



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 September 2015*

(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)

In Case C-363/14,

ACTION for annulment under Article 263 TFEU, brought on 28 July 2014,

European Parliament, represented by F. Drexler, A. Caiola and M. Pencheva, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by E. Sitbon, K. Pleśniak and K. Michoel, acting as Agents,

defendant,

supported by:

Czech Republic, represented by M. Smolek, J. Vláčil and J. Škeřík, acting as Agents,

Hungary, represented by M.Z. Fehér, G. Szima and M. Bóra, acting as Agents,

interveners,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2015,

* Language of the case: French.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 By its application the European Parliament seeks the annulment of Council Implementing Decision 2014/269/EU of 6 May 2014 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements (OJ 2014 L 138, p. 104, ‘the contested decision’).

Legal context

Decision 2009/371/JHA

- 2 The first subparagraph of Article 3 of Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) (OJ 2009 L 121, p. 37, ‘the Europol Decision’) reads as follows:

‘The objective of Europol shall be to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States.’

- 3 Article 5 of that decision provides:

‘1. Europol shall have the following principal tasks:

- (a) to collect, store, process, analyse and exchange information and intelligence;
- (b) to notify the competent authorities of the Member States without delay via the national unit referred to in Article 8 of information concerning them and of any connections identified between criminal offences;
- (c) to aid investigations in the Member States, in particular by forwarding all relevant information to the national units;
- (d) to ask the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations and to suggest the setting up of joint investigation teams in specific cases;
- (e) to provide intelligence and analytical support to Member States in connection with major international events;
- (f) to prepare threat assessments, strategic analyses and general situation reports relating to its objective, including organised crime threat assessments.

2. The tasks referred to in paragraph 1 shall include providing support to Member States in their tasks of gathering and analysing information from the Internet in order to assist in the identification of criminal activities facilitated by or committed using the Internet.

3. Europol shall have the following additional tasks:

- (a) to develop specialist knowledge of the investigative procedures of the competent authorities of the Member States and to provide advice on investigations;
- (b) to provide strategic intelligence to assist and promote the efficient and effective use of the resources available at national and Union level for operational activities and the support of such activities.

4. Additionally, in the context of its objective under Article 3, Europol may, in accordance with the staffing and budgetary resources at its disposal and within the limits set by the Management Board, assist Member States through support, advice and research in the following areas:

- (a) the training of members of their competent authorities, where appropriate in cooperation with the European Police College;
- (b) the organisation and equipment of those authorities by facilitating the provision of technical support between the Member States;
- (c) crime prevention methods;
- (d) technical and forensic methods and analysis, and investigative procedures.

5. Europol shall also act as the Central Office for combating euro counterfeiting in accordance with Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro counterfeiting ... Europol may also encourage the coordination of measures carried out in order to fight euro counterfeiting by the competent authorities of the Member States or in the context of joint investigation teams, where appropriate in liaison with Union entities and third States' bodies. Upon request, Europol may financially support investigations of euro counterfeiting.'

4 Article 23 of the decision provides:

'1. In so far as it is necessary for the performance of its tasks, Europol may also establish and maintain cooperative relations with:

- (a) third States;

...

2. Europol shall conclude agreements with the entities referred to in paragraph 1 which have been put on the list referred to in Article 26(1)(a). Such agreements may concern the exchange of operational, strategic or technical information, including personal data and classified information ... Such agreements may be concluded only after the approval by the Council, which shall previously have consulted the Management Board and, as far as it concerns the exchange of personal data, obtained the opinion of the Joint Supervisory Body via the Management Board.

...

4. Before the entry into force of the agreements referred to in paragraph 2, Europol may ... directly transmit information other than personal data and classified information to the entities referred to in paragraph 1 of this Article, in so far as that is necessary for the legitimate performance of the recipient's tasks.

...

6. Europol may ... transmit to the entities referred to in paragraph 1 of this Article:

...

(b) personal data, where Europol has concluded with the entity concerned an agreement as referred to in paragraph 2 of this Article which permits the transmission of such data on the basis of an assessment of the existence of an adequate level of data protection ensured by that entity.

...'

5 Article 26(1) of the decision provides:

'The Council, acting by qualified majority after consulting the European Parliament, shall:

(a) determine, in a list, the third States and organisations referred to in Article 23(1) with which Europol shall conclude agreements. The list shall be prepared by the Management Board and reviewed when necessary ...

