreements had been signed and ratified and had entered into force.<sup>60</sup> The 2000 Council Decision indicated that these third states and third bodies had been selected on the basis of ‘operational requirements and the need to combat in an effective way organised forms of criminality through Europol’.<sup>61</sup> However, and although

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<sup>56</sup> Ibid., p. 94.

<sup>57</sup> G. Mounier, ‘Europol: A New Player in the EU External Policy Field?’, p. 587.

<sup>58</sup> Ibid.

<sup>59</sup> Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU-related bodies, 2000/C 106/01, Article 2.

<sup>60</sup> Europol, *1998-2016: Looking Back, Moving Forward*, p. 94.

<sup>61</sup> Council Decision 2000/C 106/01, Recital (2).



Europol was at the time a separate international organisation with its own legal personality, it is clear that some broader political considerations were sometimes at play, as evidenced by the focus on the states that were about to join the EU in the 2000 Council Decision as previously mentioned. Another example was the initiative of the European Commission in 2004 to state, in a Communication on ‘An EU-India Strategic Partnership’, that ‘the Council could reflect on including India in its list of “priority countries” for a “strategic cooperation agreement” with Europol’ without seemingly having consulted Europol.<sup>62</sup> Nevertheless, the prime example of the influence of broader foreign policy considerations on Europol’s external relations was arguably provided by the swift signing of an agreement with the US in the aftermath of 9/11 despite strong reservations about the low data protection standards.<sup>63</sup> Thus, although Europol enjoyed its own legal personality and was not an EU agency at that point, there were already attempts by supranational institutions, such as the European Commission, at influencing its activities and shaping them according to wider strategic considerations. However, the Council appeared to be keen on defending its prominent position in the area. This was aptly shown by the adoption of four legislative instruments concerning Europol by the Council on 30 November 2009.<sup>64</sup> The date is important because it was the eve of the entry into force of the Treaty of Lisbon or, in other words, the last day on which the European Parliament merely had the right to be consulted (and thereby potentially ignored). The European Parliament had asked for the four proposals to be withdrawn and then re-tabled on the basis of the new provisions contained in the Treaty of Lisbon. As those were granting the European Parliament decision-

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<sup>62</sup> G. Mounier (2009) ‘Europol: A New Player in the EU External Policy Field?’, p. 588.

<sup>63</sup> Ibid., p. 587-588; E. Ilbiz, C. Kaunert and D. Anagnostakis, ‘The Counterterrorism Agreements of Europol with Third Countries: Data Protection and Power Asymmetry’, 29(6) *Terrorism and Political Violence* (2017), p. 972-974.

<sup>64</sup> 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; Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements; Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files; Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information.

taking powers on these matters, there would have been more democratic scrutiny according to the European Parliament.<sup>65</sup> However, this request was eventually turned down by the Council, which confirms that the European Parliament's control of Europol was very limited under the Europol Council Decision.

Thus, referring back to the intergovernmental-supranational continuum, the above analysis showed that, under the Europol Convention, Europol was located close to the intergovernmental pole of the continuum. Even then, there were some supranational elements in its governance, some of which were informal. However, those were very limited, most notably because they had been largely opposed by the Member States at the time.

### ***3.3 Europol's external relations under the Europol Council Decision***

The legal framework for Europol changed as a result of the adoption of Council Decision 2009/371/JHA (Europol Council Decision) in April 2009.<sup>66</sup> One of the main reasons for its adoption was to bring Europol in line with the legal framework of the other bodies operating in the AFSJ. Indeed, the activities of Eurojust – Europol's judicial counterpart - and the European Police College (Cepol) were both based on a Council Decision.<sup>67</sup>

As it was adopted before the entry into force of the Treaty of Lisbon on 1 December 2009, the Europol Council Decision was based on the provisions of the Treaty of Amsterdam, which had already been in force for ten years. This treaty had had an important impact on the third pillar, as it had transferred a series of matters (namely, asylum, migration, border controls and

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<sup>65</sup> 'Europol reforms: MEPs criticize Council and demand democratic scrutiny', Press release, European Parliament, Reference No.: 20091123IPR65046.

