



## Reports of Cases

### Case C-363/14

**European Parliament**  
v  
**Council of the European Union**

(Actions for annulment — Police and judicial cooperation in criminal matters — Europol — List of third States and organisations with which Europol is to conclude agreements — Determination of the legal basis — Legal framework applicable after the entry into force of the Treaty of Lisbon — Transitional provisions — Secondary legal basis — Distinction between legislative acts and implementing measures — Consultation of the Parliament — Initiative of a Member State or the Commission)

Summary — Judgment of the Court (Fourth Chamber), 10 September 2015

- Police and judicial cooperation in criminal matters — European Police Office (Europol) — Establishment of relations with third States — Decision 2014/269 amending the list of third States and organisations with which Europol may conclude agreements — Legal basis — Repeal of Article 34 EU — No effect on the lawfulness of Decision 2014/269*  
  
*(Art. 34 EU; Council Decisions 2009/371, Art. 26(1)(a), 2009/934, Arts 5 and 6, 2009/935 and 2014/269)*
- Acts of the institutions — Choice of legal basis — Choice to be based on objective factors amenable to judicial review*  
  
*(Art. 5 TEU)*
- Acts of the institutions — Procedure for adoption — Rules of the Treaties — Mandatory nature — Not possible for an institution to establish secondary legal bases*  
  
*(Art. 13(2) TEU)*
- Acts of the institutions — Basic legislation and implementing legislation — Implementing legislation not capable of amending or supplementing the essential elements of the basic legislation — Classification of the essential elements — Taking account of the characteristics and particular features of the field concerned — Amendment by an implementing act of the list of third States and organisations with which the European Police Office (Europol) may conclude agreements — Lawfulness — Amendment not constituting an essential element of the basic legislation*  
  
*(Art. 290 TFEU; Council Decisions 2009/371, Art. 23, and 2009/934, Art. 5(4))*

5. *Actions for annulment — Contested act — Assessment of lawfulness on the basis of the information available at the time when the act was adopted*

(Art. 263 TFEU)

6. *Police and judicial cooperation in criminal matters — Legal basis — Article 34 EU — Measures implementing Council decisions — Adoption not subject to a prior initiative of a Member State of the Commission*

(Art. 34(2)(c) EU; Council Decisions 2009/371, Art. 23, 2009/934, Arts 5(4) and 6, 2009/935, Art. 1, and 2014/269)

7. *EU Treaties — Transitional provisions — Maintenance of the effects of acts adopted on the basis of the EU Treaty — Incompatibility with procedural rules applicable after the entry into force of the Treaty of Lisbon — No effect*

(Art. 290 TFEU; Protocol No 36 annexed to the EU and FEU Treaties, Art. 9; Council Decision 2009/371, Art. 26(1)(a))

8. *Police and judicial cooperation in criminal matters — European Police Office (Europol) — Establishment of relations with third countries — Amendment of the list of third States and organisations with which Europol may conclude agreements — Requirement to consult the Parliament — Scope*

(Art. 39(1) EU; Art. 291 TFEU; Protocol No 36 annexed to the EU and FEU Treaties, Art. 9; Council Decisions 2009/371, Art. 26(1)(a), and 2009/935)

9. *Acts of the institutions — Procedure for adoption — Consultation of the Parliament — Mistaken use of a procedure of optional consultation — Lawfulness — Conditions*

1. It cannot be considered, having regard to the wording of Decision 2014/269 amending Decision 2009/935 as regards the list of third States and organisations with which the European Police Office (Europol) shall conclude agreements, which must in principle, if it is to satisfy the obligation to state reasons, indicate the legal basis on which the decision is founded, that the decision is based on Article 34 EU. The decision does not refer to Article 34 EU, and its citations mention only Article 26(1)(a) of Decision 2009/371 establishing Europol and Articles 5 and 6 of Decision 2009/934 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

In this respect, the fact that Article 34(2)(c) EU constituted the only possible legal basis for the adoption of a measure such as Decision 2014/269, even if it were established, is irrelevant, in so far as the Council's explicit choice to refer in that decision not to that provision but to Article 26(1)(a) of Decision 2009/371 and Articles 5 and 6 of Decision 2009/934 clearly indicates that Decision 2014/269 is based on the latter provisions themselves. In those circumstances, the repeal of Article 34 EU by the Treaty of Lisbon does not deprive Decision 2014/269 of a legal basis.

(see paras 23, 24, 26, 28)

2. See the text of the decision.

(see para. 41)

3. As the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties. Accordingly, to acknowledge that an institution can establish secondary legal bases for the adoption of legislative acts or implementing measures, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, would be tantamount to according that institution a legislative power which exceeds that provided for by the Treaties.

(see para. 43)

4. The adoption of the essential rules of a matter such as police cooperation is reserved to the EU legislature, and those rules must be laid down in the basic legislation. It follows that the provisions laying down the essential elements of the basic legislation, the adoption of which requires political choices falling within the responsibilities of the EU legislature, cannot be delegated or appear in implementing acts. Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned.