...'

Decision 2009/934/JHA

6 Article 5 of 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 (OJ 2009 L 325, p. 6) provides:

'1. In accordance with Article 23(1) of the Europol Decision, Europol may establish and maintain cooperative relations with third parties in so far as it is necessary for the performance of its tasks.

2. In accordance with Article 23(2) of the Europol Decision, Europol shall conclude agreements with the third parties which have been placed on the list of third States and organisations referred to in Article 26(1)(a) of the Europol Decision. Such agreements may concern the exchange of operational, strategic or technical information, including personal data and classified information. ...

3. Europol may initiate the procedure for the conclusion of an agreement with a third party as soon as that third party has been placed on the list referred to in paragraph 2.

4. Where the conclusion of an operational agreement with a third party is envisaged, Europol shall carry out an assessment of the existence of an adequate level of data protection ensured by that third party. That assessment shall be forwarded to the Management Board, which shall have obtained the prior opinion of the Joint Supervisory Body. ...'

7 Article 6 of that decision reads as follows:

'1. The Management Board shall decide, based on the assessment referred to in Article 5(4) and taking into account the opinion of the Joint Supervisory Body, whether or not the Director shall enter into negotiations with the third party on the conclusion of an operational agreement. Having obtained a prior positive decision of the Management Board, the Director shall enter into negotiations with the third party on the conclusion of such an agreement. ...

...

3. After finalising the negotiations to an agreement, the Director shall submit the draft agreement to the Management Board. In the case of the conclusion of an operational agreement, the Management Board shall obtain the opinion of the Joint Supervisory Body. The Management Board shall endorse the draft agreement before submitting it to the Council for approval.

In case of endorsement of an operational agreement, that draft agreement and the opinion of the Joint Supervisory Body shall be submitted to the Council.

4. In accordance with Article 23(2) of the Europol Decision, such agreements shall only be concluded after the approval by the Council, which shall previously have consulted the Management Board and, as far as such agreements concern the exchange of personal data, obtained the opinion of the Joint Supervisory Body via the Management Board.'

Decision 2009/935/JHA

- 8 Article 1(1) of Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements (OJ 2009 L 325, p. 12) provides:

'In accordance with Article 23(2) of the Europol Decision, Europol shall conclude agreements with the third States and organisations placed on the list in the Annex to this Decision. Europol may initiate the procedure for the conclusion of an agreement as soon as the third State or organisation has been placed on that list. Europol shall strive for the conclusion of a cooperation agreement with those third States and organisations which allows for the exchange of personal data, unless decided otherwise by the Management Board.'

- 9 Article 2 of that decision provides:

'A Member of the Management Board or Europol may propose to add a new third State or organisation to the list. In doing so, they shall outline the operational need to conclude a cooperation agreement with that third State or organisation.

2. The Management Board shall decide whether or not to propose to the Council the addition of that third State or organisation to the list.

3. The Council shall decide on the addition of the third State or organisation to the list by amending the Annex to this Decision.'

- 10 The annex to that decision contains the list of third States and organisations with which Europol is to conclude agreements.

The contested decision

- 11 Recitals 4 and 7 in the preamble to the contested decision, which refers to the Europol Decision, in particular Article 26(1)(a), and to Decision 2009/934, in particular Articles 5 and 6, read as follows:

'(4) In its meeting of 3-4 October 2012, Europol's Management Board decided to recommend to the Council that it add certain third States to the list, outlining the operational need to conclude cooperation agreements with those third States.

...

(7) On 19 December 2012, the Council decided to consult the European Parliament and, following that consultation, the European Parliament issued an opinion ...'

12 Article 1 of the decision provides:

'In point 1 of the Annex to Decision [2009/935], the following entries are inserted:

- Brazil
- Georgia
- Mexico
- United Arab Emirates.'

Forms of order sought by the parties and procedure before the Court

13 The Parliament claims that the Court should:

- annul the contested decision;
- order the Council to pay the costs.

14 The Council contends that the Court should:

- dismiss the action as inadmissible or, in the alternative, as unfounded;
- order the Parliament to pay the costs;
- in the alternative, in the event that the Court annuls the contested decision, maintain its effects until it is replaced by a new act.