<sup>66</sup> Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA).

<sup>67</sup> A. De Moor and G. Vermeulen, 'The Europol Council Decision: Transforming Europol into an Agency of the European Union', 47 *Common Market Law Review* (2010), p. 1094.

cooperation in civil justice cooperation) to the first pillar, whilst leaving policing and cooperation in criminal justice matters in the third pillar. In addition, the Treaty of Amsterdam had provided more detailed provisions regarding the contents of police cooperation, including ‘the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data’.<sup>68</sup> It had also tasked the Council with ‘[promoting] cooperation through Europol’ and had set a series of specific objectives relating to Europol to be accomplished within a period of five years following the entry into force of the Treaty.<sup>69</sup> The Treaty of Amsterdam also strengthened the position of the supranational institutions in policing and criminal justice to some extent. The European Parliament’s right to be informed and consulted was enhanced<sup>70</sup>, whilst the European Commission received a right of initiative in this field<sup>71</sup>, alongside a reinforced position for the Court of Justice.<sup>72</sup>

The adoption of the Europol Council Decision was an important development as it transformed Europol from an international organisation into an EU agency. Although it kept its legal personality, its new status as an EU agency led to the introduction of new forms of control over its activities. First of all, parliamentary control increased.<sup>73</sup> This was because, from 1 January 2010, Europol was funded by the EU’s general budget and no longer through the contributions from Member States.<sup>74</sup> As a result, the role of the European Parliament was enhanced given its direct involvement in the adoption of the budget.<sup>75</sup> Moreover, in terms of broader political

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<sup>68</sup> Article 30(1) of the Treaty on European Union.

<sup>69</sup> Article 30(2) of the Treaty on European Union.

<sup>70</sup> Article 39 of the Treaty on European Union.

<sup>71</sup> Article 34 of the Treaty on European Union.

<sup>72</sup> Article 35 of the Treaty on European Union.

<sup>73</sup> M. Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’, 15(5) *European Law Journal* (2009), p. 599-615.

<sup>74</sup> Article 42 of the Europol Council Decision and Article 35 of the Europol Convention.

<sup>75</sup> A. De Moor and G. Vermeulen, ‘The Europol Council Decision’, p. 1117.

control, the European Parliament gained the right to request the Presidency, the Chairman of the Management Board and the Director to appear before it. This was a strengthening of its position compared to its position under the Europol Convention, when it had enjoyed the right to be consulted, but had been largely ignored in practice.<sup>76</sup>

With regard to Europol's external relations, the new Europol Council Decision did not introduce any significant change. The European Commission had been in favour of ensuring a stronger alignment of Europol's external relations with the EU's strategy for the development of its external relations in general. However, both Europol and the Member States were not in favour of such a change.<sup>77</sup> As a result, Article 23 of the Europol Council Decision continued to allow Europol to develop cooperative relations with third states and international organisations if necessary for performing its tasks.<sup>78</sup> It also indicated that cooperation agreements should be concluded for underpinning these cooperative relations.<sup>79</sup> Article 23 of the European Council Decision also laid down that, in line with Europol's focus on the exchange of information, the agreements concluded by Europol with third states and international organisations were to centre on the transmission of information.<sup>80</sup> With regard to the important issue of the procedures to follow for the conclusion of these agreements, the Europol Council Decision indicated that approval by the Council was required prior to the conclusion of any agreement. This approval could only be granted after the Council had consulted the Management Board, as well as obtaining the opinion of the Joint Supervisory Body<sup>81</sup> via the Management Board in the case of the exchange of personal data.<sup>82</sup> By way of

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<sup>76</sup> A. De Moor and G. Vermeulen, 'The Europol Council Decision', p. 1117.

<sup>77</sup> A. De Moor and G. Vermeulen, 'The Europol Council Decision', p. 1107-1108.

<sup>78</sup> Article 23(1) of the European Council Decision.