As regards the list of third States and organisations with which the European Police Office (Europol) is to conclude agreements, as annexed to Decision 2009/935 establishing that list, amending the list is not an essential element of the matter regulated by Decision 2009/371 establishing Europol, and it is thus open to the EU legislature to provide that an amendment may be made by an implementing act. The establishment of relations between Europol and third States is an ancillary action to the activities of Europol, since cooperative relations with those States may be established and maintained, pursuant to Article 23(1) of Decision 2009/371, only in so far as it is necessary for the performance of Europol's tasks. Moreover, the EU legislature laid down the principle of the establishment and maintenance of such relations, defined the objective to be pursued by those relations, and defined the framework within which those relations are to take place. Consequently, even if a decision amending the list involves certain compromises with technical and political dimensions, such a decision cannot be regarded as requiring political choices falling within the responsibilities of the EU legislature.

Admittedly, the transmission of personal data, which may be authorised by agreements concluded pursuant to Article 23 of Decision 2009/371, may interfere with the fundamental rights of the persons concerned, and some of those interferences may be so serious that intervention by the EU legislature becomes necessary. However, the very principle of the transmission of personal data to certain third States and the framework within which the transmission must take place were laid down by the legislature itself, as Article 23(6)(b) of Decision 2009/371 and Article 5(4) of Decision 2009/934 adopting the implementing rules governing Europol's relations with partners provide in particular for an assessment to be carried out of the adequacy of the level of data protection ensured by the third State concerned. In any event, the inclusion of a third State on the list does not in itself allow any transmission of personal data to that State, since such transmission is possible only after the conclusion between Europol and that State of an agreement specifically authorising the transmission of such data.

(see paras 46, 47, 49-51, 53-55, 57)

5. See the text of the decision.

(see para. 59)

6. As regards the procedure for the adoption of the measures necessary for the implementation of decisions adopted in connection with the title of the Treaty on European Union relating to police and judicial cooperation in criminal matters, Article 34(2)(c) EU distinguishes between decisions which the

Council, acting unanimously, may adopt and the measures necessary to implement those decisions at EU level, which the Council, acting by a qualified majority, is to adopt. In that context, the words ‘on the initiative of any Member State or of the Commission’ must be understood, having regard to the syntax of the sentences making up that provision, as relating only to the basic acts which the Council, acting unanimously, may adopt. It thus follows from the wording of that provision that it must be construed as meaning that an initiative of a Member State or the Commission is not necessary for the adoption of implementing measures.

(see paras 60, 62-64)

7. Article 9 of the Protocol (No 36) on transitional provisions, annexed to the Treaty on European Union, must be interpreted as meaning that a provision of an act duly adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon which lays down detailed rules for the adoption of measures implementing that act continues to produce its legal effects until it is repealed, annulled or amended, and permits the adoption of implementing measures in accordance with the procedure it defines.

Consequently, as regards the argument that Article 26(1)(a) of Decision 2009/371 establishing Europol is incompatible with the procedural rules applicable after the entry into force of the Treaty of Lisbon, since Article 290 TFEU is not applicable, Article 26(1)(a) of that decision cannot be incompatible with that provision of the FEU Treaty.

(see paras 68, 70, 71)

8. Due consultation of the Parliament in the cases provided for by the applicable rules of EU law constitutes an essential formality, disregard of which means that the measure concerned is void.

As regards the list of third States and organisations with which the European Police Office (Europol) is to conclude agreements, as annexed to Decision 2009/935 establishing that list, it follows from Article 26(1)(a) of Decision 2009/371 establishing Europol that the Council is required to consult the Parliament before amending that list. The repeal of Article 39(1) EU by the Treaty of Lisbon cannot alter that requirement to consult the Parliament, as it was expressly laid down by Article 26(1)(a) of Decision 2009/371. Similarly, the fact that Article 291 TFEU does not lay down any obligation to consult the Parliament is irrelevant, as the requirement to consult the Parliament is one of the legal effects of Decision 2009/371 which is maintained after the entry into force of the Treaty of Lisbon, pursuant to Article 9 of the Protocol (No 36) on transitional provisions, annexed to the Treaty on European Union.

(see paras 82, 84-86)

9. A mistake by the Council in interpreting the applicable legal basis, concerning the requirement to consult the Parliament, does not constitute, as such, a breach of an essential procedural requirement, where it is not shown that the mistake led in practice to limiting the Parliament’s role in the procedure for the adoption of the act in question or to affecting the content of that act. That is so, in particular, where the Parliament was able to make the Council aware of its position before the act was adopted. In those circumstances, it cannot be considered that the Council’s mistake prevented the effective participation of the Parliament in the procedure in question or interfered with the conditions in which the Parliament performs its duties.

Moreover, since the incorrect substitution of a legal basis requiring the Parliament to be consulted for a legal basis not requiring such consultation is a purely formal defect, the fact that the Council is mistaken as to the legal framework within which it consults the Parliament is not such as to affect the content of the decision adopted following the procedure in question.

(see paras 89-91, 94, 96)