15 By decision of the President of the Court of 15 December 2014, the Czech Republic and Hungary were granted leave to intervene in support of the form of order sought by the Council.

The action

16 The Parliament puts forward in its pleadings three pleas in law in support of its action: the first alleges breach of essential procedural requirements as a result of the lack of an initiative of a Member State or the Commission and the incorrect procedure used of the optional consultation of the Parliament; the second alleges that a repealed or invalid legal basis was chosen; and the third alleges that a legal basis relating to implementing measures was chosen for the adoption of a legislative decision.

17 Since the legal basis of an act determines the procedure to be followed for its adoption (judgments in *Parliament v Council*, C-130/10, EU:C:2012:472, paragraph 80, and *Parliament v Council*, C-658/11, EU:C:2014:2025, paragraph 57), the second and third pleas in law should be examined first: the choice of a repealed or invalid legal basis, and the choice of a legal basis relating to implementing measures for the adoption of a legislative decision.

Second and third pleas in law: choice of a repealed or invalid legal basis and choice of a legal basis relating to implementing measures for the adoption of a legislative decision

First part of the second plea in law: choice of a repealed legal basis

– Arguments of the parties

- 18 The Parliament submits that neither Article 26(1)(a) of the Europol Decision nor Articles 5 and 6 of Decision 2009/934 may be regarded as genuine legal bases.
- 19 Those provisions merely refer implicitly to Article 34(2)(c) EU, which was the only possible legal basis for the adoption of a measure such as the contested decision under the former ‘third pillar’.
- 20 As a consequence, the legal basis used by the Council is, according to the Parliament, Article 34(2)(c) EU. As that article was repealed by the Treaty of Lisbon, it can no longer be used as a legal basis for the adoption of new acts.
- 21 The Council states that it adopted the contested decision on the basis of Article 26(1)(a) of the Europol Decision. Articles 5 and 6 of Decision 2009/934 were referred to as additional legal bases. Hungary also considers that Article 26(1)(a) of the Europol Decision was an adequate legal basis and there was thus no need to refer to primary law for the adoption of the contested decision.

– Findings of the Court

- 22 In order to decide whether the first part of the second plea is well founded, the legal basis on which the contested decision was adopted must be determined.
- 23 The contested decision does not refer to Article 34 EU and the citations in its preamble expressly cite Article 26(1)(a) of the Europol Decision and Articles 5 and 6 of Decision 2009/934.
- 24 It cannot therefore be considered, having regard to the wording of the contested decision, which must in principle, if it is to satisfy the obligation to state reasons, indicate the legal basis on which the decision is founded (see, to that effect, judgments in *Commission v Council*, C-370/07, EU:C:2009:590, paragraphs 39 and 55; *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 29; and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 19), that the decision is based on Article 34 EU.
- 25 Moreover, it should be noted that there is nothing else in the contested decision to indicate that the Council intended to use Article 34 EU as the legal basis of the decision.
- 26 In particular, the fact that Article 34(2)(c) EU constituted the only possible legal basis for the adoption of a measure such as the contested decision, even if it were established, is irrelevant in that regard, in so far as the Council’s explicit choice to refer in the contested decision not to that provision but to Article 26(1)(a) of the Europol Decision and Articles 5 and 6 of Decision 2009/934 indicates clearly that the contested decision is based on the latter provisions as such (see, by analogy, judgment in *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 21).
- 27 It must be observed that, although Articles 5 and 6 of Decision 2009/934 do not relate to amending the list referred to in Article 26(1)(a) of the Europol Decision (‘the list’) and could not therefore validly be used as legal basis for the contested decision, the reference to those articles in the citations

of that decision is in any event a purely formal defect at the most, in so far as that reference had no effect on the content of the decision or the procedure for its adoption (see, to that effect, *United Kingdom v Council*, C-81/13, EU:C:2014:2449, paragraphs 65 to 67).

28 It follows that the repeal of Article 34 EU by the Treaty of Lisbon does not deprive the contested decision of a legal basis.

29 The first part of the second plea in law must accordingly be rejected as unfounded.

Second part of the second plea in law and third plea in law: choice of an invalid legal basis and choice of a legal basis relating to implementing measures for the adoption of a legislative decision

– Arguments of the parties

30 The Parliament considers that, if it were to be concluded that Article 26(1)(a) of the Europol Decision is the legal basis of the contested decision, that provision would constitute an invalid secondary legal basis which could not form a proper basis for that decision.