<sup>79</sup> Article 23(2) of the European Council Decision.

<sup>80</sup> Article 23(2)-(9) of the European Council Decision.

<sup>81</sup> The Joint Supervisory Body was an independent body in charge of Europol's data protection control. It was composed of representatives of national supervisory bodies (see Article 24 of the European Council Decision).

<sup>82</sup> Article 23(2) of the Europol Council Decision.

derogation, Europol was also allowed to transmit personal data and classified information without an operational agreement being in place in very specific circumstances.<sup>83</sup> Although this provision was to be applied only under extraordinary conditions, it was important because it did not involve the Management Board (and thereby the Member States). Moreover, although the European Commission had not been formally granted a role in the negotiation of the agreements, in practice, there were regular meetings and informal communication between the Commission and Europol, ‘enabling the Commission to ask Europol to put more or less emphasis on one file or another according to the priorities in the EU external action area’.<sup>84</sup>

Thus, going back to the intergovernmental-supranational continuum, one can argue that the adoption of the Europol Council Decision led to a move towards more supranationalism in Europol’s external relations. This resulted from a strengthening of the role of the supranational institutions in both the design of Europol’s legal instrument – as a result of the entry into force of the Treaty of Amsterdam – and the day-to-day activities of Europol, including those relating to its external relations. However, this move towards the supranational pole was rather modest overall and the Member States remained dominant.

### ***3.4 Europol’s external relations under the Europol Regulation***

The legal basis of Europol significantly changed as a result of the adoption of the Europol Regulation, which began to apply on 1 May 2017.<sup>85</sup> The most important development that influenced the content of this new Europol legal instrument was the entry into force of the

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<sup>83</sup> Article 23(8) and (9) of the Europol Council Decision.

<sup>84</sup> F. Coman-Kund, *European Union Agencies as Global Actors*, p. 229.

<sup>85</sup> Europol 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

Treaty of Lisbon on 1 December 2009. The development of the ‘Common Approach on EU Agencies’ also played a role.<sup>86</sup>

The Treaty of Lisbon was signed by the EU Member States in December 2007 and entered into force on 1 December 2009. It was important for the development of Europol’s international role for two main reasons. First, it modified the legal provisions governing policy-making on policing and criminal justice cooperation. Secondly, it introduced a single legal personality for the EU, which put an end to the conduct of different external policies under different regimes (i.e. EC and EU).<sup>87</sup> Concerning the former, the Treaty of Lisbon introduced significant innovations in the AFSJ. It formally abolished the three-pillar structure that had been created by the Treaty of Maastricht. As a result, new legislative measures concerning policing or criminal justice cooperation would now take the form of Directives or Regulations.<sup>88</sup> Those would be adopted through the ordinary legislative procedure – with the Council and the European Parliament as co-legislators on an equal footing – and would fall under the normal jurisdiction of the Court of Justice.<sup>89</sup> However, Protocol 36 on transitional provisions laid down various derogations. Those are worth mentioning here because they are often used as evidence of the persistence of intergovernmentalism in the AFSJ.<sup>90</sup> For a period lasting five years after the entry into force of the Treaty of Lisbon (i.e. until 1 December 2014), the competences of the Court of Justice and of the European Commission remained unchanged. Thus, the European Commission did not have the power to begin infringement proceedings against the Member States that were not meeting their obligations with regard to policing and criminal justice

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<sup>86</sup> ‘Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies’, 2012.

<sup>87</sup> Article 47 TEU.

<sup>88</sup> Articles 87 and 88 TFEU.

<sup>89</sup> S. Peers ‘Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon’ (2011) 48 *Common Market Law Review*, p. 692-693

<sup>90</sup> S. Wolff, ‘Integrating in Justice and Home Affairs: A Case of New Intergovernmentalism Par Excellence?’ in C. J. Bickerton, D. Hodson, and U. Puetter (eds.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), p. 132-133.

cooperation during the five-year transition period. Nor did the Court of Justice have full jurisdiction over these matters, unless a Member State had chosen to accept this jurisdiction. According to a report authored for the European Parliament, by November 2014, 18 Member States had formally accepted the jurisdiction of the Court of Justice, which had been handing down rulings.<sup>91</sup> Whilst these transition measures can indeed be seen as evidence of the persistence of intergovernmentalism in police and criminal justice cooperation, it is important to emphasise that they duly came to an end as planned. This led to a strengthening of the supranational features in this policy area, as the role of the supranational institutions was reinforced.