31 It follows from the Court's case-law that the creation of a secondary legal basis which eases the detailed rules for the adoption of an act is incompatible with the Treaties. That is so with Article 26(1)(a) of the Europol Decision, since that provision does not make the adoption of measures implementing the decision subject to a prior initiative of a Member State or the Commission, contrary to Article 34(2)(c) EU.

32 Furthermore, Article 26(1)(a) of the Europol Decision became inapplicable following the entry into force of the Treaty of Lisbon and introduces an unlawful exception to the procedure established by that Treaty for the adoption of new acts. Such an exception is not permitted by Article 9 of the Protocol (No 36) on transitional provisions ('the Protocol on transitional provisions'), which merely provides that acts under the former 'third pillar' are not automatically repealed by the entry into force of that Treaty.

33 The Parliament further submits that the list is an essential element of the matter in question and must therefore form part of the legislative act. At the very least, it should be regarded as a normative element which must be the subject of a delegated act within the meaning of Article 290 TFEU rather than an implementing act within the meaning of Article 291 TFEU.

34 The Parliament relies in this respect on three considerations. First, the Europol Decision does not lay down the conditions which must be satisfied for a State to be put on the list. Secondly, that listing has serious consequences, including for the fundamental rights of citizens. Thirdly, the listing requires the making of political choices falling within the responsibilities of the EU legislature.

35 The Parliament concludes that the procedure and legal basis chosen were incorrect, since the contested decision was adopted as if it had been an implementing measure.

36 The Council considers that the Parliament's arguments relating, first, to the quality of secondary legal basis of Article 26(1)(a) of the Europol Decision and claiming, secondly, that the amendment to the list constituted an essential element of the matter in question must be understood as a plea of illegality attacking that provision.

37 The Council submits, as its principal argument, that that plea of illegality is inadmissible. It argues that, by virtue of Article 10(1) of the Protocol on transitional provisions, the powers of the Court concerning the Europol Decision remained until 1 December 2014 those which existed before the entry into force of the Treaty of Lisbon. The then applicable Article 35(6) EU did not provide for the

Parliament to be able to bring an action for the annulment of an act adopted in the context of the former ‘third pillar’, such as the contested decision. It follows from the lack of jurisdiction which the Court had in that regard that the Parliament’s plea of illegality should be declared inadmissible.

- 38 The Council, supported by Hungary, argues in the alternative that Article 26(1)(a) of the Europol Decision complied with the EU Treaty when that decision was adopted. That provision merely provided for the application of the procedure laid down in Article 34(2)(c) EU, which does not necessarily make the adoption of a measure such as the contested decision subject to the initiative of a Member State or the Commission.
- 39 The Council and the Czech Republic further submit that an amendment to the list does not relate in any way to an essential element of the matter regulated by the Europol Decision.
- 40 With regard to the effects of the entry into force of the Treaty of Lisbon, the Council, the Czech Republic and Hungary submit that the Parliament’s interpretation of Article 9 of the Protocol on transitional provisions would create an insuperable barrier to the adoption of any implementing measures provided for in acts under the former ‘third pillar’, which is precisely the situation which the authors of the Treaties wished to avoid.

– Findings of the Court

- 41 According to settled case-law of the Court, the choice of the legal basis of an EU act must rest on objective factors that are amenable to judicial review, including the aim and content of the act (judgment in *Commission v Parliament and Council*, C-43/12, EU:C:2014:298, paragraph 29 and the case-law cited).
- 42 It should be noted here that the parties do not disagree as to the relationship between Article 26(1)(a) of the Europol Decision and the aim or content of the contested decision. On the other hand, the Parliament contests the lawfulness of that provision, arguing that it eases the detailed rules for the adoption of a measure such as the contested decision by comparison with the procedure laid down for that purpose by the Treaties.
- 43 According to the Court’s case-law, 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, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaties (see, to that effect, judgments in *Parliament v Council*, C-133/06, EU:C:2008:257, paragraphs 54 to 56; *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraphs 42 and 43; and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraphs 32 and 33).
- 44 In that context, the Court must examine, in the first place, the Parliament’s argument that the legal basis and procedure chosen for the adoption of the contested decision were incorrect because the decision related to an essential element of the matter regulated which could be governed only by a legislative act.
- 45 In so far as the procedure provided for in Article 26(1)(a) of the Europol Decision for amending the list does not correspond to that laid down by primary law for adopting legislative acts in the field of police and judicial cooperation in criminal matters, that argument must be understood as criticising the very

lawfulness of Article 26(1)(a) of the Europol Decision, on the ground that that provision permits the adoption of an act relating to an essential element of the matter regulated by means of a more flexible procedure than that laid down for that purpose by primary law.

- 46 According to settled case-law of the Court, the adoption of the essential rules of a matter such as that at issue in the present case 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 (see, to that effect, judgment in *Parliament v Council*, C-355/10, EU:C:2012:516, paragraphs 64 to 66).
- 47 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 (see, to that effect, judgment in *Parliament v Council*, C-355/10, EU:C:2012:516, paragraphs 67 and 68).
- 48 In the present case, Article 3 of the Europol Decision states that the aim of Europol is to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States.
- 49 In that context, 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 the Europol Decision, only in so far as it is necessary for the performance of Europol's tasks.
- 50 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.
- 51 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.
- 52 The Parliament's argument that an amendment to the list is liable to have serious consequences for the fundamental rights of citizens cannot change that analysis.
- 53 Admittedly, the transmission of personal data, which may be authorised by agreements concluded pursuant to Article 23 of the Europol Decision, 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 (see, to that effect, judgment in *Parliament v Council*, C-355/10, EU:C:2012:516, paragraph 77).
- 54 However, it is apparent that 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 the Europol Decision and Article 5(4) of Decision 2009/934 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.
- 55 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. It follows from Article 23(2), (4) and (6) of the Europol Decision that such transmission is possible only after the conclusion between Europol and the third State of an agreement specifically authorising the transmission of such data. It must be emphasised in this connection that it follows from Article 23(2) of that decision in conjunction with Articles 5 and 6 of Decision 2009/934

and Article 1 of Decision 2009/935 that the negotiation and conclusion of such an agreement involves, after the inclusion of the third State on the list, successive decisions of the Europol Management Board and the Council, the former remaining free not to authorise the Director of Europol to enter into negotiations with the third State concerned, to direct those negotiations towards the conclusion of an agreement not permitting the exchange of personal data or finally not to approve the draft agreement negotiated by the director, and the latter remaining free not to approve the draft transmitted by Europol.

- 56 As to the Parliament's argument that the Europol Decision does not lay down the conditions which must be satisfied for a third State to be put on the list, it must be observed that the conditions of such a listing are defined sufficiently precisely by Article 23(1) of that decision.
- 57 It follows from the foregoing that an amendment to the list does not constitute an essential element of the matter regulated by the Europol Decision, and that it was therefore open to the EU legislature to provide that an amendment could be made by means of an implementing act.
- 58 The Court must therefore examine, in the second place, the Parliament's argument that Article 26(1)(a) of the Europol Decision is unlawful because it authorises the adoption of measures implementing that decision in the absence of any prior initiative of a Member State or the Commission.
- 59 Since the lawfulness of an EU act must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted, the lawfulness of Article 26(1)(a) of the Europol Decision must be assessed in the light of the provisions that, at the time when that decision was adopted, governed the implementation of general acts in the field of police and judicial cooperation in criminal matters, namely Article 34(2)(c) EU and Article 39(1) EU (see, by analogy, judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 45, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 35).
- 60 It follows from those provisions that the Council, acting by a qualified majority and after consulting the Parliament, is to enact the measures necessary for the implementation of decisions adopted in connection with the title relating to police and judicial cooperation in criminal matters.
- 61 However, the parties disagree on the interpretation of the rules laid down in Article 34(2)(c) EU as regards the question whether the adoption of those implementing measures requires a prior initiative of a Member State or the Commission.
- 62 It should be observed here that that provision distinguishes between the decisions which the Council, acting unanimously, may adopt and the measures necessary to implement those decisions at the level of the Union which the Council, acting by a qualified majority, adopts.
- 63 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.
- 64 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 such as the contested decision.
- 65 That interpretation is supported by the context of Article 34(2)(c) EC, which must be taken into account for the interpretation of that provision (see, to that effect, judgment in *M'Bodj*, C-542/13, EU:C:2014:2452, paragraph 34 and the case-law cited).