Moreover, as previously mentioned, the Treaty of Lisbon introduced some significant changes with regard to the EU's external relations, as it introduced a single legal personality for the EU as a consequence of the abolition of the three-pillar structure. In addition, it laid down that '[the] Union [should] ensure consistency between the different areas of its external action and between these and its other policies' and tasked the Council and the Commission to ensure that consistency.<sup>92</sup> Thus, this duty of consistency notably applied to the external dimension of the AFSJ. As a result, it was now expected that there would be coherence between the external activities of the EU and those of European agencies, such as Europol. This expectation was reinforced as a result of the development of the so-called 'Common Approach on EU agencies'.<sup>93</sup> This foresaw the strengthening of the relations between the European Commission and all EU agencies, including Europol, in order to enhance consistency across the EU's activities. In addition, some concerns regarding the lack of parliamentary scrutiny over

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<sup>91</sup> European Parliament (2014) 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted Before the Lisbon Treaty: Who Monitors Trust in the European Justice Area?', Study for the LIBE Committee, Brussels: European Parliament, p. 13.

<sup>92</sup> Article 21(3) of the Treaty on European Union.

<sup>93</sup> 'Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies', 2012.

Europol's external relations had been expressed. In particular, the European Commission had highlighted how the coherence of the EU's external role could be affected, if Europol's external relations agenda were not brought in line with that of the EU.<sup>94</sup> As for the European Parliament, it had previously expressed its dismay about its lack of involvement in both the design and the control of Europol's activities, including its external relations, as previously mentioned. The development of Europol's cooperation with the US authorities in the aftermath of the terrorist attacks on 11 September 2001 had been a particularly sensitive issue.<sup>95</sup> For that reason, the European Parliament was very intent on making use of Article 88 TFEU in order to increase its say on the design, operation and control of Europol's activities, including its international cooperation.<sup>96</sup>

Having considered the background to the adoption of the Europol Regulation, it is now possible to examine the significant changes that it introduced to Europol's external relations. First of all, Europol lost the competence to sign new cooperation agreements from 1 May 2017, although the agreements concluded until then would be preserved.<sup>97</sup> From that date onwards, international agreements entailing the transfer of personal data would have to be concluded according to Article 218 of the Treaty on the Functioning of the EU.<sup>98</sup> Furthermore, the Management Board is now only allowed to suggest to the Council to draw the attention of the European Commission to the need for concluding such an international agreement.<sup>99</sup> In other words, the role of Europol in initiating the negotiations towards an agreement allowing for the exchange of personal data has been significantly curtailed, whilst the position of the Council

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<sup>94</sup> A. De Moor and G. Vermeulen, 'The Europol Council Decision', p. 1107-1108.

<sup>95</sup> G. Mounier (2009) 'Europol: A New Player in the EU External Policy Field?', p. 587-588; E. Ilbiz, C. Kaunert and D. Anagnostakis, 'The Counterterrorism Agreements of Europol with Third Countries', p. 972-974.

<sup>96</sup> See notably 'Europol reforms: MEPs criticize Council and demand democratic scrutiny', Press release, European Parliament, Reference No.: 20091123IPR65046.

<sup>97</sup> Article 25(4) of the Europol Regulation.

<sup>98</sup> Article 25(1) and (4) of the Europol Regulation.