- 66 As regards the provisions applicable specifically to police and judicial cooperation in criminal matters after the entry into force of the Treaty of Lisbon, Articles 76 TFEU and 291 TFEU make an initiative of a Member State or the Commission a requirement for the adoption only of legislative acts, not of implementing measures.
- 67 The Parliament's argument that the fact that Article 26(1)(a) of the Europol Decision authorises the adoption of measures implementing that decision in the absence of a prior initiative of a Member State or the Commission means that that decision must be regarded as establishing detailed rules for the adoption of such measures that are easier than the procedure laid down for that purpose in the EU Treaty must therefore be rejected.
- 68 As regards the Parliament's arguments that Article 26(1)(a) of the Europol Decision is incompatible with the procedural rules applicable after the entry into force of the Treaty of Lisbon, it should be noted, in any event, that the Protocol on transitional provisions includes provisions dealing specifically with the legal rules applicable, after the entry into force of that Treaty, to acts adopted on the basis of the EU Treaty before that date (see, to that effect, judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 51, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 41).
- 69 Thus Article 9 of that protocol provides that the legal effects of such acts are to be preserved until those acts are repealed, annulled or amended in implementation of the Treaties.
- 70 The Court has held that that article 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 (judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 57, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 47).
- 71 In those circumstances, as Article 290 TFEU is not applicable, Article 26(1)(a) of the Europol Decision cannot be incompatible with that provision of the FEU Treaty.
- 72 Similarly, the Parliament's arguments aiming to show that Article 26(1)(a) of the Europol Decision lays down detailed rules for the adoption of implementing measures that are strengthened or eased by comparison with the procedure laid down for that purpose by the FEU Treaty cannot lead to the conclusion that that provision constitutes an invalid secondary legal basis which should be regarded as inapplicable by way of exception (see, by analogy, judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 58, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 48).
- 73 As a consequence and in those circumstances, without there being any need to rule on the admissibility of the second part of the second plea or of the third plea, they must be rejected as unfounded (see, to that effect, judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 59, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 49 and the case-law cited), and those pleas must therefore be rejected in their entirety.

First plea in law: breach of essential procedural requirements

Arguments of the parties

- 74 The Parliament submits that, if the rules prior to the Treaty of Lisbon remain applicable in the present case, the contested decision had to be adopted on the initiative of a Member State or the Commission and after consulting the Parliament, pursuant to Article 34(2)(c) EU in conjunction with Article 39(1) EU.
- 75 However, first, the contested decision was not preceded by an initiative of a Member State or the Commission, Secondly, the Council's consultation of the Parliament was not capable of satisfying the requirements of Article 39(1) EU and Article 26(1)(a) of the Europol Decision, since, in the Council's view, that consultation was merely optional.
- 76 The Council submits, by contrast, that neither the Europol Decision nor Article 34(2)(c) EU nor Article 291(2) TFEU nor Article 76 TFEU required an act such as the contested decision to be adopted on the initiative of a Member State or the Commission.
- 77 In addition, the Council submits that it was no longer required to consult the Parliament, because of the repeal of Article 39 EU by the Treaty of Lisbon. In the Council's view, to impose such a requirement would moreover amount to adding to the procedure laid down in Article 291 TFEU an element that does not appear there, and would thus call in question the institutional balance established by the Treaty of Lisbon.
- 78 Hungary submits for its part that the Council fulfilled the obligation to consult laid down in Article 26(1) of the Europol Decision by means of the instrument of voluntary consultation it used.

Findings of the Court

- 79 As regards, first, the fact that the contested decision was adopted without a prior initiative of a Member State or the Commission, it must be stated that Article 26(1)(a) of the Europol Decision does not provide for such an initiative. On the contrary, it follows from that provision in conjunction with Article 2(2) of Decision 2009/935 that it is for the Management Board of Europol to propose adding a third State to the list.
- 80 In addition, it follows from the considerations set out in paragraphs 62 to 66 above that Article 34(2)(c) EU also did not require implementing measures in the field of police and judicial cooperation in criminal matters to be adopted on the initiative of a Member State or the Commission.
- 81 In those circumstances, the lack of an initiative of a Member State or the Commission before the adoption of the contested decision cannot be a breach of essential procedural requirements.
- 82 As regards, secondly, the conditions of consulting the Parliament, it should be recalled that due consultation of the Parliament in the cases provided for by the applicable rules of EU law constitutes an essential procedural requirement, disregard of which renders the act concerned void (judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 63, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 53 and the case-law cited).
- 83 Consequently, in so far as it follows from the response to the second and third pleas in law that the Council was entitled to base the contested decision on Article 26(1)(a) of the Europol Decision, it must be determined whether the Parliament had to be consulted before the adoption of an act on the basis of that provision.