<sup>99</sup> Article 11(2) of the Europol Regulation.



and that of the European Commission have been strengthened in that respect. Moreover, the application of Article 218 TFEU has meant that the Council has been granted the competence to take decisions on the opening of the negotiations, the adoption of the negotiation directives, as well as the authorisation of the signing and of the conclusion of the agreement. As for the European Parliament, its position has also been reinforced as it has to give its consent to the agreements allowing for the exchange of personal data.<sup>100</sup> For Europol, this has been a major change compared to its role under the Europol Council Decision, when it was leading the initiation, the negotiation and the conclusion of the cooperation agreements.<sup>101</sup> However, it has been given the competence to conclude working arrangements and administrative arrangements. Working arrangements do not allow for the exchange of personal data and are explicitly non-binding, whereas the administrative arrangements aim to enable personal data exchanges.<sup>102</sup>

Another change introduced by the Europol Regulation has been the further enhancement of the role of the European Commission with regard to Europol's external relations. This has been evidenced by its power to adopt 'adequacy decisions' prior to personal data exchanges<sup>103</sup>, as well as its competence to give its opinion on Europol's multiannual programming and annual work programmes.<sup>104</sup> Furthermore, the Joint Supervisory Board has been replaced by the European Data Protection Supervisor, who has been given considerably stronger powers, including those of banning Europol's processing operations or referring a matter to the Court of Justice.<sup>105</sup> Finally, the Europol Regulation has maintained the derogations enabling the

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<sup>100</sup> Article 88(2) of the Treaty on the Functioning of the European Union and Article 218(6)(a) of the Treaty on the Functioning of the European Union.

<sup>101</sup> F. Coman-Kund, *European Union Agencies as Global Actors*, p. 232.

<sup>102</sup> F. Coman-Kund, *European Union Agencies as Global Actors*, p. 233.

<sup>103</sup> F. Coman-Kund, *European Union Agencies as Global Actors*, p. 234.

<sup>104</sup> Article 12 of the Europol Regulation.

<sup>105</sup> Article 43 of the Europol Regulation.

Executive Director to take its own decision on the exchange of personal data in specific circumstances.<sup>106</sup>

Thus, with reference to the intergovernmental-supranational continuum, one can argue that the application of the Europol Regulation has led to a further move towards more supranationalism in Europol's external relations. Again, this has resulted from a strengthening of the role of the supranational institutions in both the design of Europol's legal basis – as a result of the entry into force of the Treaty of Lisbon – and the day-to-day activities of Europol, including those relating to its external relations. Compared to the previous move that followed the adoption of the Europol Council Decision, this was a more significant move towards the supranational pole of the continuum given the considerable strengthening of the positions of the European Commission, the European Parliament and the Court of Justice, especially after the five-year transition period.

## **Conclusion**

This article set out to examine the extent to which, if any, the development of Europol's external relations over time has contributed to the integration of EU policing and criminal justice. More precisely, with reference to the academic debates on 'intergovernmentalism' and 'supranationalism', it has examined the extent to and the ways in which the growth in Europol's external relations has been indicative of a move away from intergovernmentalism towards more supranationalism in the EU's policing and criminal justice cooperation. After considering several possible analytical frameworks, it has justified the selection of a continuum ranging from intergovernmental to supranational as the most adequate for addressing the question at the heart of this article. The importance of carefully distinguishing supranationalism from the

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<sup>106</sup> Article 25(5)-(7) of the Europol Regulation.

‘Community method’ has also been emphasised. The application of this intergovernmental-supranational continuum to the evolution of Europol’s external relations, with reference to its three consecutive legal bases, has shown that Europol – with regard to its activities in the external domain - has gradually and significantly moved towards the supranational pole of the intergovernmental-supranational continuum. Originally, it was located closely to the intergovernmental pole of the continuum, as the governance of its external relations had only very limited and generally informal supranational features. Both the Europol Council Decision and the Europol Regulation have led to moves towards the supranational pole of the continuum, as the role of supranational institutions has been reinforced with regard to both the design of Europol and its day-to-day activities. In other words, the supranational character of Europol’s governance in its external relations has been considerably strengthened over time. One can therefore argue that Europol’s external relations have contributed to further integration in police and criminal justice cooperation in the EU.