- 84 It follows from the actual wording of that provision that the Council was required to consult the Parliament before amending the list.
- 85 Contrary to the Council's submissions, the repeal of Article 39(1) EC 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 the Europol Decision.
- 86 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 the Europol Decision which is maintained after the entry into force of the Treaty of Lisbon, pursuant to Article 9 of the Protocol on transitional provisions (see, by analogy, judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 68, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 58).
- 87 In the present case, it is common ground that the contested decision was adopted by the Council after consulting the Parliament.
- 88 However, the Parliament claims that the fact that the Council consulted it while considering that it was not obliged to do so constitutes a breach of an essential procedural requirement.
- 89 On this point, it must be observed that it has not been alleged, nor *a fortiori* proved, that the Council's mistake as to the framework within which the Parliament had to be consulted led in practice to limiting the Parliament's role in the procedure for the adoption of the contested decision, or to affecting the content of that decision.
- 90 It should be noted, in particular, that the Parliament was able to make the Council aware of its position before the decision was adopted. It appears, moreover, from the actual wording of the opinion issued by the Parliament in the course of the procedure and the statements made by the Parliament at the hearing that, when it adopted that opinion, it considered that it was being consulted by the Council pursuant to the obligation to consult in Article 26(1)(a) of the Europol Decision.
- 91 In those circumstances, it has not been shown that the Council's error prevented the effective participation of the Parliament in the procedure in question or interfered with the conditions in which the Parliament performs its duties (see, to that effect, judgments in *Parliament v Council*, C-392/95, EU:C:1997:289, paragraph 14, and *Parliament v Council*, C-658/11, EU:C:2014:2025, paragraph 81).
- 92 That conclusion is not called into question by the Court's decision in *Parliament v Council* (C-316/91, EU:C:1994:76).
- 93 The Court indeed found in that judgment that the incorrect choice of a legal basis which did not provide for the Parliament to be consulted was such as to infringe the Parliament's prerogative constituted by the right to be consulted when primary law so provides, even if optional consultation took place (judgment in *Parliament v Council*, C-316/91, EU:C:1994:76, paragraph 14).
- 94 In that judgment, however, the Court made that finding only for the purpose of assessing the admissibility of an action brought by the Parliament against an act of the Council, without ruling on whether an error on the part of the Council, in interpreting the applicable legal basis, as to the mandatory nature of the consultation of the Parliament constitutes as such a breach of an essential procedural requirement, regardless of whether its actual influence on the effective participation of the Parliament in a particular procedure or on the conditions in which the Parliament performs its duties.

- 95 The conclusion the Court reached in that case was, moreover, based partly on the fact that the alleged error as to the legal basis had the result of excluding the application of a provision which allowed the Parliament to obtain, on request, recourse to the conciliation procedure (judgment in *Parliament v Council*, C-316/91, EU:C:1994:76, paragraph 18), which was not the case here.
- 96 Furthermore, the Court has also held that the incorrect substitution of a legal basis requiring the Parliament to be consulted for a legal basis not requiring such consultation was a purely formal defect (judgment in *Commission v Council*, 165/87, EU:C:1988:458, paragraph 20). The fact that the Council is mistaken as to the legal framework within which it consults the Parliament is thus not such as to affect the content of the decision adopted following the procedure in question.
- 97 It follows from the foregoing that the first plea in law must be rejected in its entirety.
- 98 As none of the pleas in law put forward by the Parliament can be accepted, the action must be dismissed.

Costs

- 99 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Parliament has been unsuccessful, the Parliament must be ordered to pay the costs.
- 100 In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic and Hungary must bear their own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Parliament to pay the costs;**
- 3. Orders the Czech Republic and Hungary to bear their own costs.**

[Signatures]